2023 01G

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of Rambler Metals and Mining Canada Limited, Rambler Metals and Mining plc, Rambler Mines Limited, and 1948565 Ontario Inc.

AND IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("**CCAA**")

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

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TO: Counsel and others listed in the "Service List" at Schedule A to the Originating Application

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SUMMARY OF CURRENT DOCUMENT	
Court File Number:	2023 01G
Date of Filing Document:	February 23, 2023
Name of Party Filing or Person:	Rambler Metals and Mining Canada Limited, Rambler Metals and Mining plc, Rambler Mines Limited, and 1948565 Ontario Inc.
Application to which Document being filed relates:	Application to appoint a Monitor and related relief pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36
Statement of Purpose in filing	To support the application

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

OVERVIEW

1. The Applicants are part of the Rambler group of companies, consisting of Rambler Metals and Mining plc ("**Rambler UK**"), Rambler Mines Limited, 1948565 Ontario Inc. ("**1948**"), and Rambler Metals and Mining Canada Limited ("**Rambler Canada**"). The Applicants are collectively referred to as the "**Rambler Group**".

2. The Rambler Group carries on the business of mining and the exploration for and development of mineral deposits. The principal business activity of the Rambler Group is the operation, development, and exploration of the Ming copper and gold mine ("**Ming**

Mine") located in Baie Verte, Newfoundland and Labrador. Rambler Canada has a 100% ownership and operational interest in the Ming Mine.

3. Rambler Canada began mining operations at the Ming Mine in 2012. Current mining operations at the Ming Mine produce up to 1,500 tonnes per day of copper and gold bearing ore. Ore extracted from the Ming Mine is processed at Rambler Canada's milling facilities, also located on the Baie Verte Peninsula, before processed copper and gold concentrates are delivered to its Goodyears Cove port facility for shipping and delivery to customers. Rambler Canada directly employs over 250 people in connection with its mining operations, the vast majority of which are located on the Baie Verte Peninsula.

4. Since operations began in 2012, Rambler Canada and the Rambler Group as a whole have struggled to access sufficient capital to mine at optimal levels. Such lack of capital has resulted in inefficient operations and other operational stresses. This lack of capital was compounded by the effects of the COVID-19 pandemic which severely hampered operations for a long period.

5. The Rambler Group has taken numerous steps to reduce costs and increase efficiencies. Despite these steps, for the reasons set out below the Rambler Group is experiencing a significant liquidity crisis – and in fact had to pause operations recently to conserve resources pending this CCAA filing.

6. In consultation with its financial advisor and Proposed Monitor, the Rambler Group have determined that the protection of the CCAA is urgently needed to stabilize its business and to ensure continued operations while they pursue restructuring options.

7. As set out below, Rambler Group is supported in its plan to continue operations under CCAA protection by the Proposed Monitor and with the interim financing support of certain of its senior secured creditors.

8. Rambler Canada is the largest private employer on the Baie Verte Peninsula, and its operations directly and indirectly support a number of other businesses. Without the protection of the CCAA and the support of its interim lender, Rambler Canada's operations cannot continue, and the consequences will be serious and potentially irreversible for Rambler Group and the local economy.

9. The Rambler Group therefore requests an order (the "**Initial Order**"):

   (a) abridging the notice periods pursuant to section 11 of the CCAA and Rules 2.01 and 29.05(3) of the *Rules of the Supreme Court, 1986*;

   (b) pursuant to section 11 of the CCAA directing that service on those recipients listed in **Schedule A** to the Application is sufficient for the purpose of this Application;

   (c) declaring that the Rambler Group are parties to which the CCAA applies;

   (d) pursuant to section 11.02(1) of the CCAA, staying all actions, suits, or proceedings and remedies taken or that might be taken against or in respect of the Rambler Group, any of its property or business, or its director and officers, except as otherwise set forth in the Initial Order or as otherwise permitted by law, for an initial period of 10 days in accordance with the CCAA;

      (i) in the alternative with respect to Rambler UK and Rambler Mines Limited, extending the stay of proceedings to those entities should it be determined they are not "debtor companies" and/or are "affiliated debtor companies";

   (e) appointing Grant Thornton Limited ("**GTL**") as the Monitor of the Rambler Group;

   (f) pursuant to section 11.2 of the CCAA, approving interim debtor-in-possession financing;

(g) pursuant to section 11.52, approving an administration charge in favour of the Rambler Group's professional advisors;

(h) pursuant to section 11.51 of the CCAA, approving a charge in favour of the Rambler Group's directors and officers;

(i) authorizing payment of certain pre-filing obligations of the Rambler Group to their suppliers; and

(j) for such further and other relief as counsel may advise and this Court deems just.

FACTS

Corporate Structure & Operations

10. A complete review of the history, corporate structure, operations, and recent restructuring efforts of the Applicants is set out in the affidavit of Toby Bradbury, sworn February 22, 2023 (the "**Bradbury Affidavit**").

11. A summary of the jurisdiction of incorporation, activities, and head office of the entities comprising the Rambler Group is set out below:

Entity	Jurisdiction of Incorporation	Activity	Head Office
Rambler Metals and Mining plc	England	Parent corporation (publicly traded)	3 Sheen Road Richmond Upon Thames, Surrey TW9 1AD
Rambler Mines Limited	England	Holding company	3 Sheen Road Richmond Upon Thames, Surrey TW9 1AD
Rambler Metals and Mining Canada Limited	Newfoundland and Labrador	Exploration, development, and mining	P.O. Box 610, Baie Verte, NL, A0K 1B0 Route # 418, Ming's Bight Road, NL, A0K 3S0

1948565 Ontario Inc.	Ontario	Exploration	P.O. Box 610, Baie Verte, NL, A0K 1B0 Route # 418, Ming's Bight Road, NL, A0K 3S0

12. The Rambler Group's business is operations at the Ming Mine, and related exploration and development. In addition to the Ming Mine, the Rambler Group holds additional mining properties on the Baie Verte Peninsula.

13. The organizational chart of the Rambler Group is:

Entity	Assets	Employees	Function
Rambler Metals and Mining Canada Limited	100% ownership of Ming Mine 50% ownership of Little Deer and Whalesback Mines (exploration project) 100% ownership of Ming West Mine (exploration project) 100% ownership of East Mine (exploration project)	196 direct employees 16 part time/ call in employees 50 regular contract employees	Operation of the Ming Mine, Nugget Pond Mill and Goodyears Cove Storage Yard for the production of copper concentrate for export
Rambler Metals and Mining plc	Investments/loans in subsidiary companies 100% shares in Rambler Mines Limited and 100% shares in 1948	1	Parent company and market listed entity

Rambler Mines Limited	100% shares in Rambler Metals and Mining Canada Limited	Nil	Holding company
1948565 Ontario Inc.	50% ownership of Little Deer and Whalesback Mines (exploration project)	Nil	Holding company for half share of Little Deer and Whalesback Mines

14. The Ming Mine operations include an operational base at the mine site, as well as a base metals processing facility and year-round bulk storage and shipping facility, each located on the Baie Verte Peninsula.

15. While initial operations at the Ming Mine were cash flow positive, it became apparent that production at the mine needed to be increased to spread overhead costs and in order to ensure the continuing profitability of the mine. Mining operations were expanded in the years following 2016, however Rambler Canada's operations continued to be hampered by a weak balance sheet and insufficient working capital. In particular, cash-constrained decisions resulted in poor mining performance and affected the long-term profitability of mine operations in the years following 2016.

16. Improvements to mining operations and efficiency started in 2020. However, early in 2020 Rambler Canada's operations were negatively impacted by the COVID-19 pandemic and the coinciding decline in global copper prices. The effects of the COVID-19 pandemic were particularly significant for mining operations, which cannot be performed remotely. Significant time and resources were spent in order to allow operations at the Ming Mine to continue safely and pursuant to governmental directives, albeit at a significantly reduced capacity.

17. As at December 31, 2022, the Rambler Group had (based upon an internally prepared unaudited balance sheet) total current assets of USD$5.3 million versus total current liabilities of USD$39.5 million. The Rambler Group incurred significant losses in 2022; factors leading to the loss in this period include continuing impacts from the COVID-19 pandemic (including deferred payments from earlier in the pandemic period), significant inflation of key input materials (fuel and steel products), and ongoing inefficiencies brought about by limited working capital.

Rambler Group's Creditors & the Need for CCAA Protection

18. A list and description of Rambler Group's secured and unsecured creditors is set out in paragraphs 28-57 of the Bradbury Affidavit.

19. Rambler Canada's secured creditors include:

    (a) NewGen Resource Lending Inc., as agent for NewGen Resource Lending LP, WF CAD Investment Holdings LP, Dundee Resources Limited, Whitleaf Trust, and Ali Akay (collectively, the "**NewGen Lenders**");

    (b) Transamine S.A. ("**Transamine**");

    (c) Sandstorm Gold Ltd. ("**Sandstorm**");

    (d) Elemental Royalties Corp. ("**Elemental**"); and

    (e) Various equipment lessors in respect of capital leases.

20. Rambler Group's other entities have guaranteed Rambler Canada's obligations and are otherwise subject to secured creditor claims.

21. As of January 31, 2023, Rambler Canada had obligations to unsecured creditors in the amount of approximately USD$14,500,000, including:

(a) suppliers that are under contract with Rambler Canada;

(b) suppliers that are not under contract with Rambler Canada (and are engaged and paid on an as-needed basis on various payment terms);

(c) former suppliers of Rambler Canada;

(d) certain employee expense claims and reallocation allowances; and

(e) certain suppliers and other creditors which are subject to extended payment arrangements with Rambler Canada (entered into during the COVID-19 pandemic).

22. Rambler Canada's operations at the Ming Mine are able to produce saleable copper with a positive operational margin, meaning the Ming Mine operation is able to service monthly operational costs as incurred. However, this is hampered by:

(a) supply restrictions resulting from Rambler Canada's high level of net current liabilities, which can impact performance on a daily basis; and

(b) the operating margin being dependent on global copper prices.

23. However, the cash flow from operations is insufficient to satisfy accumulating secured and unsecured creditor claims or otherwise to provide sufficient capital to bring operations to a sustainably profitable level.

24. Rambler Canada has taken numerous steps to address these problems. Despite these efforts, Rambler Canada is experiencing a serious liquidity crisis due to the accumulation of unsecured claims from suppliers crucial to Rambler Canada's operations and from Rambler Canada's obligations to its secured creditors.

25. Rambler Canada's balance sheet and legacy debt must be restructured. In particular, steps need to be taken to:

    (a) address outstanding accounts payable and other commitments made during the COVID-19 pandemic and ore reserve redevelopment period;

    (b) ensure ongoing post-filing accounts payable balances can be addressed to permit ongoing operations;

    (c) re-order debt repayment to match Rambler Canada's operational cash flow generation; and

    (d) generate new capital and/or restructure existing debt.

26. CCAA protection is necessary to stabilize operations and continue supply from critical suppliers.

27. Absent restructuring, the Rambler Group cannot continue as a going concern, and the Ming Mine will have to be shut down.

28. Despite these challenges, Rambler Group believes there is significant value in the Ming Mine and other properties, and that the future operations at the Ming Mine can be profitable if properly funded.

ISSUES

29. The issues on this application are as follows:

    (a) Does the CCAA apply to the Rambler Group?

    (b) Should a stay of proceedings be ordered?

(i) If the CCAA does not apply to Rambler UK and Rambler Mines Limited, should the stay be extended to those entities?

(c) Should DIP financing be approved?

(d) Should the Administration Charge and Director and Officer Charge (each as defined below) be approved?

(e) Should the Rambler Group be permitted to make pre-filing payments to certain suppliers?

(f) Should GTL be appointed as Monitor?

LAW AND ARGUMENT

The CCAA Applies to the Rambler Group

30. Section 3 of the CCAA provides:

(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

[...]

Reference: Section 3 of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

31. "Debtor company" is defined as:

any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

Reference: Section 2(1) of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

32. And "company":

means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

Reference: Section 2(1) of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

33. The term "insolvent" is not defined in the CCAA, however a company is insolvent for the purposes of the CCAA if it meets the definition for insolvent person under section 2 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**") or if the corporation can "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

Reference: *Target Canada Co. (Re)*, 2015 ONSC 303, Memorandum of Fact and Law of the Applicants, Tab 2, at para 26

34. "Insolvent person" is defined in section 2 of the BIA as follows:

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

Reference: Section 2 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Memorandum of Fact and Law of the Applicants, Tab 3

35. Rambler Canada is a corporation formed and existing under the laws of the Province of Newfoundland and Labrador and 1948 is a corporation formed and existing under the laws of the Province of Ontario, and therefore each is a "company" for the purpose of the CCAA.

36. Each of Rambler Mines Limited and Rambler UK is a company formed and existing under the laws of the United Kingdom.

37. Rambler UK is a publicly traded company and a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec, with shares traded on the London Stock Exchange Alternative Investment Market (AIM) under the symbol "RMM". Rambler UK holds 100% of the shares of each of 1948 and Rambler Mines Limited.

38. Rambler Mines Limited is a private limited company registered and domiciled in England. Rambler Mines holds 100% of the shares of Rambler Canada.

39. While Rambler Mines Limited and Rambler UK are not incorporated by or under an Act of Parliament or of the legislature of a province, they are each incorporated and exist for sole the purpose of the mining operations carried on by Rambler Canada and the Rambler Group as a whole.

40. Rambler Group submits that each of Rambler UK and Rambler Mines Limited hold assets and carry on business in Canada (as part of the larger Rambler Group), and therefore each is a "company" for the purpose of the CCAA.

41. With respect to insolvency, each of the Rambler Group:

(a) have liabilities exceeding their assets;

(b) are unable to meet their obligations as they generally become due; and

(c) hold property that would not, at a fair valuation, be sufficient to enable payments of all their obligations under a legal process.

42. Further, each of the Rambler Group have aggregate liabilities exceeding CAD$5 million. Accordingly, Rambler Canada, 1948, Rambler UK, and Rambler Mines Limited are each a "debtor company" and/or an "affiliated debtor company" to which the CCAA applies.

A Stay of Proceedings is Appropriate

43. The CCAA is remedial legislation intended to allow companies breathing room to attempt to restructure their operations. Several courts have endorsed the principles to be applied in considering any application for an initial CCAA order (and an accompanying stay of proceedings):

(a) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the court;

(b) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees;

(c) During the stay period the CCAA is intended to prevent maneuvers for positioning amongst the creditors of the company;

(d) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a

compromise or arrangement is approved or it is evident that the attempt is doomed to failure;

(e) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the CCAA is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions; and

(f) The court has a broad discretion to apply these principles to the facts of a particular case.

Reference: *Humber Valley Resort Corp. – Re: Companies' Creditors Arrangement Act*, 2008 NLTD 160, Memorandum of Fact and Law of the Applicants, Tab 4, at para 3

44. The Supreme Court of Canada has said that the CCAA generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent company. As a result, the typical CCAA case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern.

Reference: *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, Memorandum of Fact and Law of the Applicants, Tab 5, at paras 39 - 42

45. Pursuant to section 11.02(1) of the CCAA, a court may, upon an application for an initial order under the CCAA, grant a stay of proceedings in respect of a debtor company for a period of not more than 10 days.

Reference: Section 11.02(1) of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

46. On an initial application, this Court may make an initial order where Rambler Group satisfies this Court that "circumstances exist that make the order appropriate". Appropriateness is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA.

Reference: Section 11.02(3)(a) of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, Memorandum of Fact and Law of the Applicants, Tab 5, at para 49

47. The threshold for an initial order under section 11.02(1) is low and not exceptionally onerous. The Rambler Group must satisfy the Court that there is a "germ of a plan" that suggests a possibility of restructuring under the CCAA.

Reference: *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238, Memorandum of Fact and Law of the Applicants, Tab 6, at paras 14 – 16

48. Rambler Group is a significant employer and economic driver on the Baie Verte Peninsula and in the province generally. Certain of Rambler Canada's senior secured creditors support the CCAA plan through interim financing. Rambler Canada's unsecured creditors have, through the pre-filing period, worked with the company to continue providing services on modified terms.

49. The Rambler Group submit that the evidence establishes there are appropriate circumstances to grant the Initial Order. Further, the Rambler Group will suffer serious prejudice if they are not granted the benefit of the stay of proceedings under the CCAA as described in detail in the Bradbury Affidavit.

50. As set out in these materials and in the Pre-Filing Report of the Proposed Monitor, the Rambler Group has established more than a "germ of a plan" at this time. Therefore, the stay of proceedings should be granted.

The Stay Should Extend to Rambler Mines and Rambler UK

51. In the alternative, if it is determined that the CCAA does not apply to either/both of Rambler UK and Rambler Mines Limited, Rambler Group submits that this Court has well-established and broad jurisdiction to extend the stay of proceedings to those entities.

52. In *Laurentian University of Sudbury*, Chief Justice Morawetz noted that extending the CCAA stay of proceedings to non-applicant entities has occurred a number of times, in particular in cases where:

(a) The non-applicant parties are integrally and closely interrelated to the debtor companies' business;

(i) in particular, where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group, or shared cash management systems; and

(b) stay extension is necessary to advance the CCAA's primary purpose of restructuring the debtors' business.

Reference: *Laurentian University of Sudbury*, 2021 ONSC 659, Memorandum of Fact and Law of the Applicants, Tab 7, at paras 39 – 40

53. Rambler Group submits that each of those factors are present in this case.

54. In addition, courts have extended stays of proceedings to foreign non-applicant entities on the basis that such non-applicants are guarantors of the obligations of the Canadian

applicant company. In *Tamerlane Ventures Inc., Re*, Justice Newbould was satisfied that it was appropriate to extend the stay to the foreign subsidiaries of the Canadian applicant companies, as the subsidiaries had guaranteed the secured loans of the applicants (and held valuable assets of the applicants).

Reference: *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461, Memorandum of Fact and Law of the Applicants, Tab 8, at para 21

55. In *Sino-Forest Corp., Re*, Justice Morawetz (as he then was) extended the stay of proceedings of the non-applicant subsidiaries of the applicant relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the applicant debtor companies.

Reference: *Sino-Forest Corp., Re*, 2012 ONSC 2063, Memorandum of Fact and Law of the Applicants, Tab 9, at paras 5, 18, and 31

56. Rambler Group submits that it is reasonable and necessary to extend the stay of proceedings to Rambler UK and Rambler Mines Limited. The Rambler Group carries on a single principal business activity – being the mining operation of Rambler Canada – through the various entities in the Rambler Group. Rambler UK and Rambler Mines Limited are parent companies of Rambler Canada and 1948. As such, the business operations of Rambler UK/Rambler Mines Limited and Rambler Canada/1948 are integrally and closely interrelated.

57. Further, Rambler UK and Rambler Mines Limited are guarantors of various Rambler Canada obligations to its secured creditors including the NewGen Lenders, Transamine, Sandstorm, and Elemental.

58. If the CCAA stay of proceedings is not extended to Rambler UK and Rambler Mines Limited, their exposure to secured claims will:

(a) have a detrimental impact on the Rambler Group's ability to restructure its operations and emerge from CCAA protection; and

(b) erode the value of the Rambler Group's business as a going concern, to the detriment of stakeholders generally.

59. For those reasons, should the CCAA not apply to Rambler UK and Rambler Mines Limited, it would be just and appropriate to extend the stay of proceedings to those entities during the course of this proceeding.

First-Day DIP Financing is Necessary and Appropriate

The Proposed DIP Financing

60. As set out in the Cash Flow Statement and the Pre-Filing Report of the Proposed Monitor, Rambler Group requires first-day debtor-in-possession ("**DIP**") financing in order to fund their operations and pursue restructuring efforts.

61. Rambler Canada has entered into Terms and Conditions for a Senior Secured Superpriority Debtor-in-Possession Credit Facility dated February 23, 2023 (the "**DIP Agreement**") among RMM Debt Limited Partnership by its General Partner RMM General Partner Inc. (the "**DIP Lender**"), as lender, Rambler Canada, as borrower, and Rambler Mines Limited, Rambler UK, and 1948, as guarantors, in respect of a DIP financing facility (the "**DIP Facility**"). The DIP Facility is a non-revolving interim credit facility, up to a maximum amount of USD$5,000,000.

Reference: Affidavit of Toby Bradbury, sworn February 22, 2023, at Exhibit 15

62. As is standard, the DIP Facility is conditional upon, among other things, the issuance of the proposed Initial Order approving the DIP Agreement and granting a Court-ordered priority charge over the assets and property of the Rambler Group to secure all amounts advanced by the DIP Lender (the "**DIP Lender's Charge**"), subject only to the Administration Charge discussed below.

63. In consultation with the Proposed Monitor, the Rambler Group has determined that it requires USD$2,000,000 in the first 10 days of this proceeding. Accordingly, if the DIP Agreement is approved, Rambler Group requests that the DIP Lender's Charge be limited to USD$2,000,000 in the Initial Order. Rambler Canada expects to draw down on the DIP Facility further and seek a corresponding increase to the DIP Lender's Charge as part of an amended and restated initial order.

<u>It is Appropriate to Approve the DIP Agreement and the DIP Lender's Charge</u>

64. Interim financing is permitted by section 11.2 of the CCAA on notice to affected secured creditors.

Reference: Section 11.2 of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

65. Section 11.2(4) of the CCAA sets out the factors to be considered by this Court in assessing a request for interim financing:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report, if any.

Reference: Section 11.2(4) of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

66. No one factor set out in section 11.2(4) governs or limits the a CCAA court's consideration. Instead, the exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the breathing room said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court.

Reference: *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359, Memorandum of Fact and Law of the Applicants, Tab 10, at para 35

67. Pursuant to subsection 11.2(5) of the CCAA, where an where an application for interim financing is made at the same time as an initial application, the court must also be satisfied that the "terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period".

68. Despite the additional requirements, courts have continued to approve interim financing upon an initial application where appropriate.

Reference: *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586, Memorandum of Fact and Law of the Applicants, Tab 11, at para 2

69. The Bradbury Affidavit describes in detail why DIP financing at this stage is required in order for Rambler Canada to proceed with its efforts to prepare a restructuring plan and to return to commercial success.

70. Rambler Group submit that the DIP Agreement and DIP Lender's Charge are both necessary and appropriate. With respect to the factors to consider under section 11.2(4) and (5):

(a) the Rambler Group will seek to raise additional capital (via debt and/or equity) through a SISP in order to restructure their operations and, as an alternative, consider a sale of all or part of their operations;

(b) the Rambler Group's directors intend to carry on their existing restructuring efforts under the Monitor's supervision during the course of the CCAA proceeding;

(c) the Rambler Group's major secured creditors have not formally objected to this CCAA application. In fact, certain of the senior secured creditors are DIP Lenders;

(d) the Cash Flow Statement indicates that the Rambler Group cannot continue operations without the additional financing, which will significantly increase the prospect of a success restructuring plan;

(i) in particular, the DIP Facility is needed to bring the mine back into full production after operations were paused in the lead up to this proceeding;

(e) the proposed DIP Facility will not materially prejudice any existing secured creditor, as the amount of such financing is reasonable compared to the overall assets and

liabilities of the Rambler Group – in particular as the DIP Lenders include the plurality of the senior secured creditor NewGen Lenders;

(f) the Pre-Filing Report of the Proposed Monitor confirms its view that the DIP Facility is necessary to support operations in the CCAA.

71. Rambler Group's request upon an Initial Order is limited to what is reasonably necessary for its continued operations and other CCAA obligations during the 10-day period.

72. Without the DIP Facility, Rambler Canada cannot continue to operate its business while pursuing a restructuring plan. Rambler Canada has already had to pause its operations pending this CCAA filing. Without immediate financing, the mine will have to be shut down entirely, which will lead to the termination of most or all of its employees and will likely lead to the bankruptcy of the Rambler Group.

73. In *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359, interim financing was approved on the basis, in part, that would provide a viable short-term path forward to allow the petitioners to explore restructuring options, all for the benefit of the entire large stakeholder group.

Reference: *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359, Memorandum of Fact and Law of the Applicants, Tab 10, at para 64

The Administration Charge is Necessary and Appropriate

74. The Rambler Group seeks a charge to secure the fees of its professional advisors in the amount of CAD$250,000 (the "**Administration Charge**") for the first 10 days of this proceeding.

75. Section 11.52 of the CCAA authorizes this Court to grant a priority charge in respect of professional fees and disbursements on notice to affected secured creditors.

Reference: Section 11.52 of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

76. In *Canwest Publishing Inc./Publications Canwest Inc., Re*, Justice Pepall set out the following non-exhaustive list of factors a court may consider in respect of an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

Reference: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, Memorandum of Fact and Law of the Applicants, Tab 12, at para 54

77. The Administration Charge is necessary and reasonable in the circumstances as:

(a) the continuing assistance of qualified professionals is necessary given the size, nature, and complexity of the Rambler Group's business. In particular, the operation and regulation of mining is inherently complex and there are numerous stakeholders with differing yet overlapping interests in the Rambler Group's business and assets;

(b) the Proposed Monitor, its counsel, DIP Lender counsel, and Rambler Group's counsel have contributed and will continue to contribute to the restructuring of Rambler Canada and the Rambler Group as a whole;

(c) there is no evidence of duplication of roles;

(d) the quantum of the proposed Administration Charge is limited in relation to the size of Rambler Group's business; and

(e) The Proposed Monitor believes the Administration Charge is reasonable, as reflected in the Cash Flow Statement and the Pre-Filing Report.

The Directors Charge is Necessary and Appropriate

78. Rambler Group seek an administrative charge for Rambler Canada's directors and officers in the amount of USD$650,000 (the "**Directors Charge**").

79. Section 11.51 of the CCAA authorizes this Court to grant a priority charge in favour of any director or officer to indemnify them against obligations and liabilities that they may incur as a director or officer of the debtor after the commencement of proceedings under the CCAA, on notice to affected secured creditors.

Reference: Section 11.51 of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

80. Rambler Group currently has a D&O policy for all directors and officers of the group with a limit of CAD$10 million. However, it is not clear at this time whether that policy will respond to all areas where the directors and officers could potentially have personal exposure.

81. Rambler Group's D&O policy will expire in March 2023. Rambler Group intends to renew its existing D&O policy during the CCAA proceeding (as reflected in the Cash Flow Statement), and is exploring options to secure additional coverage.

82. Rambler Canada requires the continuing engagements of its directors and officers throughout the restructuring process. Rambler Canada's directors and officers have considerable industry and operational knowledge, and the company carries on the inherently complex and specialized business of mining. Therefore, their ongoing participation will be integral to the Rambler Group's restructuring.

83. Rambler Group understands that its directors and officers continued participation in this proceeding is conditional upon the Directors Charge.

The Rambler Group Should be Permitted to Make Limited Pre-Filing Payments

84. In order to ensure the continued supply of goods and services necessary for Rambler Canada to operate as planned in the CCAA, Rambler Group seeks authorization to make certain payments on account of pre-filing amounts owed to suppliers. Pursuant to the draft Initial Order, such payments may only be made if, in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation or preservation of the business or property of the Rambler Group.

85. CCAA courts have permitted the payment of pre-filing amounts to suppliers on a number of occasions, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its supplier relationships, the services are deemed critical, or to prevent the restructuring process from being frustrated by suppliers.

Reference: *Canwest Global Communications Corp., Re*, [2009] OJ No 4286, Memorandum of Fact and Law of the Applicants, Tab 13, at para 43

Northstar Aerospace Inc., Re, 2012 ONSC 4546, Memorandum of Fact and Law of the Applicants, Tab 14, at paras 12 - 15

86. In permitting or facilitating the payment of pre-filing claims, CCAA courts have relied upon their broad discretion and inherent jurisdiction under section 11 of the CCAA. In *McEwan Enterprises Inc.*, Chief Justice Morawetz held:

> *I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. …*
>
> *In arriving at this conclusion, I have taken into account a number of factors in authorizing the payment of pay pre-filing obligations, including: (a) whether the goods and services were integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) whether the applicant had sufficient inventory of the goods on hand to meet its needs; (d) the effect on the applicant's operations and ability to restructure if it could not make pre-filing payments; and (e) the fact that no payments would be made without the consent of the Monitor.*

Reference: *McEwan Enterprises Inc.*, 2021 ONSC 6453, Memorandum of Fact and Law of the Applicants, Tab 15, at paras 32-33

87. In *Performance Sports Group Ltd., Re*, Justice Newbould authorized the debtors to pay pre-filing amounts to suppliers (upon approval by the monitor) on the basis that:

(a) any interruption of supply or service by the critical suppliers could have had an immediate materially adverse impact on the debtors' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern;

(b) certain of the critical suppliers may not have been able to continue to operate if not paid for pre-filing goods and services;

(c) the debtors did not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services, and

(d) there was a substantial risk that certain of the critical suppliers, including foreign suppliers, would interrupt supply if the pre-filing arrears that they were owed were not paid.

Reference: *Performance Sports Group Ltd., Re*, 2016 ONSC 6800, Memorandum of Fact and Law of the Applicants, Tab 16, at para 25

88. Those factors, when applied in this case, militate strongly in favour of Rambler Group's request:

(a) Given the specialized nature of Rambler Canada's mining operations, and the remote location of the Ming Mine, it is highly unlikely that Rambler Canada could obtain alternate suppliers in the near term;

(b) Any interruption of supply by the Critical Suppliers will have an immediate and material adverse impact on Rambler Canada's operations;

(c) It is likely that certain suppliers will cease the supply of goods and services without payment of arrears; and

(d) Certain suppliers may suffer material prejudice if the amounts owing to such suppliers are not paid.

89. The Rambler Group, in consultation with the Proposed Monitor, believe that it is in the best interests of the Rambler Group and its stakeholders that they have the authority to pay certain pre-filing amounts with the consent and oversight of the Monitor.

GTL Should be Appointed as Monitor

90. Subsection 11.7(1) of the CCAA requires a court, when granting an initial order, to appoint a person to monitor the business and financial affairs of the applicant company.

91. GTL is a "trustee" within the meaning of section 2 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") and is not subject to any of the restrictions on who may be appointed as Monitor set out in section 11.7(2) of the CCAA.

92. GTL has consented to act as the Monitor for Rambler Group, subject to this Court's approval.

93. GTL has been assisting Rambler Group since November 2022 with reviewing its financial condition, developing operational changes, and exploring various formal and informal restructuring and liquidation alternatives.

94. GTL has extensive experience in matters of this nature, including both going-concern and liquidation proceedings in the CCAA, and is therefore well-suited to this mandate.

95. Given its knowledge of Rambler Group's operations and finances, and its ability to perform monitoring functions without delay, Rambler Group believes it is in its best interests that GTL be appointed as Monitor.

RELIEF SOUGHT

96. The Rambler Group request an order:

(a) in the form of the draft Initial Order filed with this application; and

(b) for such further and other relief as counsel may advise and this Court deems just.

[*signature page to follow*]

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED at St. John's, Newfoundland and Labrador, this 23rd day of February, 2023.

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Solicitors for the Applicant

TO: Counsel and others listed in the "Service List" at Schedule A to the Originating Application

LIST OF AUTHORITIES

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 8, 2023

Last amended on November 1, 2019

À jour au 8 février 2023

Dernière modification le 1 novembre 2019

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Companies' Creditors Arrangement Act

2 (1) In this Act, ...

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

...

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

...

(3) The court shall not make the order unless

> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> **(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> **(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

TAB 2

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to February 8, 2023

Last amended on September 1, 2022

À jour au 8 février 2023

Dernière modification le 1 septembre 2022

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Bankruptcy and Insolvency Act

2 In this Act, ...

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

> **(a)** who is for any reason unable to meet his obligations as they generally become due,
>
> **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> **(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

...

trustee or ***licensed trustee*** means a person who is licensed or appointed under this Act. (*syndic* ou *syndic autorisé*)

TAB 4

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *Humber Valley Resort Corp. – Re: Companies' Creditors Arrangement Act 2008NLTD160*
Date: 20081010
Docket: 200801T3743

BETWEEN:

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

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HUMBER VALLEY RESORT CORPORATION, NEWFOUNDLAND TRAVEL AND TOURISM CORPORATION, HUMBER VALLEY CONSTRUCTION LIMITED AND HUMBER VALLEY INTERIORS LIMITED

APPLICANTS

Before: The Honourable Justice Robert M. Hall

Place of hearing: St. John's, Newfoundland and Labrador

Heard: October 6, 2008

Appearances:

John Stringer, Q.C. Stephen Kingston Douglas B. Skinner	Counsel for the Applicants
Archibald Bonnell	Counsel for Notre Dame Agencies Limited and R & T Custom Woodworking Limited
Geoffrey E.J. Brown, Q.C.	Counsel for Alex Lee
Joseph F. Hutchings, Q.C.	Counsel for Marine Contractors Inc. and Home Construction Limited
Bruce C. Grant, Q.C.	Counsel for Her Majesty the Queen in right of Newfoundland and Labrador
Shawn M. Kavanagh	Counsel for Simon and Jean Burch
Geoffrey L. Spencer	Counsel for Maxium Financial Services Inc.

Authorities Cited:

CASES CONSIDERED: *Pacific National Lease Holding Corp. (Re)*, (1992), 72 B.C.L.R. (2d) 368 (B.C.C.A.);

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

REASONS FOR JUDGMENT ON APPLICATION SEEKING EXTENSION OF STAY TERMINATION DATE AND APPROVAL OF ADDITIONAL D.I.P. FINANCING UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

HALL, J.:

INTRODUCTION

[1] Humber Valley Resort Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited and the Humber Valley Interiors Limited (collectively, the "Resort" and/or the "Applicant") applied to this Court for an order seeking a stay of proceedings under section 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as a amended (the "CCAA"). An Initial Order (the "Initial Order") was granted and filed September 5, 2008, providing a stay of proceedings up to and including October 6, 2008, or such later date as this Court may further order stipulate (the "Stay Termination Date"). Additionally on the same date, the Court authorized the Resort to enter into an arrangement to obtain a non-revolving credit facility (the "DIP Facility") from Newfound UK Limited (the "DIP Lender") in a maximum principal amount of $600,000. Under that order (the "First DIP Order") the DIP Lender was granted the right to obtain first priority charge, mortgage and security interest (the "DIP Charge") over real and personal property of the resort comprising a portion of its operations and land known as "Strawberry Hill", as described in a commitment letter between the Resort and the DIP Lender.

[2] This present application is brought *inter partes* by the Resort seeking two further orders. The first order sought is for an extension of the Stay Termination Date from October 6, 2008, to December 5, 2008, as may be granted by this court under the authority of Section 11(4) of the CCAA. The second order sought is for approval of additional debtor-in-possession and the securitization thereof (the "Second DIP Order").

[3] The legislative purpose behind the CCAA and the principles to be considered in applications made under it have been considered by many Canadian courts. A clear delineation of the principles to be considered in applications under the CCAA is contained in the decision of Mr. Justice Brenner in *Pacific National*

Lease Holding Corp. (Re), (1992), 72 B.C.L.R. (2d) 368 (B.C.C.A.) where he states those principles at page 10 as follows:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

[4] Section 11(4) of the CCAA specifically deals with the powers of a Court on applications other than an application for the Initial Stay Order. It provides

> Other than initial application court orders
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[5] In making application for either an Initial Order or subsequent orders, section 11(6) of the CCAA establishes that certain preconditions must be met as follows:

> Burden of proof on application
>
> (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

It is important to note that subsection 11(6) of the CCAA requires not only that the Applicant has acted in good faith and has acted with due diligence, but that the Applicant is continuing to do so.

[6] My first obligation in considering this matter, therefore, is to determine whether the Applicant has and continues to act in good faith and has and continues to act with due diligence in this matter. It is necessary to provide some background in these Reasons for Judgment as to the nature and extent of the business of the Resort as this will enlighten the reader as to the difficulties facing the Resort in formulating a plan or arrangement under the CCAA. The business of the Resort has been diverse. It acquired freehold and leasehold interests in two very large parcels of land, with a view to developing a high-end resort development wherein expensive chalets would be sold to high net worth investors and buyers. These people would be attracted to purchase land in the development and have the Resort

build chalets for them by the fact that a world-class golf course would be constructed together with a substantial clubhouse and separate restaurant and conference centre facilities, which facilities in combination, would make the Resort area an attractive tourist destination and recreation home area. This development necessitated immense expenditures on infrastructure including a very expensive bridge across the Humber River in order to provide access to the development lands; the installation of a full municipal level water supply and treatment system; the installation of separate septic disposal systems for each chalet; the development of a significant road network; and other related infrastructure. In addition, in order to attract purchasers it has been necessary to become engaged in an extensive marketing campaign in the United Kingdom and Europe whence the bulk of the purchasers have been solicited and obtained. In order to make purchasing in the Resort development attractive, the Resort developed a subsidized charter flight system from the U.K., which has proven to be expensive and a generator of considerable losses for the Resort.

[7] Three hundred and seventy lots have been sold in the Resort development and two hundred and twenty chalets have been completed. All of these were completed at a loss to the Resort. An additional one hundred and thirty-five chalets are in various stages of construction, ranging from near completion to only the installation of foundations in some cases. Mr. Derrick White, a director of the Resort, testified that if all of the chalets are completed, this will result in a 7.5 million dollar loss to the Resort. In many cases, the cost to complete the chalet and to clear it of mechanics' liens and other encumbrances so that clear title can be delivered to the buyer exceeds the balance remaining to be paid to the Resort by that prospective purchaser.

[8] Additionally, neither the clubhouse, the golf course, the beach house restaurant nor the Strawberry Hill restaurant and conference centre have generated any positive cash flow for the Resort.

[9] Since the granting of the Initial Order in this matter, the Resort has closed the golf course, the clubhouse, the beach house restaurant and the Strawberry Hill

restaurant and conference centre. The staffing of the Resort has been very seriously reduced with some employees remaining on staff in order to work out their notice and to provide services necessary to the Resort, in order to properly mothball it for the winter season. In addition, a much diminished staff exists in order to maintain core and key personnel for an ultimate reopening of the Resort and to deal with matters arising under the CCAA and relations with creditors and chalet owners.

[10] The Resort, with the assistance of the Monitor, is actively pursuing the sale of that portion of the Resort known as “Strawberry Hill”. Advertisements for its sale have been published and deadlines set for submission of tenders at October 15, 2008. I am satisfied that the efforts made by the Resort to dispose of this portion of its assets have been both diligent and reasonable and done in good faith.

[11] Mr. White deposed as well that the Resort and the Monitor had met with representatives of the Province of Newfoundland and Labrador to review with the Province the CCAA process and to discuss potential provincial assistance and involvement in the restructuring. No information was provided with respect to any details of those discussions or any outcomes therefrom. The Court was advised, however, that discussions remain ongoing with the Province.

[12] In addition, the Resort has met with representatives of a major international corporation which has expressed interest in the Resort and a representative of that party has toured the Resort on two occasions since the date of the Initial Order and confidential discussions with that party are ongoing.

[13] In addition to staff reductions, the Resort, with the concurrence of the Monitor, has taken steps to minimize its negative cash flow including closure of offices and reduction in the scale of operations. The Resort continues to provide essential services to maintain and preserve the key assets such as the golf course, the clubhouse and the beach house, which would be key components in a business restructuring of the Resort.

[14] At present no plan or arrangement nor any outline thereof has been presented the Court. It is clear, and I am satisfied that if the Stay Termination Date is not extended, the Resort's creditors will commence proceedings and that those proceedings will be prejudicial to the Resort to the extent that it would eliminate its ability to propose and complete any successful restructuring. Therefore, without the extension of the Stay of the Resort will fail.

RULING ON EXTENSION OF STAY TERMINATION DATE

[15] In other types of restructurings under the CCAA, one might have expected to see at this time a clearer indication from the Applicant that a plan or arrangement with creditors had been largely formulated and was projected to be successful. That is not the case here. The ultimate restructuring plan is still very much in the initial stages of discussion and development. The complex nature of the diverse operations of the Resort and the various factors which contributed to its accumulated losses are not in my view simple to either analyze or resolve. I am satisfied that the present lack of a plan is not reflective of a situation where the Applicant has engaged the Court only to defer liquidation without any real prospect of devising a plan acceptable to creditors. If I thought that were the case or that the Applicant was not proceeding with due diligence or in good faith, I would not exercise the discretion of the Court to grant the extension of the Stay. Obviously, however, in balancing the various interests which the CCAA is designed to protect and promote, stay periods can not be justified where there is no real prospect of a successful restructuring. However, I am satisfied that we are not at the point where a conclusion can be drawn that restructuring is likely to be unsuccessful.

[16] I am therefore satisfied to grant the Stay Extension sought by the Applicant to December 5, 2008. Two of the interested parties, while not opposing a Stay in principle, have asked me to shorten the Stay Extension period to 30 days from October 6, 2008. I am not prepared to accede to those requests but will deal with them later in this Judgment.

DECISION ON AUTHORIZATION OF ADDITIONAL DIP FINANCING AND SECURITIZATION

[17] As part of its application for Stay Extension and the authorization of additional DIP Financing, the Resort has filed the First Report of the Monitor dated October 1, 2008 (the "Monitor's Report"). The Monitor's Report has attached as Appendix B a revised cash flow projection for the period September 5, 2008, through to December 28, 2008. In the "Out Flows" section thereof, there is a categorized list of projected expenditures. As expected, the Monitor's fees and other professional fees feature prominently therein as well as ongoing labour costs and the costs to the Resort of early termination of employment. With respect to all contractual employees, termination allowances have been made on the basis of their contracts as opposed to mere statutory notice periods under the *Labour Standards Act*. In addition, certain key personnel have received salary augmentations over and above their pre-Initial Order salaries in order to maintain their continued employment with the Resort during the restructuring period and to diminish the likelihood of the lost key personnel who would be important for a successful restructuring of the Resort. I have been asked by counsel representing chalet owners to reverse the provisions of the Initial Order authorizing such salary augmentations and also to order that no future payments be made on the basis of contractual termination provisions versus *Labour Standards Act* termination rights.

[18] I am not satisfied that it is appropriate for the Court to annul the previously approved termination arrangements or salary augmentations. In the scheme of things, the amount of unpaid termination benefits is not significant, given the fact that a large portion thereof remains payable to employees who are working out their notice period, as opposed to those whose employment has been terminated absolutely. Therefore the Resort is receiving the benefit of their labours. With respect to annulling or varying the salary augmentations for key employees, it is my view that such a decision would be counterproductive as it may result in the loss of those key personnel or some of them at a point in time when they are very busy and their historic institutional knowledge of the Resort is extremely important to formulating a successful plan or arrangement with the creditors of the Resort. Additionally, a key component in a successful restructuring will be the continuing

ability of the Resort after restructuring to market its remaining lots. In my view the Resort needs to reach a certain critical mass of sold lots and constructed chalets which level is not yet met. The practice in the Resort has been that certain chalet owners make their chalets available as part of a rental pool, which the Resort then markets much as a hotel would be marketed. If key staff are cut back and relations with existing chalet owners deteriorate further as a result thereof, the dissatisfaction of existing chalet owners would create a very negative reputation for the Resort thus compounding the difficulties of the Resort in restructuring and marketing itself thus inhibiting prospects of additional chalet construction, thus the Resort will be marginalized. I am therefore not satisfied that varying these salary augmentations is wise in the long term.

[19] I have reviewed the cash flow statements provided and the categories of expense to which it is intended to apply any additional DIP Financing authorized by this Court. I am satisfied that the cash flow statement is sufficiently detailed so that it is not necessary for this Court to specifically order that the DIP Financing be used in specified amounts for specified purposes.

[20] In addition, the amount of additional DIP Financing sought in the amount of $1,400,000 in my view is not of sufficient magnitude as to greatly prejudice existing creditors, in the event that the restructuring plan or arrangement should fail by not being accepted by the creditors. The real hope for creditors in this matter lies largely in a successful restructuring of the Resort. The effects of a failure of the Resort to be successfully restructured are virtually impossible to predict but I am satisfied that the adverse effect upon creditors of such a failure would be greater than any diminution of their recovery caused by allowing the proposed DIP Financing. Therefore, the additional DIP Financing in amount of $1,400,000 and securitization thereof over the clubhouse, the golf course, the beach house and Strawberry Hill is approved.

[21] Counsel for chalet owners had asked me to reduce the amount of approved DIP Financing essentially by cutting it in half. The rationale behind this suggestion is that by early November the state of the proposed sale of Strawberry Hill, while

not being completed, will be reasonably predictable and whether there is a need for all of the DIP Financing will then become clear because the available net proceeds from the sale of Strawberry Hill will then be known. While this proposal has an initial attractiveness to it, I am of the view that any hearing with respect to continuation of DIP Financing and the expansion thereof, up to the original amount requested by the Resort, would simply generate into a distracting hearing about the whole Stay Period Extension without much concomitant benefit resulting therefrom. Nothing in the Order authorizing the DIP Financing requires the Resort to draw down on that financing if it is not necessary to do so. I am satisfied, therefore, that normal commercial common sense will keep the DIP borrowings to the minimum amount necessary in order to carry out the development of and implementation of the plan or arrangement under the CCAA.

MAXIUM FINANCIAL SERVICES INC. ("MAXIUM")

[22] Maxium is a corporation which finances and leases golf course equipment to various hotels and resorts. Its counsel filed an affidavit of John Barraclough, the senior manager, credit and collections, of Maxium. Mr. Barraclough disposed that under its master lease agreement 139 pieces of equipment were leased to the Resort for use in the operation of the golf course. Under the master lease agreement, title to that equipment remains in Maxium and defaults by the Resort, under the master lease agreement, have entitled Maxium to repossess the equipment, which right of repossession is stayed by the Initial Order. Maxium has indicated that there is definite limited season for the sale of golf course equipment to be utilized by resorts in the commencement of the 2009 golf season, which would commence around April 1, 2009. Maxium says that if the equipment is not available to it soon, Maxium will lose an opportunity to sell the equipment to another golf course prior to the commencement of the 2009 season. It estimates its loss as being as much as 20% to 25% of the value with respect to the equipment. Unfortunately with respect the sale of the equipment, Maxium does not provide any estimate of market value thereof. It only indicates that there is an outstanding balance as of September 5th owed to it by the Resort in the amount of $895,990.15. Therefore, I have no way of knowing whether Maxium will in fact suffer any loss at all if the equipment is repossessed at a later date and has to be sold at a lesser value. I am

therefore not prepared to lift the Stay of Proceedings presently in place against Maxium in order to allow it to repossess its security. Maxium, of course, is at liberty under the CCAA to make a specific application to have the Stay against it lifted upon sufficient grounds indicating to the Court that Maxium will be unduly prejudiced by a continuation of the Stay.

MARINE CONTRACTORS INC. AND HOME CONSTRUCTION LTD.

[23] These two corporations have applied for an order lifting the Stay in order to allow them to commence mechanics' liens actions in order to perfect mechanics' liens already filed. The Applicant and the Monitor as well as creditors present at the hearing had no objection to this process and it is therefore ordered that a Stay of Proceedings granted in the Initial Order of September 5, 2008, is lifted to the extent only as required to allow commencement of actions under the *Mechanics' Lien Act* to enforce claims for liens described on the Schedule annexed to the Applications of these two companies naming, amongst others, Humber Valley Resort Corporation as a defendant, such Stay to be re-instated forthwith upon issuance of the said Statements of Claim as regard to any claim against Humber Valley Resort Corporation, such Stay to continue thereafter in full force and effect in accordance with the terms of the Initial Order until further Order of this Court.

NOTRE DAME AGENCIES AND R. & T. CUSTOM WOODWORKING LIMITED

[24] The above named corporations are in a similar position to Home Construction Limited and Marine Contractors Inc. They have filed mechanics' lien claims but have not as yet commenced any actions. They too will be seeking leave to commence their actions and have the Stay lifted against them on the same basis as ordered with respect to the previous two companies. Counsel for the Resort has no objection to this procedure and has undertaken to file a consent order in that respect. Upon the filing of an appropriate application to lift the Stay against them so as to allow the issuance of Statements of Claim under the *Mechanics' Lien Act*,

leave to file a consent judgment is hereby granted without the need for further appearance in Court.

ROBERT M. HALL
Justice

TAB 5

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

INDEXED AS: 9354-9186 QUÉBEC INC. *v.* CALLIDUS CAPITAL CORP.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

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Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International

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POURVOIS contre un arrêt de la Cour d'appel du Québec (les juges Dutil, Schrager et Dumas), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), qui a infirmé une décision du juge Michaud, 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Pourvois accueillis.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* et *Hannah Toledano*, pour les appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc.

Neil A. Peden, pour les appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)).

Geneviève Cloutier et *Clifton P. Prophet*, pour l'intimée Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* et *François Alexandre Toupin*, pour les intimés International

Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier.

Joseph Reynaud et *Nathalie Nouvet*, pour l'intervenante Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* et *Saam Pousht-Mashhad*, pour les intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

[1] Ces pourvois s'inscrivent dans le contexte d'une instance toujours en cours introduite sous le régime de la *Loi sur les arrangements avec les créanciers de compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), dans le cadre de laquelle la quasi-totalité des éléments d'actif des compagnies débitrices ont été liquidés. L'instance a été introduite il y a plus de quatre ans. Depuis, un seul juge surveillant a été chargé de sa supervision. À ce titre, il a rendu de nombreuses décisions discrétionnaires.

[2] Deux de ces décisions du juge surveillant font l'objet du présent pourvoi. Chacune d'elles soulève une question exigeant de notre Cour qu'elle précise la nature et la portée du pouvoir discrétionnaire exercé par les tribunaux dans les instances relevant de la *LACC*. La première est de savoir si le juge surveillant dispose du pouvoir discrétionnaire d'interdire à un créancier de voter sur un plan d'arrangement s'il estime que ce créancier agit dans un but illégitime. La deuxième porte sur le pouvoir du juge surveillant d'approuver le financement du litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*.

[3] Pour les motifs qui suivent, nous sommes d'avis de répondre à ces deux questions par l'affirmative, à l'instar du juge surveillant. Dans la mesure où la

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la *LACC*. Dans sa requête, Bluberi allègue

were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

que ses problèmes de liquidité découlent du fait que Callidus exerce un contrôle de facto à l'égard de son entreprise et lui dicte un certain nombre de décisions d'affaires dans l'intention de lui nuire. Bluberi prétend que Callidus agit ainsi afin de réduire la valeur des actions dans le but de devenir propriétaire de Bluberi et ultimement de la vendre.

[8] Malgré l'objection de Callidus, la requête de Bluberi est accueillie. Le juge surveillant, le juge Michaud, rend une ordonnance initiale sous le régime de la *LACC*. Celle-ci confirme entre autres que Bluberi est une « compagnie débitrice » au sens du par. 2(1) de la Loi, suspend toute procédure introduite à l'encontre de Bluberi, de ses administrateurs ou dirigeants, et désigne Ernst & Young Inc. pour agir à titre de contrôleur (« contrôleur »).

[9] Travaillant en collaboration avec le contrôleur, Bluberi décide que la vente de ses actifs est nécessaire. Le 28 janvier 2016, elle propose un processus de mise en vente que le juge surveillant approuve. Ce processus débouche sur la conclusion d'une convention d'achat d'actifs entre Bluberi et Callidus. Cette convention prévoit que Callidus obtient l'ensemble des actifs de Bluberi en échange de l'extinction de la presque totalité de la créance garantie qu'elle détient à l'encontre de Bluberi, qui s'élevait à environ 135,7 millions de dollars. Callidus conserve une créance garantie non libérée de 3 millions de dollars contre Bluberi. La convention prévoit aussi que Bluberi se réserve le droit de réclamer des dommages-intérêts à Callidus en raison de l'implication alléguée de celle-ci dans ses difficultés financières (les « réclamations réservées »)[1]. Tout au long de ces procédures, Bluberi affirme que la valeur des réclamations ainsi réservées représente plus de 200 millions de dollars en dommages-intérêts.

[10] Le juge surveillant approuve la convention d'achat d'actifs, et la vente des actifs de Bluberi à Callidus est conclue en février 2017. En conséquence, Callidus acquiert l'entreprise de Bluberi et en poursuit l'exploitation.

[1] Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. *Les premiers plans d'arrangement concurrents*

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 $; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

C. *Le vote des créanciers sur le premier plan de Callidus*

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la *LACC* prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 $) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 $). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

D. *La demande de financement provisoire de Bluberi et le nouveau plan de Callidus*

[18] Le 6 février 2018, Bluberi dépose une des demandes à l'origine des présents pourvois. Elle demande au tribunal l'autorisation de conclure un accord de financement du litige par un tiers (« AFL »)

litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

avec un bailleur de fonds de litiges coté en bourse, IMF Bentham Limited ou sa filiale canadienne, Corporation Bentham IMF Capital (collectivement, « Bentham »). Bluberi demande également l'autorisation de grever son actif d'une charge superprioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

[19] L'AFL prévoit que Bentham financera le litige relatif aux réclamations réservées de Bluberi et qu'en retour elle recevra un pourcentage de toute somme convenue par règlement ou accordée à l'issue d'un procès. Toutefois, dans l'éventualité où Bluberi serait déboutée, Bentham perdra la totalité des fonds investis. L'AFL prévoit aussi que Bentham peut mettre fin au recours si, agissant de façon raisonnable, elle n'est plus convaincue du bien-fondé du litige ou de sa viabilité commerciale.

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l'AFL est un plan d'arrangement et qu'à ce titre, il doit être soumis au vote des créanciers[2].

[21] Le 12 février 2018, Callidus dépose l'autre demande qui est à l'origine des présents pourvois, laquelle vise à soumettre un autre plan d'arrangement au vote des créanciers (« nouveau plan »). Le nouveau plan est pour l'essentiel identique au premier plan, sauf que Callidus propose que la somme à distribuer soit augmentée de 250 000 $ (passant de 2,63 millions à 2,88 millions de dollars). Callidus a en outre déposé une preuve de réclamation modifiée qui ramène à *zéro* la valeur de la garantie liée à sa créance de 3 millions de dollars. Callidus considère que cette évaluation est juste parce que Bluberi n'a aucun autre élément d'actif que les revendications réservées. Sur cette base, elle fait valoir qu'elle se trouve dans la situation d'un créancier non garanti et

[2] Fait à remarquer, le groupe de créanciers a informé Callidus qu'il appuierait le nouveau plan. Il lui a aussi demandé de rembourser tous les frais juridiques découlant de cet appui. Par ailleurs, le groupe de créanciers ne s'est pas engagé à voter d'une certaine façon, et a confirmé que chacun de ses membres évaluerait toutes les possibilités qui s'offraient à lui.

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

> [TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la *LACC*, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l'AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu'il n'est pas nécessaire que l'AFL soit assorti d'un plan étant donné que Bluberi a exprimé l'intention d'en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l'AFL respecte le critère d'approbation applicable en matière de financement d'un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d'investissement et de risque. Il rejette en outre l'argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l'AFL donne trop de latitude à Bentham. Il conclut que l'AFL ne permet pas à Bentham d'exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu'il contient ont déjà été approuvées dans le contexte de la *LACC* (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s'il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l'engagement financier de Bentham dans le litige; et le fait que Bentham n'exige aucune provision pour frais ou intérêts (c.-à-d. qu'elle ne tirera profit de l'accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu'elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l'ordonnance du juge surveillant et met en cause Bentham.

B. *Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted

B. *Cour d'appel du Québec, 2019 QCCA 171 (les juges Dutil et Schrager et le juge Dumas (ad hoc))*

[32] La Cour d'appel accueille l'appel et conclut que [TRADUCTION] « [l]'exercice par le juge de son pouvoir discrétionnaire [n'était] pas fondé en droit, non plus qu'il ne reposait sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il [était] justifié d'intervenir en appel » (par. 48 (CanLII)). En particulier, la cour relève deux erreurs qui sont pertinentes pour les présents pourvois.

[33] D'une part, la cour conclut que le juge surveillant a commis une erreur en concluant que Callidus a agi dans un but illégitime en demandant l'autorisation de voter sur son nouveau plan. À son avis, Callidus aurait dû être autorisée à voter. La cour s'appuie grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. Elle juge que l'exercice du pouvoir discrétionnaire qui consiste à empêcher un créancier de voter dans un but illégitime devrait être [TRADUCTION] « réservé aux cas les plus évidents » (par. 62, renvoyant à *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, par. 45). Selon elle, en tentant de façon transparente d'être libérée des réclamations de Bluberi à son égard, Callidus ne pouvait être considérée comme ayant agi dans un but illégitime. La cour conclut également que la conduite de Callidus, avant et pendant la procédure introduite en vertu de la *LACC*, ne pouvait justifier la conclusion qu'il existe un but illégitime.

[34] D'autre part, la cour conclut que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'est pas lié aux opérations commerciales de Bluberi. Elle conclut que le juge surveillant a [TRADUCTION] « donné à la notion de financement provisoire une interprétation non fondée en droit et qu'il a mal appliqué cette notion aux circonstances factuelles de l'affaire » (par. 78).

[35] À la lumière de ce qu'elle percevait comme une erreur, la cour substitue son opinion selon laquelle l'AFL est un plan d'arrangement et que pour

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu'u]n arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

(1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?

(2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la *LACC*?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la *LACC*

[39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir

company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires[3]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

[3] Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco*

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc.*, *Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la *LACC* dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

> [TRADUCTION] . . . une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la *LACC* est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [. . .] Les procédures intentées sous le régime de la *LACC* sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC,* par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [. . .] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la *LACC*, art. 6). Le juge surveillant tiendra ce qu'on appelle communément une [TRADUCTION] « audience d'équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (*LACC*, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d'arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la *LACC* n'interdit à un créancier de voter sur un plan d'arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu'une interprétation téléologique du par. 22(3) de la *LACC* révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d'harmoniser le régime de la *LACC* avec le par. 54(3) de la *LFI*, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la *LFI*, seuls les débiteurs peuvent faire la promotion d'un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s'entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la *LACC* doit également les viser. Pour cette raison, les appelantes nous demandent d'étendre la restriction au droit de

creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

voter imposée par le par. 22(3) de manière à ce qu'elle s'applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d'un plan. Elles soutiennent que cette interprétation donne effet à l'intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu'un créancier qui est en conflit d'intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] Nous n'acceptons pas cette interprétation forcée du par. 22(3). Il n'est nullement question dans cette disposition de conflit d'intérêts entre les créanciers et les promoteurs d'un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s'appliquent qu'aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « joue[r] un rôle primordial dans le processus d'interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l'analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] Bien que les appelantes aient raison de dire que l'adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu'il ne s'agit pas d'une disposition générale relative aux conflits d'intérêts. Avant qu'elle soit modifiée et qu'on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d'arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l'opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d'accepter que le législateur n'a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n'a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC,* le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l'adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l'adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d'établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d'autres mécanismes qui réduisent le risque qu'un créancier en situation de conflit d'intérêts par rapport au plan qu'il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l'interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n'ont pas suffisamment d'intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l'expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d'interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d'appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: ". . . courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the

(*Century Services*, par. 61; voir aussi par. 62). Dans l'arrêt *Century Services*, notre Cour a souscrit à l'approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la *LACC* suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Après avoir appliqué cette approche, nous concluons que l'art. 11 de la *LACC* confère au tribunal le pouvoir d'interdire à un créancier de voter sur un plan d'arrangement ou une transaction s'il agit dans un but illégitime.

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

Selon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire[4]. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir *LACC*, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 $ — les

[4] Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n'avaient pas réellement changé. Pourtant, Callidus a tenté d'évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d'arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d'un vote, le fait d'ordonner la tenue d'une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu'il ne servirait ou n'accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C'est particulièrement le cas en l'espèce étant donné que la tenue d'une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 $ (voir les motifs du juge surveillant, par. 72).

[80] Ajoutons que la façon d'agir de Callidus était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d'actif garantissant la réclamation de Callidus. Cette dernière n'a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n'avaient aucune valeur, on se serait attendu à ce qu'elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

C. *L'AFL de Bluberi devrait être approuvé à titre de financement temporaire*

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

(1) Le financement temporaire et l'art. 11.2 de la *LACC*

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

immédiat aux compagnies débitrices. Conformément aux objectifs réparateurs de la *LACC*, le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur.

[86] Depuis 2009, le par. 11.2(1) de la *LACC* a codifié le pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire et d'accorder une charge ou une sûreté correspondante, d'un montant qu'il estime indiqué, en faveur du prêteur :

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type[5]. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

[5] Une autre exception a été codifiée dans les modifications apportées en 2019 à la *LACC* qui créent le par. 11.2(5) (voir *Loi nº 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA*

[88] Le juge surveillant peut également accorder au prêteur une « charge super prioritaire » qui aura priorité sur toute réclamation des créanciers garantis, en vertu du par. 11.2(2) :

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[89] Ces charges, également appelées « superprivilèges », réduisent les risques des prêteurs, les incitant ainsi à aider les compagnies insolvables (Innovation, Sciences et Développement économique Canada, *Archivé — Projet de loi C-55 : analyse article par article*, dernière mise à jour le 29 décembre 2016 (en ligne), cl. 128, art. 11.2; Wood, p. 387). Sur le plan pratique, ces charges constituent souvent le seul moyen d'encourager ce type de prêt. Généralement, le prêteur se protège contre le risque de crédit en prenant une sûreté sur les éléments d'actifs de l'emprunteur. Or, les compagnies débitrices qui sont sous la protection de la *LACC* ont souvent donné en gage la totalité ou la presque totalité de leurs actifs à d'autres créanciers. En l'absence d'une charge super prioritaire, le prêteur qui accepte d'apporter un financement temporaire prendrait rang derrière les autres créanciers (McElcheran, p. 298-299). Bien que la charge super prioritaire subordonne les sûretés des créanciers garantis à celle du prêteur qui apporte un financement temporaire — un résultat qui a suscité la controverse en common law — le législateur a signifié son acceptation générale des transactions allant de pair avec ces charges en adoptant le par. 11.2(2) (voir M. B. Rotsztain et A. Dostal, « Debtor-In-Possession Financing », dans S. Ben-Ishai et A. Duggan, dir., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (2007), 227, p. 228-229 et 240-250). En effet, cet équilibre a été expressément pris en considération par le Comité sénatorial permanent des banques et du commerce, qui a recommandé la codification du financement temporaire dans la *LACC* (p. 111-115).

[90] Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le

sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La *LACC* énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

(2) Les juges surveillants peuvent approuver le financement d'un litige par un tiers à titre de financement temporaire

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)[6]. Le délit de soutien abusif interdit [TRADUCTION] « l'immixtion trop empressée dans une action avec laquelle on n'a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d'une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] S'appuyant sur la jurisprudence voulant que les conventions d'*honoraires conditionnels* ne constituent pas de la champartie lorsqu'elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d'instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d'un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s'est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l'accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l'approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d'évoluer, et aucune des parties au présent pourvoi ne nous a invités à l'analyser.

[6] L'ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n'y a aucune raison de principe qui permet d'empêcher les juges surveillants d'approuver ce type d'accord à titre de financement temporaire dans les cas qui s'y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l'espèce, lorsqu'il existait un seul élément d'actif susceptible de monétisation au bénéfice des créanciers, l'objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l'objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d'actif.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d'autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection,

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d'instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d'appel de l'Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l'espèce. Cette affaire mettait en cause une société minière ayant le droit d'exploiter un grand gisement d'or au Venezuela. Crystallex est finalement devenue insolvable, et (comme Bluberi) il ne lui restait plus qu'un seul élément d'actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Nous ne pouvons affirmer qu'il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

dans l'exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l'AFL était aussi favorable aux créanciers de Bluberi qu'il aurait pu l'être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l'exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[108] Dans la mesure où la Cour d'appel a conclu le contraire, en toute déférence, nous ne sommes pas d'accord. De façon générale, nous estimons que la Cour d'appel a encore une fois omis de faire preuve de la déférence nécessaire à l'égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu'aurait décelées la Cour d'appel dans la décision du juge surveillant.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d'appel a eu tort de conclure que l'approbation de l'AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[110] Deuxièmement, à notre avis, la Cour d'appel a eu tort de conclure que l'AFL était un plan d'arrangement, et qu'il était possible d'établir une distinction entre l'espèce et les faits de l'affaire *Crystallex*. La Cour d'appel a conclu que l'AFL et la charge relative au financement de litige super prioritaire s'y rattachant constituaient un plan parce qu'ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

[111] Nous souscrivons à l'opinion du juge surveillant selon laquelle l'AFL ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu'a employée la Cour d'appel dans *Crystallex*, la réclamation de Bluberi s'apparente à une [TRADUCTION] « marmite d'or » (par. 4). Les plans d'arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n'indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New

l'existence de leurs droits d'avoir accès à la marmite une fois qu'elle est remplie, pas plus qu'on ne saurait dire qu'il s'agit d'une « transaction » à l'égard de leurs droits. Lorsque la « marmite d'or » aura été obtenue — c'est-à-dire dans l'éventualité d'une action ou d'un règlement — les sommes nettes seront distribuées aux créanciers. En l'espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d'arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s'est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

> [TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.
>
> . . .
>
> . . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

TAB 6

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238
Date: December 30, 2019
Docket: 201901G7732

IN THE MATTER OF an Application by Norcon Marine Services Ltd. for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

- AND -

Docket: 201901G7735

IN THE MATTER OF the Receivership of Norcon Marine Services Ltd.

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

APPLICANT

AND:

NORCON MARINE SERVICES LTD.

RESPONDENT

Before: Justice David B. Orsborn

Place of Hearing:	St. John's, Newfoundland and Labrador
Date(s) of Hearing:	December 17, 2019
Date of Oral Judgment:	December 18, 2019

Summary:

On or about November 9, 2019, Business Development Bank of Canada ("BDC"), a secured creditor of Norcon Marine Services Ltd. ("Norcon") served a Notice of Intention to enforce its security pursuant to section 244 of the *Bankruptcy and Insolvency Act* ("BIA"). In response, but more than ten days after being served with BDC's Notice of Intention, Norcon, pursuant to section 50.4 of the BIA, filed Notice of Intention to make a proposal to its creditors. On December 5, 2019, Norcon applied pursuant to section 11.02(1) of the *Companies' Creditors Arrangement Act*, ("CCAA") to transfer its proposal process to the CCAA restructuring regime. Concurrently, BDC applied pursuant to section 243 of the BIA for a court-appointed receiver. Both applications were heard together. **Held:** Both applications were dismissed. The evidence did not support a finding of "appropriate circumstances" to warrant initiating proceedings under the CCAA. Neither, in the circumstances where BDC enjoyed a contractual right to appoint a receiver, did the evidence support the conclusion that it would be just and convenient for the Court to exercise its discretion to appoint a receiver.

Appearances:

Tim Hill, Q.C.	Appearing on behalf of Norcon Marine Services Ltd.

Darren D. O'Keefe and Allison J. Philpott	Appearing on behalf of Business Development Bank of Canada
Peter Wedlake	Appearing on behalf of Grant Thornton Limited, proposed court-appointed Receiver
Geoffrey L. Spencer	Appearing on behalf of Deloitte Restructuring Inc., proposed court-appointed Monitor
Joseph J. Thorne	Appearing on behalf of Bank of Nova Scotia

Authorities Cited:

CASES CONSIDERED: *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522; *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36; *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35, rev'd 2015 SCC 53; *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023; *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.).

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

TEXTS CONSIDERED: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell: Toronto, Ontario 2013-2014).

REASONS FOR JUDGMENT

ORSBORN, J.:

INTRODUCTION

[1] The Court has been asked to rule on what are essentially two competing applications. One is an application by a debtor – Norcon Marine Services Ltd. ("Norcon") to transfer restructuring proceedings from the proposal track in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), to the reorganization track provided by the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The second is an application by a secured creditor – Business Development Bank of Canada ("BDC") – pursuant to section 243 of the BIA for a court-appointed receiver.

[2] The applications were heard on December 17, 2019 and a decision given on December 18 in the form of a brief summary only. Both applications were dismissed.

ISSUES

[3] Is Norcon to be permitted to continue its restructuring proceedings under the CCAA?

[4] Should a receiver be appointed by the Court?

BACKGROUND

[5] For some 20 years, Norcon has been involved in the marine transportation business, operating passenger/freight and cargo ships. Presently, it owns four vessels.

[6] In recent times, Norcon has been hit hard by the loss of government contracts for ferry services and by problems in the aquaculture industry, an industry which provides and continues to provide a source of revenue for Norcon. Two of Norcon's vessels are presently listed for sale, and one is under arrest pursuant to proceedings in the Federal Court. The fourth vessel is working in the aquaculture business. Norcon also owns some real property.

[7] Because of the loss of the ferry contracts, the downturn in the aquaculture business and the need to write off a large debt from a related company, Norcon's financial situation is not good.

[8] BDC is owed almost $1,400,000, some $836,000 of which represents the guaranteed debt of Burry's Shipyard Inc. ("BSI"), a related company which is now bankrupt.

[9] On or about November 9, 2019, BDC served a Notice of Intention to enforce its security under section 244 of the BIA. On November 25, 2019, Norcon filed, pursuant to section 50.4 of the BIA, a Notice of Intention to make a proposal under the BIA. Such a notice may only be filed by an insolvent person.

[10] It is clear that one of the reasons, if not the primary reason, for Norcon's filing of a Notice of Intention was to impose a statutory stay on any enforcement actions by BDC. However, due to the lapse of time between November 9 and November 25, 2019, the statutory stay provision was not engaged.

[11] On December 5, 2019, Norcon filed an application seeking, in effect, to transition the BIA proceedings to CCAA proceedings. It asked for an initial order under section 11.02(1) of the CCAA, the effect of which would be to stay all proceedings – including BDC's enforcement action, for an initial ten days. Concurrently, BDC filed an application pursuant to section 243 of the BIA asking for a court-appointed receiver. These are the two applications before the Court.

DISCUSSION

[12] I will deal first with Norcon's application for an initial CCAA order.

[13] Provided that no proposal has been filed, proceedings commenced under Part III of the BIA may be continued under the CCAA. As Justice Brown said in *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522, the BIA proposal regime and the CCAA regime "serve the same remedial purpose" (paragraph 11), with the CCAA regime being somewhat more flexible. However, the objective remains the same – to provide a window of opportunity within which, without having to deal with creditors' claims and enforcement proceedings (because of a statutory stay), a company can explore the prospect of a reorganization or a sale which would avoid or significantly lessen the harmful economic and social effects of a liquidation and cessation of the business. See, generally, *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60. I refer particularly to paragraph 59:

> 59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> [Citation omitted.]

[14] The threshold for gaining access to the CCAA process is not high. On an initial application, section 11.02(3)(a) requires an applicant to satisfy the court that "circumstances exist that make the order appropriate". When a continuation is sought in circumstances where, as here, the BIA proposal process has already been engaged, case authorities suggest the section 11.02(3)(b) criteria of good faith and diligence also come into play. See *Clothing for Modern Times* at paragraph 14; and *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36, at paragraphs 22-23.

[15] Although the threshold of appropriate circumstances is, in my view, low, it does require the Court to consider the initial application in the context of the objectives of the CCAA. In other words, is the Court able to conclude, even at an early stage, that there is some chance that engaging the CCAA process – which brings all enforcement proceedings to a halt – will result in furthering the purposes of the legislation?

[16] To obtain this breathing room, a debtor must do more than simply plead for time. The authorities speak of the need to have "a germ of a plan" that would suggest "a reasonable possibility of restructuring". In *Industrial Properties Regina,* the Saskatchewan Court of Appeal put it this way – at paragraphs 19-21:

> 19 The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*: Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 14, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) [*Alberta Treasury*]; *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* (August 1, 2006), Doc. 0601-08395 (Alta. Q.B.) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 (Ont. S.C.J.) at paras 51-53, (2015), 22 C.B.R. (6th) 67 (Ont. S.C.J.); *Redstone Investment Corp., Re*, 2014 ONSC 2004 (Ont. S.C.J.) at paras 49-50.
>
> 20 ... The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order [now ten days], the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

> 21 For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. … If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: ...

[17] The present case is a little different than the usual CCAA initial application. Norcon's Notice of Intention to make a BIA proposal was filed on November 25, 2019, just over two weeks ago. In my view, this suggests that restructuring is not a possibility that has just appeared. Although not a lot of time has passed, the fact that the Court is being asked to continue an existing restructuring proceeding suggests that the "germ" of any plan should exhibit a slightly higher possibility of coming to life than might otherwise be the case. Further, once a debtor has engaged the BIA proposal process, there should be some reason, linked to the purpose of the restructuring/reorganization objective, to warrant continuing under the CCAA process. See, for example, the impending expiration of the maximum six-month proposal period in *Clothing for Modern Times*. The earlier in the BIA proposal process the transfer request, the more apparent should be the particular purpose precipitating the request for transition to the CCAA.

[18] What does the evidence here suggest?

[19] The evidence from Norcon consists of a pro-forma affidavit of Glenn Burry – an owner of the company – deposing as to the facts in the application. The only paragraph in the application that looks to the future is paragraph 12:

> 12. The Company is actively seeking new contracts for its vessels and services, but does not expect to enter into such new contracts until early Spring, 2020.

[20] There is no other evidence from Norcon about potential available contracts, ability to bid, chances of success, terms, efforts to date, or the like.

[21] BDC filed an affidavit of Robert Prince, Director of Business Restructuring, setting out the lengthy history of BDC's dealings with Norcon and BSI. Norcon filed a "Pre-filing Report" of Deloitte Restructuring, the proposed CCAA monitor, and also filed its "review engagement" financial statements for the year ending January 31, 2019. The monitor updated the figures to October 31, 2019.

[22] As October 31, 2019, Norcon's current assets totaled $611,000, primarily receivables of $561,000 (rounded). Current liabilities were just over $2,660,000, not including the $836,000 liability attached to the guaranteed debt of BSI. The current liabilities include approximately $444,000 owed to the Canada Revenue Agency for unpaid source deductions and the like, income taxes of $54,000, bank indebtedness and accounts payable of over $1,290,000, and $873,000 representing the current portion of long-term debt. The long-term debt (excluding the current portion) owed to arm's-length creditors is $1,400,000. It is not contested that Norcon, as of the date of filing of the application, satisfied the $5,000,000 threshold under section 3(1) of the CCAA.

[23] The net book value of the fixed assets – primarily the vessels – is shown as $5,800,000. There is no evidence of current estimated market value.

[24] Of the efforts to date to reorganize or restructure Norcon, the Pre-filing Report says this – at paragraph 6.1:

> 6.1 [Norcon] has taken the following steps to deal with operational and financial challenges it is currently facing:
>
> (i) Reduced operating expenses, including a reduction in headcount and a redeployment of Management resources from administrative to revenue generating tasks.
>
> (ii) Actively pursuing contracts for the next operating season.
>
> (iii) Prior to the NOI Filing, the Applicant was working with CRA on an arrangement satisfactory to both parties to reduce the liability owing from the Applicant.

> (iv) Engaged in discussions with Deloitte regarding a financial consulting engagement during the week beginning November 17, 2019.

[25] The proposed monitor reviewed Norcon's projected cash flow statement for the 13 weeks ended February 28, 2020. The Pre-filing Report says:

> 7.3 The Cash Flow Forecast has been prepared by Management for the purpose described in the notes to the Cash Flow Forecast, using the probable and hypothetical assumptions set out in the notes.

[26] The assumptions referred to are the projection of the collection of accounts receivable as of November 25, 2019, and the continuation of an existing vessel crewing contract and aquaculture support contract. No evidence was given as to the particular provisions or durations of these contracts.

[27] I did not find the proposed monitor's comments on the cash flow report particularly helpful:

> 7.4 The Proposed Monitor's review of the Cash Flow Forecast consisted of inquiries, analytical procedures and discussions on the information provided by Management of the Applicant. The Proposed Monitor's involvement with respect to the hypothetical assumptions was limited to evaluating whether they were consistent with the purpose of the Cash Flow Forecast. The Proposed Monitor has also reviewed the supporting documentation provided by Management of the Applicant for the probable assumptions and the preparation and presentation of the Cash Flow Forecast.
>
> 7.5 Based on our review and the foregoing reserves and limitations, nothing has come to the attention of the Proposed Monitor that causes us to believe that, in all materials respects:
>
> (i) the hypothetical assumptions are not consistent with the purpose of the Cash Flow Forecast;
>
> (ii) as at the date of the Pre-filing Report, the probable assumptions developed by the Applicant are not suitably supported and

> consistent with the plans of the Applicant or do not provide a reasonable basis for the Cash Flow Forecast, given the hypothetical assumptions; or
>
> (iii) the Cash Flow Forecast does not reflect the probable and hypothetical assumptions.

Counsel was not able to assist in my comprehension of these paragraphs.

[28] The projected cash flow report, on its face, shows a cash position improvement of $197,001 over the 13-week period. However, $283,476 of the cash inflow comes from the collection of existing accounts receivable. Taking these receivables out of the equation, the projected cash position will worsen by $86,475.

[29] The projected cash flow took no account of debt servicing over the 13-week period, such debt servicing estimated by BDC to be in excess of $83,000.

[30] The monitor appears to offer argument in support of Norcon's application for a CCAA process. It gives the following reasons – at paragraph 9.1:

> 9.1 As discussed herein, the Applicant wishes to convert the NOI Filing to the CCAA Proceedings on December 17, 2019 for the following reasons:
>
> (i) the CCAA will provide the Applicant with increased flexibility as it moves forward with its restructuring plan;
>
> (ii) the CCAA will provide the Applicant with additional time (if required) to prepare and present a restructuring plan, including a Plan of Arrangement, to its creditors; and
>
> (iii) if granted, the Initial Order will provide the Applicant with a stay of proceedings against all creditors, including the pending application of BDC to appoint a Receiver over the Property of the Applicant.

[31] The arguments relating to increased flexibility and additional time were not explained. The time argument is difficult to accept where, unlike the situation in *Clothing for Modern Times*, the BIA proposal process is just beginning and can potentially last for six months. I note that the situation in *Clothing for Modern Times* was where the available extensions of time to make a proposal had expired, leaving a CCAA continuation as the only means of avoiding a deemed bankruptcy.

[32] There is nothing I see in the proposed monitor's report which provides a hint of a plan for restructuring, other than, as noted, a plan to reduce operating costs in some undefined amount.

[33] The cash flow projection shows a 13-week total of compensation, occupancy and related general expenses of some $263,000, a weekly average of just over $20,000. How savings within these expenditures would realistically assist in restructuring the finances of Norcon – with a current ratio (current assets/current liabilities) of 0.23 was not explained. I think it is fair to say that, overall, the issues facing Norcon are issues of revenue and debt servicing rather than control over relatively minor expenses.

[34] The financial statements and the projected cash flow statement provide no support for Norcon's position. The report of the proposed monitor provides no support for Norcon's position. The only hope offered is one in the form of pursuing new contracts with the hope of getting one. In the circumstances of this case, that hope is not sufficient to satisfy the appropriateness threshold needed to open the door to CCAA proceedings.

[35] Assessing the matter as objectively as I can, the evidence does not disclose a germ of a reasonable possibility of reorganizing or restructuring Norcon to a position from which it can either continue its operations or be sold as a going concern or otherwise. The evidence discloses no potentially viable thread with which to begin the process of weaving a plan that will fulfill the objectives of the CCAA. The threshold of appropriate circumstances has not been crossed.

[36] In view of this finding, it is not necessary to consider the issues of good faith and due diligence.

[37] The application for an initial CCAA application is dismissed.

[38] That leaves BDC's request for a court-appointed receiver. BDC's request is supported by the Bank of Nova Scotia, another senior secured creditor.

[39] BDC's application was brought following its November 9, 2019, Notice of Intention to enforce its security. As noted, BDC is owed almost $1,400,000 by Norcon, including the guaranteed debt of BSI, a related company which is now bankrupt. It is fair to assume that BDC initiated the enforcement mechanism to protect its own interests as a secured creditor.

[40] The appointment of a receiver by the Court engages the exercise of the Court's discretion. A receiver may be appointed when it appears to the Court to be just or convenient to do so. Any discretion must be judicially exercised.

[41] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, Justice Edwards set out, from *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, factors that may be considered by a court – at paragraph 26:

> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
> (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> (c) the nature of the property;
> (d) the apprehended or actual waste of the debtor's assets;
> (e) the preservation and protection of the property pending judicial resolution;
> (f) the balance of convenience to the parties;
> (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
(i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
(k) the effect of the order on the parties;
(l) the conduct of the parties;
(m) the length of time that a receiver may be in place;
(n) the cost to the parties;
(o) the likelihood of maximizing return to the parties; and
(p) the goal of facilitating the duties of the receiver.

[42] In *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35 (rev'd on constitutional grounds 2015 SCC 53), the Saskatchewan Court of Appeal suggested this analysis – at paragraph 99:

> 99 The third edition of *Bennett on Receiverships*, (Toronto: Carswell, 2011), at pp. 155-162, suggests that the following factors are typically taken into consideration in deciding whether to appoint a receiver: (a) whether irreparable harm might be caused if no order is made; (b) whether the security holder's position will be prejudiced if no receivership order is made; (c) whether it is necessary to apprehend or stop waste of the debtor's assets; (d) whether it is necessary to preserve and protect property pending a judicial resolution of matters outstanding; and (e) the balance of convenience between the parties. See also: Houlden, et al, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at p. 1005.

[43] These factors are not unlike those considered when injunctive relief is sought.

[44] It is accepted that the court's appointment of a receiver over the property of a person is an extraordinary order. It reflects the authority and jurisdiction of the court to act to protect and preserve property, often before the issues between the parties have been adjudicated.

[45] The extraordinary and intrusive nature of the order must inform what is considered to be just and convenient, although as I will point out, this aspect assumes less importance when a party already has a contractual right to appoint a receiver.

[46] The party asking the Court to appoint a receiver must persuade the Court that the appointment would be just or convenient. The word 'just' suggests a requirement of fairness and balance while "convenient' suggests, in my view, not just an order which the applicant would find helpful, but one that is necessary for the protection of the assets in question. To put it simply, is it fair or necessary that the authority of the Court be used to pass control of, in this case, the debtor's assets to a receiver who will deal with those assets pursuant to court supervision?

[47] In this analysis, of what relevance is it that the applicant – here, BDC – has the ability and contractual authority to appoint a receiver and manager without enlisting the aid of the Court?

[48] In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, the Court said this at paragraph 42:

> 42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).
>
> [Emphasis added.]

[49] Blair J. of the Ontario Superior Court expressed it slightly differently in *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.) when he said at paragraphs 11 and 13:

> 11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: … In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. … The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; …
>
> …
>
> 13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver … and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances … including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.
>
> [Emphasis added.]

[50] I note his use of the word "necessary" when referring to a court appointment. Thus, while the fact of a party's prior consent to a private contractual appointment may lessen or eliminate the need for caution because of the intrusive nature of the appointment of a receiver, the threshold of just or convenient must still be met. Particularly when considering whether an appointment would be convenient – an element which incorporates the practical and protective nature of the appointment – my view is that a court must consider whether court supervision of the receiver is necessary to protect and preserve the assets in question and to manage any undue complexity in the functioning of the receivership. The issue is not that far removed from situations in administrative law where the availability of an adequate alternative avenue of relief may persuade

a court not to exercise its discretion to grant relief by way of an order in the nature of a prerogative writ.

[51] Is a court-supervised receivership order convenient in the sense of the added factor of court supervision being necessary to protect the interests of BDC and others affected by the fortunes of Norcon?

[52] Here, counsel for BDC acknowledged that a receivership of Norcon's secured property would be relatively straightforward. As noted, the assets are primarily fixed assets – four vessels and real property – covered by security. There is no suggestion that the assets are at risk of being removed from the jurisdiction. Any ongoing management of the business would not be complex. Counsel advised that two primary creditors, BDC and the Bank of Nova Scotia, have already signed an inter-creditor agreement addressing issues of relevance to them.

[53] BDC offers the following reasons to support a finding of just or convenient:

> 29. BDC submits that it is just and convenient for this Court to appoint a receiver in the present case for the following reasons:
>
> (a) BDC has the contractual right to appoint a private receiver.
> (b) The amount of the Indebtedness is not in dispute.
> (c) … Norcon has withheld information, has shown disregard for DBC's rights and has occasioned several Events of Default. A court-appointed receiver will be able to prevent and/or mitigate further defaults through greater transparency.
> (d) The arrest of one of Norcon's vessels in which BDC has a security interest establishes that BDC's security is in jeopardy. A court-appointed receiver is necessary to immediately protect and preserve BDC's security interest in Norcon's property.
> (e) A court-appointed receiver will be able to more effectively deal with and sell property in a manner that will maximize the value for the creditors of Norcon.
> (f) A court-appointed receiver will be able to provide all stakeholders with a more efficient forum for creditors of Norcon to resolve priority issues.

> (g) A court-appointed receiver is required as the cooperation of Norcon with a private receiver is unlikely, given Norcon's conduct to date.

[54] The application continues:

> 30. The Court's refusal to grant the Receivership Application would place the interests of BDC and other creditors at significant risk.

[55] There is little, if any, evidence on these points.

[56] With respect to the conduct of Norcon, the evidence is that it did not disclose to BDC that one of its vessels had been arrested in the context of a proceeding in Federal Court. Without further evidence and argument on the point, I am not prepared to conclude, without more, that the arrest in and of itself places BDC's security in jeopardy and while this one instance of non-disclosure may be a fact, it is not sufficient to support the inference that Norcon or its management would be obstructionist so as to warrant Court supervision of a receivership. Neither, in my view, does it support the inference that Norcon's management would not cooperate with a private receiver. The evidence does support the view that the BIA-related history of the related company, BSI, and the CCAA filing by Norcon reflect efforts to delay enforcement action by creditors. But where a creditor has the ability to act expeditiously pursuant to a contractual right, the fact that a debtor may try to delay the process does not call for the intervention of the Court.

[57] The suggestion by BDC that Court supervision is necessary to more effectively deal with and sell the property and provide a more efficient forum for the resolution of priority disputes is simply that – a suggestion. I refer again to Blair J.'s comments in *Freure Village* where he suggests that an examination of all the circumstances is required to determine whether or not an appointment by the court is necessary.

[58] A fair assessment of all of the circumstances requires evidence. I note the comprehensive nature of the evidence before Edwards J. in *Crown Jewel Resort*.

[59] Looking at the evidence as a whole, I am not satisfied that there is sufficient evidence from which to draw reliable inferences relating to, and these are examples only, (i) the potential for irreparable harm in the absence of court supervision; (ii) the risk to BDC and the need for the added factor of court supervision in the protection and preservation of the assets; (iii) the need for court supervision of the relationship between Norcon and its creditors; and (iv) the relative costs and returns of a court-supervised process.

[60] In effect, and with respect, I am being asked to assume that a court-supervised process is necessary – just or convenient – for the effective and lawful realization of BDC's security interest. I am not prepared to make such an assumption.

[61] BDC has the contractual right to appoint a receiver/manager with wide powers to take over the business, manage Norcon and its assets and, if considered appropriate, sell the assets. There is no evidence to suggest that such a receiver/manager would not act efficiently and responsibly in accordance with the law, would not properly protect BDC's security, would not act in good faith to secure maximum value for the secured property, and would not have ready access to the court process should the need arise.

[62] In summary, on such evidence as I have, I am not able to reasonably draw the inference that the circumstances are such as to render just or convenient the Court's appointment of a receiver.

[63] BDC's application for a court-appointed receiver is dismissed.

[64] The parties will bear their own costs in both matters.

DAVID B. ORSBORN
Justice

TAB 7

CITATION: Laurentian University of Sudbury, 2021 ONSC 659
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan* and *Derek Harland*, for the Applicant

Ashley John Taylor and *Elizabeth Pillon*, for the Monitor

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel to the Applicant

Pamela L.J. Huff and *Aryo Shalviri*, for Royal Bank of Canada

Stuart Brotman and *Dylan Chochla*, for Toronto Dominion Bank

Martin R. Kaplan and *Vern W. DaRe*, for Firm Capital Mortgage Fund Inc., DIP Lender

Michael Kennedy, Labour Counsel for the Applicant

George Benchetrit, for Bank of Montreal

HEARD: February 1, 2021

ENDORSEMENT

Introduction

[1] Laurentian University of Sudbury ("LU" or the "Applicant") seeks certain relief pursuant to an order (the "Initial Order") under the *Companies' Creditors Arrangement Act* (the "CCAA").[1]

[2] LU is a publicly funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, LU has provided higher education to the community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.

[3] As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding LU's recent efforts to improve its financial stability, LU is experiencing a liquidity crisis and is insolvent.

[4] LU submits that it requires the protection of the Court and the relief available under the CCAA so that it can financially and operationally restructure itself in order to emerge as a financially sustainable university for the benefit of all its stakeholders.

[5] The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 30, 2021, filed in support of this application (the "Haché Affidavit").[2]

[6] For the following reasons, the Interim Order is granted.

Overview of the Applicant

[7] LU is a non-share capital corporation that was incorporated pursuant to *An Act to Incorporate Laurentian University of Sudbury,* S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154 (the "LU Act") and is a registered charity pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[8] The governance structure of LU is bicameral. The Board of Governors (the "Board"), the President, and the Vice-Chancellor generally have powers over the operational and financial management of LU, whereas the Senate of LU (the "Senate") is responsible for the academic policy of LU.

[9] LU primarily focuses on undergraduate programming, with approximately 8,200 total domestic and international undergraduate students (approximately 6,250 full-time equivalents) enrolled in the 2020-21 academic year. LU has five undergraduate faculties, each of which offer

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[2] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.

programs in both English and French, and students can choose from 132 undergraduate programs to enroll in.

[10] LU also has a graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year. LU offers 43 Masters and PhD programs in a variety of disciplines.

[11] LU has a federated school structure whereby it has formal affiliations with several independent universities under the overall LU umbrella: the University of Sudbury, the University of Thorneloe, and Huntington University. The Federated Universities are integrated into LU, however, each of the Federated Universities are separate legal entities and are governed by Boards that are independent of LU.

[12] LU is one of the largest employers in the Greater Sudbury area. As at December 30, 2020, LU employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent the single largest expense item for LU on an annual basis (approximately $134 million of $201 million in total expenses during fiscal year 2019-20).

[13] Approximately 612 LU employees are represented by the Laurentian University Faculty Association ("LUFA"). Approximately 268 non-faculty staff are represented by the Laurentian University Staff Union ("LUSU").

[14] LUFA and the Board of LU are parties to a Collective Agreement (the "LUFA CA"), with a three-year term that expired on June 30, 2020.

[15] Since April 2020, LU and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement.

[16] On July 1, 2018, LUSU and LU entered into a Collective Agreement that was set to expire on June 30, 2021 (the "LUSU CA").

Assets and Liabilities

[17] LU does not prepare interim financial statements. The most recent audited statements for the year ended April 30, 2020, are attached to the Haché Affidavit.

[18] As at April 30, 2020, LU had assets with a book value totaling approximately $358 million, of which approximately $33 million is comprised of current assets such as cash and short-term investments, accounts receivable, and other current assets. The remaining assets of LU consist primarily of investments in LU's segregated endowment fund ($53 million) and capital assets ($272 million), comprising LU's land and buildings.

[19] As at April 30, 2020, LU had liabilities with a book value totaling approximately $322 million, comprised of: (i) approximately $43 million of current liabilities; (ii) approximately $168 million of deferred contributions; and (iii) approximately $110 million in long-term liabilities.

LU's Liquidity Crisis and Insolvency

[20] LU has experienced recurring operational deficits in the millions of dollars each year for a significant period of time. These operational deficits have led to the accumulated deficit in the operational fund of LU of approximately $20 million at the end of 2019-20 fiscal year. In the current 2020-21 fiscal year, LU projects a further operational deficit of $5.6 million.

[21] LU takes the position that it is insolvent and absent the relief sought in the Initial Order, will run out of cash to meet payroll in February.

[22] LU advises that it has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including:

(a) The terms of the LUFA CA are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between LU and LUFA;

(b) Operationally, the structure of the academic programming offered by LU and the distribution of enrollment among the programs offered is flawed and must be addressed; and

(c) With its current cost structure, it costs more for LU and the Federated Universities to educate each student than the average for all Ontario universities by approximately $2,000 per student, per year.

[23] LU submits that the financial challenges that LU faces are significant and, absent fundamental change, LU's short-term and long-term financial and operational sustainability are at risk.

Objective of CCAA Filing

[24] As part of its restructuring strategy, LU intends to implement long-term financial stability initiatives including, among other things:

(a) A review of the breadth of academic programs offered at LU and their enrollment levels;

(b) A re-evaluation of the Federated Universities model;

(c) Negotiations with LU's unions regarding what LU must look like in the future and ensuring that a restructured LU can be aligned with collective agreements that will facilitate its future sustainability;

(d) Identification of opportunities for future revenue generation;

(e) Refinement of the student experience at LU to continue providing a top-notch education; and

(f) Consideration of options for addressing current and long-term indebtedness.

Law and Analysis

[25] The CCAA applies to a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[3]

[26] The CCAA defines "company" to include, among other things, a company incorporated by or under an Act of the legislature of a province.[4]

[27] The Applicant is incorporated under an act of the legislature of the Province of Ontario, the LU Act, and therefore is a "company" for the purposes of the CCAA.[5] Further, as a not-for-profit, non-share capital corporation, the Applicant falls under the *Corporations Act* (Ontario).[6]

[28] There have been several CCAA proceedings commenced in respect of not-for-profit corporations, such as *Canadian Red Cross Society*[7] and *The Land Conservancy of British Columbia*.[8]

[29] I am satisfied that the Applicant's status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant.

Insolvency

[30] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.[9] The BIA defines "insolvent person" as follows:[10]

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,

[3] R.S.C. 1985, c. B-3 ("BIA").
[4] CCAA, s. 2(1).
[5] S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154.
[6] R.S.O. 1990, c. C.38.
[7] *Canadian Red Cross Society*, 2000 CarswellOnt 3269 (S.C.).
[8] *TLC, The Land Conservancy of British Columbia, Re*, 2014 BCSC 97 at paras. 14-18.
[9] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C.) at paras. 21-22 [*Stelco*].
[10] BIA, s. 2.

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[31] The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[11]

[32] In addition to the foregoing tests, in *Stelco*, Farley J. held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[12]

[33] Based on the evidence set out in the Haché Affidavit and as summarized in the Report of Ernst & Young Inc., the Proposed Monitor, I find that the Applicant is plainly insolvent and faces a severe liquidity crisis.

[34] I also find that the Applicant is a "debtor company" to which the CCAA applies.

Stay of Proceedings

[35] Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

[36] The Applicant submits that it is just and appropriate to grant a stay of proceedings. The Applicant submits that it requires a stay of proceedings in order to provide it with the breathing room necessary to financially and operationally restructure itself in order to emerge as a sustainable and long-term financially viable university to continue providing quality post-secondary education in Northern Ontario.

[37] The Proposed Initial Order provides for a stay of proceedings in favour of the Applicant's current and future directors and officers who may subsequently be appointed. The Applicant submits that the stay in favour of the current and future directors and officers is critical to retain the involvement of the Board and key officers who have knowledge that will assist the Applicant in negotiating with stakeholders and implementing a restructuring plan. I accept this submission.

[38] The Applicant also seeks a limited stay in respect of the Laurentian University Students General Association (the "Non-Applicant Stay Party" or "the SGA"). The stay in respect of the

[11] *Stelco, supra* note 9 at para. 28.
[12] *Stelco, supra* note 9 at para. 26.

Non-Applicant Stay Party is limited to preventing any person from: (i) commencing proceedings against the Non-Applicant Stay Party, (ii) terminating, repudiating, making any demand or otherwise altering any contractual relationships with the Non-Applicant Stay Party or enforcing any rights or remedies, or (iii) discontinuing or ceasing to perform any obligations under any contractual agreements with the Non-Applicant Stay Party, resulting from the commencement of this CCAA proceeding by the Applicant, the stay of proceedings granted to the Applicant and any default or cross-default arising due to the foregoing.

[39] CCAA courts have, on numerous occasions, extended the initial stay of proceedings to non-applicants.[13] The Court's authority to grant such an order is derived from its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose." It is well-established that it is appropriate for the Court to extend the protection of the stay of proceedings to third party entities where such parties are integrally and closely interrelated to the debtor companies' business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company.[14]

[40] In particular, where the business operations of a group of entities are inextricably intertwined, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems, courts have found it necessary and appropriate to extend a stay in respect of non-applicant parties.[15]

[41] In the present circumstances, the Applicant has provided a written guarantee in respect of a credit facility obtained by the Non-Applicant Stay Party. If counterparties were to exercise remedies due to the Applicant's insolvency, it would disrupt the Non-Applicant Stay Party and have financial implications for the Applicant.

[42] In my view, it is desirable to avoid disruption to the Non-Applicant Stay Party which is particularly critical given the Applicant's status as an operating university and its overarching aim in this CCAA proceeding to avoid or minimize any disruption to students resulting from the commencement of this proceeding. In furtherance of this objective, the Non-Applicant Stay Party will be essential to ensuring students are given all of the information and resources they need to stay informed. The Non-Applicant Stay Party will play a crucial role in maintaining an open dialogue between the Applicant and the interests/concerns of all students.

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[13] For example, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063; *Canwest Global Communications Corp, Re*, 2009 CarswellOnt 6184 (S.C.) [*Canwest*]; *Cinram International Inc (Re*), 2012 ONSC 3767 [*Cinram*].
[14] *Cinram, ibid* at paras. 61-65.
[15] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at paras. 20-21; *Cinram, ibid* at paras. 61-65.

[43] I am satisfied that extending a limited stay of proceedings to the Non-Applicant Stay Party will allow it to continue fulfilling its intended role and providing the myriad of other key services it provides to the Applicant's students.

Pre-Filing and Post-Filing Payments

[44] The Proposed Initial Order allows the Applicant to continue to make certain pre-filing and post-filing payments, including express authorization to:

(a) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts owing in respect of rebates, refunds or other amounts that are owing or may be owed to students (directly, or to the student associations of the Applicant on behalf of students), in each case, subject to the policies and procedures of the Applicant; and

(b) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts payable to students in respect of student scholarship, bursary or grants.

[45] The Applicant intends on operating in the ordinary course during this CCAA proceeding and minimizing the disruption to students as much as possible. To facilitate this, the Applicant must be able to process certain rebates owing to students and continue to provide students with scholarship and bursary money that is critical to their ongoing studies. Some students must pay tuition prior to the receipt of funding from the Ontario Student Assistance Program (OSAP). Upon receipt of OSAP funding, the Applicant reimburses the students who receive such funding. In many instances, scholarship, bursary and grant money has been committed and is critical to students in need of financial aid to fund their education.

[46] If the Applicant is unable to continue to process such payments, vulnerable students may be irreparably harmed. Many of these students are younger than 19 years of age, and therefore particularly vulnerable. In addition, a change to the manner in which these financial aspects are addressed by the Applicant with their students could create immediate emergencies and disruption to their ability to continue their studies.

[47] The proposed Monitor supports the inclusion of this provision and I am satisfied that it is reasonable in the circumstances.

The Administration Charge

[48] The Applicant requests that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Proposed Monitor, counsel to the Proposed Monitor, the Applicant's counsel and advisors, and independent counsel to the Board. At the initial hearing the Administration Charge was requested in the amount of $400,000, and the Applicant will seek to increase it to $1.25 million pursuant to a proposed Amended and Restated Initial Order on the Comeback Hearing. Section 11.52 of the CCAA provides the Court with statutory jurisdiction to grant the Administration Charge.

[49] In *Canwest Publishing*, Pepall, J. (as she then was) considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[16]

[50] The Applicant submits that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the DIP Charge and the Directors' Charge; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

[51] Further, the Applicant has limited the quantum of the Administration Charge that it seeks approval of to what is reasonably necessary for the first ten days of the CCAA proceedings.

[52] The proposed Monitor supports the requested relief.

[53] I am satisfied that the Administrative Charge is reasonable in the circumstances.

The Directors' Charge

[54] The Applicant requests that this Court also grant a priority charge in favour of the Applicant's current and future directors and officers in the amount of $2 million (the "Directors' Charge"). The Applicant will seek to increase the Directors' Charge at the comeback hearing to

[16] *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para. 58.

$5 million, $3 million of which will rank subordinate to the DIP Charge. The Directors' Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of the Applicant after the commencement of the CCAA proceedings, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[55] The Applicant has certain insurance policies in place (as defined in the Haché Affidavit); however, the Applicant is concerned that the directors and officers may be unwilling to continue in their roles with the Applicant absent the Court granting the Directors' Charge. The Directors' Charge will only be available to the extent that any claim or liability is not covered by any applicable D&O insurance and in the event that the Applicant's D&O insurance does not respond to claims against the directors and officers.

[56] Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[17]

[57] In approving a similar charge in *Canwest*, Pepall J. applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[18]

[58] The proposed Monitor supports the relief requested.

[59] I am satisfied that the Directors' Charge is reasonable in the circumstances because: (i) the Applicant will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring, (ii) the Applicant cannot be certain whether the existing insurance will be applicable or respond to any claims made, and the Applicant does not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities, (iii) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct, and (iv) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

[17] CCAA, section 11.51.
[18] *Canwest*, *supra* note 17 at paras. 46 and 48.

Sealing Provision

[60] Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record."[19]

[61] In *Sierra Club of Canada v. Canada (Minister of Finance)*, Iacobucci J. set out that a sealing order should only be granted when:

> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternatives measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[20]

[62] The Applicant requests that, in the Initial Order, this Court seal Confidential Exhibits "FFF" and "GGG" to the Haché Affidavit. These documents relate to correspondence between the Applicant and the Ministry of Colleges and Universities (the "Ministry"). The documents contain information with respect to the Applicant and certain stakeholders of the Applicant, including various rights or positions that stakeholders of the Applicant may take either inside or outside of a CCAA proceeding, which could jeopardize the Applicant's efforts to restructure.

[63] If the Confidential Exhibits are not sealed, the Applicant submits that stakeholders may react in such a way that jeopardizes the viability of the Applicant's restructuring. As such, the salutary effects of the sealing order, which provides the Applicant with the best possible chance to effect a restructuring, far outweigh the deleterious effects of not disclosing the correspondence between the Applicant and the Ministry.

[64] I have reviewed the Confidential Exhibits and I accept the submissions of the Applicant and grant the sealing request.

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[19] *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp (Re)*, 2015 ONSC 1487 at paras. 28 – 30.

[20] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at para. 53.

The Requested Relief Sought is Reasonably Necessary

[65] Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.[21]

[66] The stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[22]

[67] For the purposes of relief sought on this initial hearing, I accept the facts as stated in the Haché affidavit.

[68] The financial information required pursuant to s. 10(2) of the CCAA has been provided.

[69] I am satisfied the Ernst & Young Inc. is qualified to act as Monitor.

Disposition

[70] The requested relief complies with s. 11.001 of the CCAA in that it is limited to relief that is reasonably necessary for the continued operation of the applicant in the ordinary course of business. The Initial Order is granted in the form presented and it has been signed by me.

[71] The comeback hearing is to be held by Zoom on Wednesday, February 10, 2021 at 9:00 a.m.

Court-Appointed Mediator

[72] Finally, LU is also seeking an Order for the appointment of a mediator by the Court (the "Court-Appointed Mediator") to oversee negotiations with respect to the various restructuring initiatives necessary for the Applicant to achieve a successful restructuring.

[73] If appointed, the Applicant expects the Court-Appointed Mediator to assist with (i) negotiations related to the review and restructuring of the academic programs and (ii) the collective agreement between the Applicant and LUFA.

[74] The Applicant is of the view that the need for the appointment of a mediator by the court is urgent and a high priority item.

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[21] CCAA, s. 11.001, 11.02(1) and (3).
[22] *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26.

[75] The proposed Monitor is of the view that the appointment of a Court-Appointed Mediator is critical to ensure that LU, LUFA and the other negotiating parties have the best possible opportunity to succeed.

[76] It is the Proposed Monitor's view that it is necessary that the Court-Appointed Mediator be someone who is independent and objective, has experience in both insolvency matters as well as collective agreements and labour negotiations, someone who will appreciate the urgency with which the mediation must be conducted and have the time available to dedicate to it. Finally, in the Proposed Monitor's view, a sitting or recently retired judge meeting these characteristics would be preferable. The Proposed Monitor asks that the appointment be made by the court on an urgent basis.

[77] I appreciate and acknowledge the points put forth by counsel to both the Applicant and the Proposed Monitor. However, prior to determining this issue, in my view it is necessary to provide LUFA with an opportunity to make submissions.

[78] In recognition of the compressed timeline in these proceedings, it is desirable to determine this issue at the earliest opportunity and, in any event, not later than the comeback hearing on February 10, 2021.

[79] If LU, LUFA and the Proposed Monitor wish to address this matter prior to February 10, 2021, a case conference can be scheduled with me through the Commercial List Office.

CHIEF JUSTICE G.B. MORAWETZ

Date: February 1, 2021

TAB 8

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:	
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.	S. Richard Orzy, Derek J. Bell and Sean H. Zweig, for the Applicants Robert J. Chadwick and Logan Willis, for Duff & Phelps Canada Restructuring Inc., the proposed Monitor Joseph Bellissimo, for Renvest Mercantile Bankcorp Inc. **HEARD:** August 23, 2013

NEWBOULD J.

[1] The applicants applied on August 23, 2013 for protection under the CCAA, at which time an Initial Order was granted containing several provisions. These are my reasons for the granting of the order.

Tamerlane business

[2] At the time of the application, Tamerlane Ventures Inc. (“Tamerlane”) was a publicly traded company whose shares were listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "Tamerlane Group"), including Pine Point Holding Corp. (“Tamerlane Pine Point”), Tamerlane Ventures USA Inc. ("Tamerlane USA") and Tamerlane Ventures Peru SAC ("Tamerlane Peru") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.

[3] The applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. It at one time was an operating mine. The applicants firmly believe that there is substantial value in the Pine Point Property and have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The project has been determined to be feasible and licences have been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, power lines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The applicants only need to raise the financing necessary to be able to exploit the value of the project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

[4] The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

[5] The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices, it is now viewed as being even more valuable.

[6] The exploration and development activities have been generally carried out by employees of Tamerlane USA. The applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the applicants.

[7] As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of $24,814,433. The assets included consolidated current assets of $2,007,406, and consolidated non-current assets with a net book value of $22,807,027. Non-current assets included primarily the investment in the Pine Point property of $20,729,551 and the Los Pinos property of $1,314,936.

[8] Tamerlane has obtained valuations of Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of $12 to $15 million using a 0.3% copper cut-off grade, or $17 to $21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of $30 to $56 million based on market comparables, with a value as high as $229 million considering precedent transactions.

Secured and unsecured debt

[9] Pursuant to a credit agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (“Global Resource Fund” or "secured lender") made as of December 16, 2010, as amended by a first amending agreement dated June 30, 2011 and a second amending agreement dated July 29, 2011, Tamerlane became indebted to the Secured Lender for USD $10,000,000 . The secured indebtedness under the credit agreement is

guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the secured lender in respect of the secured debt.

[10] The only other secured creditors are the applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each.

[11] The applicants' unsecured creditors are principally trade creditors. Collectively, the applicants' accounts payable were approximately CAD $850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the secured debt and this proceeding.

Events leading to filing

[12] Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

[13] It was contemplated when the credit agreement with Global Resource Fund was entered into that the take-out financing would be in the form of construction financing for Pine Point. However Tamerlane was unsuccessful in arranging that. Tamerlane was successful in late 2012 in arranging a small flow-through financing from a director and in early 2013 a share issuance for $1.7 million dollars. Negotiations with various parties for to raise more funds by debt or asset sales have so far been unsuccessful.

[14] As a result of liquidity constraints facing Tamerlane in the fall of 2012, it failed to make regularly scheduled monthly interest payments in respect of the secured debt beginning on September 25, 2012 and failed to repay the principal balance on the maturity date of October 16, 2012, each of which was an event of default under the credit agreement with the secured lender Global Resource Fund.

[15] Tamerlane and Global Resource Fund then entered into a forbearance agreement made as of December 31, 2012 in which Tamerlane agreed to make certain payments to Global Resource Fund, including a $1,500,000 principal repayment on March 31, 2013. As a result of liquidity constraints, Tamerlane was unable to make the March 31 payment, an event of default under the credit and forbearance agreements. On May 24, 2013, Tamerlane failed to make the May interest payment, and on May 29, 2013, the applicants received a letter from Global Resource Fund's counsel enclosing a NITES notice under the BIA and a notice of intention to dispose of collateral pursuant to section 63 of the PPSA. The total secured debt was $11,631,948.90.

[16] On June 10, 2013, Global Resource Fund and Tamerlane entered into an amendment to the forbearance agreement pursuant to which Global Resource Fund withdrew its statutory notices and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Global Resource Fund that were capitalized and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment. Tamerlane was unable to make the July 25 payment, which resulted in an event of default under the credit and forbearance amendment agreements.

[17] On July 26, 2013, Global Resource Fund served a new NITES notice and a notice of intention to dispose of collateral pursuant to section 63 the PPSA, at which time the total of the secured debt was $12,100,254.26.

[18] Thereafter the parties negotiated a consensual CCAA filing, under which Global Resource Fund has agreed to provide DIP financing and to forbear from exercising its rights until January 7, 2014. The terms of the stay of proceedings and DIP financing are unusual, to be discussed.

Discussion

[19] There is no doubt that the applicants are insolvent and qualify for filing under the CCAA and obtaining a stay of proceedings. I am satisfied from the record, including the report from the

proposed Monitor, that an Initial Order and a stay under section 11 of the CCAA should be made.

[20] The applicants request that the stay apply to Tamerlane USA and Tamerlane Peru, non-parties to this application. The business operations of the applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the request to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru is to maintain stability and value during the CCAA process.

[21] Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. See Farley J. in *Re Lehndorff* (1993), 9 B.L.R. (2d) 275 and Pepall J. (as she then was) in *Re Canwest Publishing Inc*. (2010), 63 C.B.R. (5th) 115. Recently Morawetz J. has made such orders in *Cinram International Inc. (Re.),* 2012 ONSC 3767, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 and *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500. I am satisfied that it is appropriate that the stay of proceedings extend to Tamerlane USA, which has guaranteed the secured loans and to Tamerlane Peru, which holds the valuable Los Pinos assets in Peru.

[22] Under the Initial Order, PricewaterhouseCoopers Corporate Finance Inc. is to be appointed a financial advisor. PWC is under the oversight of the Monitor to implement a Sale and Solicitation Process, under which PWC will seek to identify one or more financiers or purchasers of, and/or investors in, the key entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing to repay the secured debt, an investment in the applicants' business and/or a purchase of some or all of the applicants' assets. The proposed Monitor supports the SIST and is of the view that it is in the interests of the applicants' stakeholders. The SISP and its terms are appropriate and it is approved.

[23] The Initial Order contains provisions for an administration charge for the Monitor, its counsel and for counsel to the applicants in the amount of $300,000, a financial advisor charge of

$300,000, a directors' charge of $45,000 to the extent the directors are not covered under their D&O policy and a subordinated administration charge subordinated to the secured loans and the proposed DIP charge for expenses not covered by the administration and financial advisor charges. These charges appear reasonable and the proposed Monitor is of the same view. They are approved.

DIP facility and charge

[24] The applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. The applicants will require additional borrowing to do this. It is apparent that given the lack of alternate financing, any restructuring will not be possible without DIP financing.

[25] The DIP lender is Global Resource Fund, the secured lender to the applicants. The DIP loan is for a net $1,017,500 with simple 12% interest. It is to mature on January 7, 2014, by which time it is anticipated that the SISP process will have resulted in a successful raising of funds to repay the secured loan and the DIP facility.

[26] Section 11.2(4) of the CCAA lists factors, among other things, that the court is to consider when a request for a DIP financing charge is made. A review of those factors in this case supports the DIP facility and charge. The facility is required to continue during the CCAA process, the assets are sufficient to support the charge, the secured lender supports the applicants' management remaining in possession of the business, albeit with PWC being engaged to run the SISP, the loan is a fraction of the applicants' total assets and the proposed Monitor is of the view that the DIP facility and charge are fair and reasonable. The one factor that gives me pause is the first listed in section 11.2(4), being the period during which the applicants are expected to be subject to the CCAA proceedings. That involves the sunset clause, to which I now turn.

Sunset clause

[27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and (ii) a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.

[28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.

[29] Ms. Kent, the executive chair and CFO of Tamerlane, has sworn in her affidavit that Global Resource Fund insisted on these terms and that given the financial circumstances of the applicants, there were significant cost-savings and other benefits to them and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the applicants exercised their business judgment to agree to the terms. The proposed Monitor states its understanding as well is that the consent of Global Resource Fund to these CCAA proceedings is conditional on these terms.

[30] Section 11 of the CCAA authorizes a court to make any order “that it considers appropriate in the circumstances.” In considering what may be appropriate, Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379:

> 70. …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.

[31] There is no doubt that CCAA proceedings can be terminated when the prospects of a restructuring are at an end. In *Century Services*, Deschamps J. recognized this in stating:

> 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), 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.

[32] The fact that the board of directors of the applicants exercised their business judgment in agreeing to the terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account, with the caution that in the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). The court may consider, but not defer to or be fettered by, the recommendation of the board. See *Re Crystallex International Corp.* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para 85.

[33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to

any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.

[34] What is unusual in the proposed Initial Order is that the discretion of the court on January 7, 2014 to do what it considers appropriate is removed. Counsel have been unable to provide any case in which such an order has been made. I did not think it appropriate for such an order to be made. At my direction, the parties agreed to add a clause that the order was subject in all respects to the discretion of the Court. With that change, I approved the Initial Order.

Newbould J.

Released: August 28, 2013

CITATION: Re: Tamerlane Ventures Inc. and Pine Point Holding Corp., 2013 ONSC 5461
COURT FILE NO.: CV-13-10228-00CL
DATE: 20130828

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

REASONS FOR JUDGMENT

Newbould J.

Released: August 28, 2013

TAB 9

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 2063
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for the Applicant**

E. A. Sellers for the Sino Forest Corporation Board of Directors

Derrick Tay and Jennifer Stam for the Proposed Monitor, FTI Consulting Canada, Inc.

R. J. Chadwick, B. O'Neill and C. Descours for the Ad Hoc Noteholders

M. Starnino for counsel in the Ontario class action

P. Griffin for Ernst & Young

Jim Grout and Hugh Craig for the Ontario Securities Commission

Scott Bomhof for Credit Suisse, TD and the underwriter defendants in the Canadian class action

HEARD: **MARCH 30, 2012**

ENDORSED: MARCH 30, 2012

REASONS: **APRIL 2, 2012**

ENDORSEMENT

OVERVIEW

[1] The Applicant, Sino-Forest Corporation ("SFC"), moves for an Initial Order and Sale Process Order under the *Companies' Creditors Arrangement Act* ("CCAA").

[2] The factual basis for the application is set out in the affidavit of Mr. W. Judson Martin, sworn March 30, 2012. Additional detail has been provided in a pre-filing report provided by the proposed monitor, FTI Consulting Canada Inc. ("FTI").

[3] Counsel to SFC advise that, after extensive arm's-length negotiations, SFC has entered into a Support Agreement with a substantial number of its Noteholders, which requires SFC to pursue a CCAA plan as well as a Sale Process.

[4] Counsel to SFC advises that the restructuring transactions contemplated by this proceeding are intended to:

(a) separate Sino-Forest's business operations from the problems facing SFC outside the People's Republic of China ("PRC") by transferring the intermediate holding companies that own the "business" and SFC's inter-company claims against its subsidiaries to a newly formed company owned primarily by the Noteholders in compromise of their claims;

(b) effect a Sale Process to determine whether anyone will purchase SFC's business operations for an amount of consideration acceptable to SFC and its Noteholders, with potential excess being made available to Junior Constituents;

(c) create a structure that will enable litigation claims to be pursued for the benefit of SFC's stakeholders; and

(d) allow Junior Constituents some "upside" in the form of a profit participation if Sino-Forest's business operations acquired by the Noteholders are monetized at a profit within seven years from Plan implementation.

[5] The relief sought by SFC in this application includes:

(i) a stay of proceedings against SFC, its current or former directors or officers, any of SFC's property, and in respect of certain of SFC's subsidiaries with respect to the note indentures issued by SFC;

(ii) the granting of a Directors' Charge and Administration Charge on certain of SFC's property;

(iii) the approval of the engagement letter of SFC's financial advisor, Houlihan Lokey;

(iv) the relieving of SFC of any obligation to call and hold an annual meeting of shareholders until further order of this court; and

(v) the approval of sales process procedures.

FACTS

[6] SFC was formed under the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B-16, and in 2002 filed articles of continuance under the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ("CBCA").

[7] Since 1995, SFC has been a publicly-listed company on the TSX. SFC's registered office is in Mississauga, Ontario, and its principal executive office is in Hong Kong.

[8] A total of 137 entities make up the Sino-Forest Companies: 67 PRC incorporated entities (with 12 branch companies), 58 BVI incorporated entities, 7 Hong Kong incorporated entities, 2 Canadian entities and 3 entities incorporated in other jurisdictions.

[9] SFC currently has three employees. Collectively, the Sino-Forest Companies employ a total of approximately 3,553 employees, with approximately 3,460 located in the PRC and approximately 90 located in Hong Kong.

[10] Sino-Forest is a publicly-listed major integrated forest plantation operator and forest productions company, with assets predominantly in the PRC. Its principal businesses include the sale of standing timber and wood logs, the ownership and management of forest plantation trees, and the complementary manufacturing of downstream engineered-wood products.

[11] Substantially all of Sino-Forest's sales are generated in the PRC.

[12] On June 2, 2011, Muddy Waters LLC published a report (the "MW Report") which, according to submissions made by SFC, alleged, among other things, that SFC is a "near total fraud" and a "ponzi scheme".

[13] On the same day that the MW Report was released, the board of directors of SFC appointed an independent committee to investigate the allegations set out in the MW Report.

[14] In addition, investigations have been launched by the Ontario Securities Commission ("OSC"), the Hong Kong Securities and Futures Commissions ("HKSFC") and the Royal Canadian Mounted Police ("RCMP").

[15] On August 26, 2011, the OSC issued a cease trade order with respect to the securities of SFC and with respect to certain senior management personnel. With the consent of SFC, the cease trade order was extended by subsequent orders of the OSC.

[16] SFC and certain of its officers, directors and employees, along with SFC's current and former auditors, technical consultants and various underwriters involved in prior equity and debt

offerings, have been named as defendants in eight class action lawsuits in Canada. Additionally, a class action was commenced against SFC and other defendants in the State of New York.

[17] The affidavit of Mr. Martin also points out that circumstances are such that SFC has not been able to release Q3 2011 results and these circumstances could also impact SFC's historical financial statements and its ability to obtain an audit for its 2011 fiscal year. On January 10, 2012, SFC cautioned that its historic financial statements and related audit reports should not be relied upon.

[18] SFC has issued four series of notes (two senior notes and two convertible notes), with a combined principal amount of approximately $1.8 billion, which remain outstanding and mature at various times between 2013 and 2017. The notes are supported by various guarantees from subsidiaries of SFC, and some are also supported by share pledges from certain of SFC's subsidiaries.

[19] Mr. Martin has acknowledged that SFC's failure to file the Q3 results constitutes a default under the note indentures.

[20] On January 12, 2012, SFC announced that holders of a majority in principal amount of SFC's senior notes due 2014 and its senior notes due 2017 agreed to waive the default arising from SFC's failure to release the Q3 results on a timely basis.

[21] The waiver agreements expire on the earlier of April 30, 2012 and any earlier termination of the waiver agreements in accordance with their terms. In addition, should SFC fail to file its audited financial statements for its fiscal year ended December 31, 2011 by March 30, 2012, the indenture trustees would be in a position to accelerate and enforce the approximately $1.8 billion in notes.

[22] The audited financial statements for the fiscal year that ended on December 31, 2011 have not yet been filed.

[23] Mr. Martin also deposes that, although the allegations in the MW Report have not been substantiated, the allegations have had a catastrophic negative impact on Sino-Forest's business activities and there has been a material decline in the market value of SFC's common shares and notes. Further, credit ratings were lowered and ultimately withdrawn.

[24] Mr. Martin contends that the various investigations and class action lawsuits have required, and will continue to require, that significant resources be expended by directors, officers and employees of Sino-Forest. This has also affected Sino-Forest's ability to conduct its operations in the normal course of business and the business has effectively been frozen and ground to a halt. In addition, SFC has been unable to secure or renew certain existing onshore banking facilities and has been unable to obtain offshore letters of credit to facilitate its trading business. Further, relationships with the PRC government, local government, and suppliers have become strained, making it increasingly difficult to conduct any business operations.

[25] As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

APPLICATION OF THE CCAA

[26] SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

[27] SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

[28] The issued and outstanding convertible and senior notes of SFC total approximately $1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Re Stelco* [2004] O.J. No. 1257 at para. 26; leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336; and *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp*., [2008] O.J. No. 1818 (S.C.J.) at paras. 12 and 32.

[29] For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of $5 million, SFC meets the statutory requirements for relief under the CCAA.

[30] The required financial information, including cash-flow information, has been filed.

[31] I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

THE ADMINISTRATION CHARGE

[32] SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

[33] I am satisfied that, in the circumstances of this case, an Administration Charge in the requested amount is appropriate. In making this determination I have taken into account the complexity of the business, the proposed role of the beneficiaries of the charge, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge and the position of FTI.

[34] In this case, FTI supports the Administration Charge. Further, it is noted that the Administration Charge does not seek a super priority charge ranking ahead of the secured creditors.

THE DIRECTORS' CHARGE

[35] SFC also requests a Directors' Charge. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a charge in favour of any director to indemnify the director against obligations and liabilities that they may incur as a director of the company after commencement of the CCAA proceedings.

[36] Having reviewed the record, I am satisfied that the Directors' Charge in the requested amount is appropriate and necessary. In making this determination, I have taken into account that the continued participation of directors is desirable and, in this particular case, absent the Directors' Charge, the directors have indicated they will not continue in their participation in the restructuring of SFC. I am also satisfied that the insurance policies currently in place contain exclusions and limitations of coverage which could leave SFC's directors without coverage in certain circumstances.

[37] In addition, the Directors' Charge is intended to rank behind the Administration Charge. Further, FTI supports the Directors' Charge and the Directors' Charge does not seek a super priority charge ranking ahead of secured creditors.

[38] Based on the above, I am satisfied that the Directors' Charge is fair and reasonable in the circumstances.

THE SALE PROCESS

[39] SFC has also requested approval for the Sale Process.

[40] The CCAA is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. It has been held that a sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan. See *Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (S.C.J.) at paras. 47-48.

[41] The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan (See *Re Nortel Networks Corp., supra* at para. 49):

(i) Is the sale transaction warranted at this time?

(ii) Will the sale benefit the "whole economic community"?

(iii) Do any of the debtors' creditors have a *bone fide* reason to object to the sale of the business?

(iv) Is there a better alternative?

[42] Counsel submits that as a result of the uncertainty surrounding SFC, it is impossible to know what an interested third party might be willing to pay for the underlying business operations of SFC once they are separated from the problems facing SFC outside the PRC. Counsel further contends that it is only by running the Sale Process that SFC and the court can determine whether there is an interested party that would be willing to purchase SFC's business operations for an amount of consideration that is acceptable to SFC and its Noteholders while also making excess funds available to Junior Constituents.

[43] Based on a review of the record, the comments of FTI, and the support levels being provided by the Ad Hoc Noteholders Committee, I am satisfied that the aforementioned factors, when considered in the circumstances of this case, justify the approval of the Sale Process at this point in time.

ANCILLARY RELIEF

[44] I am also of the view that it is impractical for SFC to call and hold its annual general meeting at this time and, therefore, I am of the view that it is appropriate to grant an order relieving SFC of this obligation.

[45] SFC seeks to have FTI authorized, as a formal representative of SFC, to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including as "foreign main proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Counsel contends that such an order is necessary to facilitate the restructuring as, among other things, SFC faces class action lawsuits in New York, the notes are governed by New York law, the indenture trustees are located in New York and certain of the SFC subsidiaries may face proceedings in foreign jurisdictions in respect of certain notes issued by SFC. In my view, this relief is appropriate and is granted.

[46] SFC also requests an order approving:

(i) the Financial Advisor Agreement; and

(ii) Houlihan Lokey's retention by SFC under the terms of the agreement.

[47] Both SFC and FTI believe that the quantum and nature of the remuneration provided for in the Financial Advisor Agreement is fair and reasonable and that an order approving the Financial Advisor Agreement is appropriate and essential to a successful restructuring of SFC.

This request has the support of parties appearing today and, in my view, is appropriate in the circumstances and is therefore granted.

DISPOSITION

[48] Accordingly, the relief requested by SFC is granted and orders shall issue substantially in the form of the Initial Order and the Sale Process Order included the Application Record.

MISCELLANEOUS

[49] SFC has confirmed that it is bound by the Support Agreement and intends to comply with it.

[50] The come-back hearing is scheduled for Friday, April 13, 2012. The orders granted today contain a come-back clause. The orders were made on extremely short notice and for all practical purposes are to be treated as being made *ex parte*.

[51] The scheduling of future hearings in this matter shall be coordinated through counsel to the Monitor and the Commercial List Office.

[52] Finally, it would be helpful if counsel could also file materials on a USB key in addition to a paper record.

MORAWETZ J.

Date: April 2, 2012

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1057863 B.C. Ltd. (Re),*
2020 BCSC 1359

Date: 20200914
Docket: S206189
Registry: Vancouver

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

and

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

and

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	S. Collins W.W. MacLeod J. Roberts
Counsel for Province of Nova Scotia:	R.G. Grant, Q.C. M.P. Chiasson, Q.C.
Counsel for Paper Excellence Canada Holdings Corporation:	P.J. Reardon
Counsel for the Monitor, Ernst & Young Inc.:	E. Pillon L. Nicholson

Counsel for Unifor, Local 440:	R.A. Pink, QC
Counsel Pacific Harbor North American Resources Ltd, as the proposed interim lender:	B. Brammall
Counsel for Atlas Holdings LLC and Blue Wolf Capital Management, LLC:	N. MacParland
Counsel for Envirosystems Inc., dba Terrapure Environmental:	H. P. Whiteley
Counsel for Pictou Landing First Nation:	B. Hebert
Counsel for Nova Scotia Superintendent of Pensions:	S. Choo
Place and Date of Hearing:	Vancouver, B.C. July 31 and August 5, 2020
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. August 6, 2020
Place and Date of Written Reasons:	Vancouver, B.C. September 14, 2020

INTRODUCTION

[1] On June 17, 2020, the petitioners filed these proceedings seeking a restructuring solution to their financial problems, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] The petitioner, 1057863 B.C. Ltd., a British Columbia company, is the parent company of the other petitioners. The corporate group also includes various limited partnerships that are not named petitioners. Together, the group operates a pulp mill in Pictou County, Nova Scotia (the "Pulp Mill"). They also conduct related forestry activities in the Province of Nova Scotia to support those operations. I will refer to the group collectively as the "Petitioners".

[3] On January 31, 2020, the Petitioners were required to shut down the Pulp Mill, resulting in a complete cessation of its business activities. At the centre of the reasons for the shut down is an Effluent Treatment Facility ("ETF") that became inoperable after that date. The ETF is source of considerable controversy with certain of the stakeholders.

[4] Without the ability to use the ETF, the Pulp Mill could not operate.

[5] The Petitioners describe that the shut down of the Pulp Mill had a "devastating effect" on them and their partners. Indeed, most employees were laid off after the shut down.

[6] On June 19, 2020, the Petitioners sought and the Court granted an initial order under the *CCAA* (the "Initial Order"). The Petitioners' stated intention at that time was to continue to ensure the orderly hibernation, care and maintenance of the Pulp Mill while they investigated and assessed various restructuring options. The Initial Order granted was what is colloquially termed a "skinny" order, particularly in light of new strictures under s. 11.001 of the *CCAA* that limit the initial relief to what is reasonably necessary during the initial stay period.

[7] In the Initial Order, I appointed Ernst & Young Inc. as Monitor. I granted a Director's Charge limited to $500,000. I extended the stay of proceedings to the limited partnerships, as appropriate in these circumstances: *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37. Finally, I granted an Administration Charge of $500,000. At the time of the initial hearing, the Petitioners indicated that it was their intention to come back to the Court to seek approval of interim financing and other relief, including approval of a Key Employee Retention Plan ("KERP") and authority to pay certain pre-filing amounts.

[8] Since June 19, 2020, I have extended the stay a number of times to allow further discussions between the Petitioners and their stakeholders toward a possible resolution, including with the Province of Nova Scotia ("Nova Scotia"), their major secured creditor. The Monitor supported those extensions, as set out in its first report to the Court dated July 2, 2020 (the "First Report").

[9] Unfortunately, considerable disagreement remains as to whether this proceeding should continue and if so, on what terms.

[10] This hearing was essentially the comeback hearing. The Petitioners sought an Amended and Restated Initial Order ("ARIO") to incorporate the original relief in the Initial Order, with some amendments; significantly, they sought approval for interim financing that would allow their restructuring activities to continue.

[11] On August 6, 2020, I granted an ARIO that incorporated much of the relief sought. In addition, I granted the order sought by Unifor, Local 440 ("Unifor") for representative status in this proceeding. These reasons follow from my decisions at that time.

BACKGROUND

[12] The Pulp Mill has a considerable history leading to the current and fraught relationship between the owners of the Pulp Mill and other stakeholders, being Nova Scotia in particular. I will only provide a very high-level description of that history as is relevant to this application.

[13] The Pulp Mill has been in operation since 1967. It is located on Abercrombie Point in Pictou County, NS. The process of producing pulp at the Pulp Mill creates wastewater, and it is necessary to treat that wastewater before discharge. Since 1972, the treatment of the wastewater was done at the ETF, which is located near "Boat Harbour". Nova Scotia owns the ETF and has leased it to the Pulp Mill's owners over the years. As stated, the Pulp Mill cannot operate without treating the wastewater at the ETF.

[14] The Pulp Mill is adjacent to reserve lands of the Pictou Landing First Nation ("PLFN"), a Mi'kmaq First Nation.

[15] In 2011, Paper Excellence Canada Holdings Corporation ("PEC") directly or indirectly acquired ownership of the Petitioners. PEC describes having spent more than $118 million in respect of the operations of the Pulp Mill and related activities.

[16] Events leading to the Petitioners' financial difficulties include:

a) In 2014, there was an effluent leak in the pipeline from the Pulp Mill to the ETF; that event led to PLFN members blockading the area;

b) In 2015, Nova Scotia passed the *Boat Harbour Act*, S.N.S. 2015, c. 4 (the "*BHAct*"). The *BHAct* required the Petitioners cease using the ETF for the reception and treatment of effluent from the Pulp Mill by January 31, 2020. The deadline set in this legislation was contrary to the terms of the lease between Nova Scotia and the Pulp Mill (entered into prior to PEC's involvement) that contemplated use of the ETF until December 31, 2030;

c) The Petitioners set about planning for a replacement ETF ("RETF") that would allow the Pulp Mill's operations to continue past January 2020. The Petitioners have spent considerable monies to advance the project, with financial and other contributions by Nova Scotia;

d) The Petitioners' efforts to establish the RETF involved, understandably, considerable input and agreement from Nova Scotia under its environmental and regulatory process and requirements;

e) The RETF approval process did not go smoothly, at least from the Petitioners' point of view. In part, the process took place in the face of litigation between Nova Scotia and PLFN relating to Nova Scotia's decisions in relation to the Petitioners and the Pulp Mill;

f) The Petitioners say that they told Nova Scotia that it was not possible to complete the RETF by January 2020. Nova Scotia says that they never gave the Petitioners any inkling that a possible extension would be afforded to them;

g) Matters came to a head somewhat in late December 2019. Nova Scotia's Minister of Environment ("MOE") determined that a further environmental assessment report ("EAR") was required for the RETF. Almost immediately thereafter, Nova Scotia gave formal notice to the Petitioners that no extension under the *BHAct* was forthcoming;

h) In January 2020, the Petitioners filed a judicial review proceeding challenging the MOE's requirement to file a further EAR (the "Judicial Review");

i) The Pulp Mill ceased operations on January 12, 2020;

j) Commencing January 29, 2020, the MOE issued various orders to the Petitioners in respect of the orderly shutdown of the Pulp Mill. The MOE's May 14, 2020 order was appealed to the Supreme Court of Nova Scotia (the "Appeal"); and

k) The Petitioners have clearly signalled to Nova Scotia that they are seeking financial redress from the Province arising from the passage and implementation of the *BHAct* (the "BH Claim"). As matters stand,

> the Judicial Review and Appeal are in abeyance, along with the Petitioners' consideration of the BH Claim against Nova Scotia.

[17] The primary debt owed by the Petitioners is to PEC and Nova Scotia. The Petitioners owe PEC approximately $213 million; $30 million of that amount is secured against the Petitioners' assets. The Petitioners owe Nova Scotia approximately $85 million, which has a first ranking secured position against the assets. The Petitioners also owe Nova Scotia $1.3 million on an unsecured basis.

[18] In addition to unsecured amounts owed to PEC, Nova Scotia and employees, the Petitioners owe approximately $4.3 million to trade creditors and owners of the timberlands that they harvested.

[19] Before the shutdown of the Pulp Mill, the Petitioners employed approximately 200 unionized persons, represented by Unifor. In addition, there were approximately 135 other full-time employees, including salaried personnel. The Petitioners also retained approximately 600 contractors on a full or part-time basis.

[20] As of June 2020, approximately 32 employees and 18 seasonal part-time employees remained. The rest of the employees were laid off or terminated.

[21] Considered more broadly, the impact of the shutdown of the Pulp Mill has had far-reaching and considerable negative consequences for the stakeholders.

[22] The Monitor confirms in the First Report that the Petitioners contributed more than $279 million annually to the Nova Scotia economy, arising from purchases of goods and services. The Petitioners maintained a supply chain of approximately 1,379 companies who supported the operations of the Pulp Mill. Finally, the Pulp Mill provided employment for an estimated 2,679 full-time equivalent jobs, generating an estimated $38 million annually in provincial and federal taxes.

INTERIM FINANCING

[23] The Petitioners seek court approval of an interim financing term sheet (the "Term Sheet") for a financing facility (the "Interim Lending Facility") between the

Petitioners, as borrowers, PEC, as arranger and agent, and PEC together with Pacific Harbor North American Resources Ltd., as lenders (collectively, the "Interim Lenders").

[24] The Interim Lending Facility contemplates a maximum principal amount of $50 million. However, the Petitioners presently only seek approval of an initial advance of $15 million and a corresponding charge in favour of the Interim Lenders over the Petitioners' assets in first ranking priority (the "Interim Financing Charge"). The stated purpose for these initial funds is to allow payment of the Petitioners' expenses to December 2020. If the Term Sheet is approved, the Petitioners intend to make later applications for court approval to access further draws.

[25] In support of their request, the Petitioners prepared a budget to detail the uses of the $50 million (the "Financing Budget"). The Financing Budget indicates the projected financing requirements of the Petitioners to June 2022. As stated by Bruce Chapman, the general manager of the Petitioners and PEC, those projections were based on a "successful outcome" of these proceedings, said to include: the successful shutdown of the ETF; hibernation of the Pulp Mill; identifying, designing, and obtaining approvals for the RETF; and, negotiating contributions and financing associated with those activities.

[26] After the Petitioners' introduced the Financing Budget as part of this application, Nova Scotia raised a variety of objections. Nova Scotia's response at para. 2, filed in opposition to the application, sets out those objections:

> (a) there is no restructuring plan being pursued by the Applicants;
>
> (b) the DIP financing will be used to fund the Applicants' pre-filing obligations;
>
> (c) the DIP financing will be an inappropriate re-prioritization of security;
>
> (d) the cash flow statements are not supported by appropriate documentation; and
>
> (e) the Applicants have not engaged the Province in any meaningful way, other than to continue to pursue their agenda for obtaining the DIP financing to fund existing obligations.

[27] The Monitor has brought considerable balance and objectivity forward in terms of assisting the stakeholders in understanding the Financing Budget. In particular, the Monitor has sought to address Nova Scotia's concerns in the face of significant disputes between the Petitioners and Nova Scotia.

[28] In the Monitor's second report dated July 23, 2020 (the "Second Report"), the Monitor introduced the concept of milestones. The milestones set out categories of work or activities required to move the overall restructuring toward the anticipated "success" date of June 2022. Target Completion Dates are identified in the "Milestones Schedule" at Appendix C to the Second Report, along with Evaluation Dates and the Cumulative DIP Draw required by the respective dates. This "Milestones Schedule" provides, in my view, considerable structure to the approval process and it will allow, in the future, the Court, the Monitor and the stakeholders (particularly Nova Scotia) to gauge the ongoing progress of the Petitioners' efforts.

[29] In addition, the Monitor assisted in the development of an interim budget to December 2020 (the "Interim Budget"). That document, discussed in the Monitor's Second Report and its Supplemental Report dated July 30, 2020, provides a detailed breakdown of the activities and the estimated cost of those activities under the initial draw of $15 million. Those activities and costs are:

Activity	**Activity Costs**
Boat Harbour operations and de-commissioning costs and environmental costs	$6,846,698
Mill operating costs	$1,231,650
Financing and administration costs	$407,734
Employee costs	$1,161,104
Severance and salary continuations	$2,646,498
Professional fees (includes approx. $575,000 for the Judicial Review and Appeal)	$3,481,625
TOTAL	**$15,775,308**

[30] The Monitor anticipates that, with cash on hand of approximately $4.8 million, the Petitioners will have sufficient funding through to the end of 2020 with this interim financing.

[31] Section 11.2(1) and (2) of the *CCAA* confirms the Court's jurisdiction to approve interim financing and approve a charge in priority to existing secured creditors:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[32] The Supreme Court of Canada recently commented on the importance of the relief available under s. 11.2, including the granting of an interim lenders' charge. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 85-86, the Court confirmed that a court may exercise its discretion to approve such financing to achieve the important statutory objective under the *CCAA* of not only providing working capital, but also enabling the "preservation and realization of the value of a debtor's assets".

[33] The Court in *Callidus* also acknowledged that a court's ability to grant a charge in favour of an interim financier is often necessarily and practically the only way to secure this benefit:

> [89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies. As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors. Although super-priority charges do subordinate secured creditors' security positions to

> the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].

[34] Section 11.2(4) of the *CCAA* sets out certain non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report…

[35] No one factor set out in s. 11.2(4) governs or limits the Court's consideration. The exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the "breathing room" said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court: *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176, at para. 33 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49.

[36] I will discuss the factors in turn.

[37] These proceedings were filed in mid-June 2020. Despite the Petitioners' initial intentions to undertake a restructuring process to mid-2022 under the Interim Lending Facility, their ambitions have been significantly curtailed, at least in the short term. Under the present proposal, the Petitioners seek only to extend these proceedings to December 2020, when hopefully there will be further clarity about how the restructuring may proceed. This shortened period will allow the Court, the

Monitor and the stakeholders to get a sense of the Petitioners' progress toward assessing whether any further extension of the proceedings is justified.

[38] Nova Scotia submitted that, if the Court approved the interim financing and extended the stay, that stay period should only be to October 2020, when the Court could assess matters then.

[39] I would not accede to this submission. There is considerable cost and energy to bring matters forward to the Court, which may not necessarily be justified depending on the status of matters in October 2020. Rather, I accept that the financing is justified in order to allow further operations to December 2020. I have specifically ordered the Monitor to provide oversight with respect to the Petitioners' expenditures to ensure that they are consistent with the Interim Budget. In addition, I ordered that the Monitor file a formal report with the Court by no later than October 31, 2020 as to the status of the Petitioners' restructuring efforts and spending under the Interim Budget. That information will of course be available to the stakeholders. If anything arises from that report, the Monitor or any stakeholder may apply to the Court.

[40] Nova Scotia has raised, however obliquely, concerns regarding how the Petitioners' business and financial affairs will be managed during the proceedings. In my view, this largely arises from the great degree of mistrust and suspicion, if not downright animosity, that exists in the chasm that separates Nova Scotia and the Petitioners.

[41] Nova Scotia filed various affidavits in support of its opposition to this application, being those of Duff MacKay Montgomerie, Paul Bradley and Kenneth Swain. All of these affidavits were intended to provide Nova Scotia's side of the "story" and respond to Mr. Chapman's various affidavits. Mr. Chapman replied to the points raised in Nova Scotia's affidavits.

[42] Clearly, the disagreements between the Petitioners and Nova Scotia are many, and some long-standing. Two major issues relate to (a) payments made by

the Petitioners to PEC as a shareholder some years ago when monies were owed to Nova Scotia, and (b) the use of monies advanced by Nova Scotia to the Petitioners for environmental expenses under a Contribution Agreement. I only note the existence of those disputes; in my view, there is no need at this time and in these proceedings to resolve those disputes. Whether those disputes need to be resolved in the fullness of time remains to be seen.

[43] I accept that Nova Scotia's concerns give rise to some question as to the future conduct of these proceedings. However, this question is largely answered by the Monitor, who raises no concerns regarding the conduct of the Petitioners' management from the time of the Initial Order. As stated in *Pacific Shores* at para. 31, the good faith requirement to support the relief on this application relates to conduct within the proceeding, not conduct pre-existing the filing. The Monitor continues to provide oversight with respect to the Petitioners' activities.

[44] One of the major factors is whether the loan would enhance the prospect of the Petitioners making a viable compromise or arrangement with their creditors.

[45] The result of not approving this financing is stark. The shutdown of the Pulp Mill has resulted in a complete cessation of any revenue. Both Mr. Chapman and the Monitor confirm that, without the financing, the Petitioners cannot continue any restructuring efforts or even the continued hibernation of the Pulp Mill. The Monitor confirms that a lack of funding would likely result in a receivership or bankruptcy, with the usual dire result of yielding nothing for the majority of the stakeholders.

[46] A large portion of the $15 million interim financing is earmarked for what Mr. Chapman calls "critical expenses" relating to the direct and indirect expenses of the hibernation of the Pulp Mill. In its opposition, Nova Scotia does not address what would happen in the event that PEC walked away from its investment in the Petitioners and the Pulp Mill. As best I can tell, Nova Scotia seems to be ready to test PEC's resolve to determine if PEC will, as the shareholder, fund the ongoing costs itself without any interim financing and related charge.

[47] In my view, given the sensitive nature of the assets, and the potential and negative consequences particular to the environment and local population arising on a liquidation, I do not consider it is reasonable to allow a "game of chicken" to take place between Nova Scotia and PEC. It appears to be the case that even if a receivership takes place (perhaps at the behest of Nova Scotia), many of these costs would be incurred in any event: *Pacific Shores* at para. 49(f).

[48] Nova Scotia also takes issue with payment of pre-filing unsecured amounts, including amounts owed to employees and former employees, which the Petitioners seek to fund under the Financing Budget and the Interim Budget. I will address that issue separately below.

[49] Finally, Nova Scotia takes great umbrage in having an Interim Financing Charge placed ahead of its own charge when some of the funds under the Financing and Interim Budgets are to be used to some extent to advance litigation (or potential litigation) against it. Paragraph 10 of the Term Sheet provides that the purpose of the facility is in part to fund expenses associated with:

> … the evaluation, settlement or progression of claims and other legal remedies that may be available to the Borrowers and to pay transaction costs, fees and expenses [including all reasonable fees and expenses in connection with any other proceeding pursued or defended by the Borrowers relating to the Northern Pulp facility and business] …

[50] It is common ground that the "claims and other legal remedies" include the Judicial Review, the Appeal and the potential BH Claim against Nova Scotia. The estimated cost in the Interim Budget of professional fees toward those matters is approximately $575,000. Nova Scotia questions whether the Interim Financing Facility is simply to improve the Petitioners' negotiating position with Nova Scotia.

[51] The Petitioners state that they remain committed to pursuing the re-start of the Pulp Mill in an environmentally responsible manner by ultimately constructing the RETF and resuming operations. The Petitioners believe that a re-start of operations affords Nova Scotia the best opportunity to recover its secured claims for money

advanced. Nova Scotia disagrees and appears to have considered the consequences of a complete and permanent shutdown of the Pulp Mill.

[52] The Petitioners say that they have continued the litigation – and are still considering the BH Claim – against Nova Scotia only as a backstop if they are not able to resolve their outstanding claims against Nova Scotia through negotiation and settlement. As noted by the Petitioners' counsel, the rights of the Petitioners under the Judicial Review, the Appeal and the BH Claim are choses in action and part of the Petitioners' assets. In *Callidus* at para. 96, the Court recognized that funding to preserve a "litigation asset" may be appropriate if it is intended to preserve and realize upon that asset for the benefit of the stakeholders.

[53] In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.

[54] Another factor is the nature and value of the Petitioners' property. The Monitor sets out in the First Report that the 2019 unaudited consolidated assets of the Petitioners (at book value) was approximately $343 million. The estimated liabilities as of mid-June 2020 were approximately $311 million. By any measure, most of the value of the Petitioners' assets, particularly the Pulp Mill, will only be realized if the Pulp Mill begins operations again. That necessarily involves the establishment of the RETF.

[55] The Interim Financing Facility, as limited by the initial draw under the Interim Budget, will allow the Petitioners a short period (some five months) to show real progress toward that objective of enhancing the value of their assets. I do not agree with Nova Scotia that the Petitioners have failed to identify any restructuring plan or that the Interim Financing Facility *is* the plan. The materials before the Court clearly show a "kernel of a plan" – namely the restart of the Pulp Mill and the Petitioners' operations, all intended to alleviate the dire financial circumstances here and allow the Petitioners to fashion a way forward with the support of their creditors. The

Petitioners should be allowed some opportunity to advance their efforts to that end, if possible.

[56] Another significant factor here is whether any creditor would be materially prejudiced if the Interim Financing Charge is granted. Clearly, Nova Scotia, as the major and presently first ranking secured creditor thinks so. It is not difficult to discern that Nova Scotia faces a myriad of concerns with respect to the Petitioners and the Pulp Mill, including relating to the environment, employment of its citizens, the general welfare of the employees, obligations to the PLFN and the state of its economy.

[57] It is not my role on this application to judge how Nova Scotia has seen fit to balance its duties and obligations in this complex situation. Nova Scotia is clearly frustrated with the Petitioners, noting in particular that it has already contributed significant amounts of public money and other benefits to assist them in meeting their environmental obligations.

[58] I agree that Nova Scotia faces prejudice, although not to the degree submitted by its counsel. As stated above, it remains the case that, if a receivership occurs, a receiver would incur some of these expenses anyway. This is particularly so, with respect to the expenses (both direct and indirect) intended to protect the environment and the citizens of Pictou County in the Pulp Mill hibernation process.

[59] I have no concerns that Nova Scotia is anything but committed to the well-being of the environment and its citizens, particularly those living near the Pulp Mill, such as members of the PLFN. I acknowledge Nova Scotia's concerns, but they must be balanced against other stakeholder interests and prejudice faced by those stakeholders if the financing is not approved: *Pacific Shores* at para. 49.

[60] The final factor is whether the monitor supports the financing. That is clearly the case here. As stated above, the Monitor has attempt to bridge the gap between Nova Scotia's concerns and the objectives of the Petitioners. It has succeeded to some degree.

[61] The Monitor has carefully analyzed the proposed financing terms. In its various reports, the Monitor has provided a detailed summary of the key elements of the Term Sheet, including specific terms that Nova Scotia questioned (including those provisions relating to payment-in-kind terms, change of control, right of first refusal and right to match, a prohibition on voluntary provisions and certain default terms). In light of submissions made by the Petitioners, and comments of the Monitor, I have no concerns regarding those matters.

[62] Nova Scotia also raised an issue with respect to possible action by the Interim Lenders if there is an Event of Default (para. 23 of the Term Sheet). Again, I had no concerns in that respect as those were normal terms. I ordered an amendment to the draft ARIO to ensure that it was consistent with the provisions in the Term Sheet.

[63] The Monitor recommends approval of the Interim Financing Facility, limited to the initial draw under the Interim Budget. I expect that the Monitor will work closely with the Petitioners in the next few months to ensure that proper expenditures are made in accordance with the Interim Budget. Such oversight will allow adequate protection to the stakeholders in this critical interim period while the Petitioners explore what options are available to them in the future with or without certain stakeholder support.

[64] I conclude that the Interim Financing Facility is reasonable and appropriate in the circumstances. I approve the interim draw of $15 million, as sought. This financing will provide a viable short term path forward to allow the Petitioners to explore restructuring options, all for the benefit of the entire large stakeholder group, including Nova Scotia, the employees (both past and present) and members of the PLFN, all of whom were represented on this application.

[65] As noted by Petitioners' counsel, no other viable alternatives are available to avoid the significant and negative social, economic and environmental consequences if the Petitioners do not receive the funding they need to advance their restructuring plan.

SEVERANCE / SALARY CONTINUATION PAYMENTS

[66] The Initial Order provided that the Petitioners could pay certain employee expenses incurred prior to that date:

> 4. The Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:
>
> (a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred …

[67] The pre-filing unsecured employee obligations fall into two categories:

a) 191 unionized employees were terminated before filing (or expect to be terminated shortly), trigging severance obligations under Unifor's collective bargaining agreements (the "Severance Obligations"). Before the filing, approximately half of that amount ($1.65 million) was paid, leaving approximately $1.94 million to be paid (some already due and the rest to be funded into July 2021); and

b) Between January and June 2020, 45 salaried employees were terminated. In that event, their employment agreements require payment of salary continuance (the "Salary Continuance"). Before the filing, $3.3 million of Salary Continuance was paid. Under the terms of the Initial Order, $370,000 was paid to these employees. The remaining estimated amount of Salary Continuance budgeted to be paid from August 2020 to September 2024 is approximately $3.5 million.

[68] The Interim Budget provides for payment of the Severance Obligations and the Salary Continuance, together with benefits to retired employees. The Petitioners seek an order allowing them to make such payments, estimated in total at $2.9 million to December 2020.

[69] Unifor understandably supports the Petitioners' request to make pre-filing payments of the Severance Obligations in accordance with the Interim Budget.

[70] There is no dispute between the parties that I have the jurisdiction to authorize payment of pre-filing unsecured obligations. Section 11 of the *CCAA* provides a broad discretion to the Court to make any order as may be "appropriate in the circumstances". The more difficult question is whether I *should* exercise my discretion to allow such payments here.

[71] Nova Scotia disputes that these payments are appropriate in the circumstances. The Monitor presents, appropriately, a neutral exposition of the relevant circumstances, without recommendation.

[72] The Petitioners refer to *Cinram International Inc. (Re)*, 2012 ONSC 3767. In *Cinram*, the Court authorized payments to certain employees, including any obligations that arose prior to the filing. However, as noted at paras. 23 and 43, the Court did so in the context of Cinram's "ongoing business operations" and with respect to the "active employment of employees in the ordinary course".

[73] In this case, there are no ongoing business operations as discussed in *Cinram*; in addition, the payments are to be made to *former* employees who were terminated before the filing.

[74] The circumstances considered in *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 are also unhelpful to the Petitioners. At paras. 24-25, the Court's discussion of payment of pre-filing employee claims took place within the context of "critical suppliers" and the need to ensure continued delivery of necessary goods and services for the debtor's operations and to support the restructuring. The Court accepted the recommendation of the proposed monitor that pre and post-filing "payroll and benefits" be paid. The monitor's reasons included that many of the relevant payments would have priority status and/or give rise to director liability if not paid. Further, in the proposed monitor's experience, it is common to pay pre-filing and post-filing obligations to employees in the normal course, to ensure continued

and uninterrupted service by employees. Importantly, the debtor had sufficient cash on hand to pay these expenses, which is not the case here.

[75] The reasons advanced by the Petitioners in asserting that these payments are "critical" are much more ephemeral than the reasons advanced in *JTI-Macdonald*. The Petitioners argue that allowing payment of the pre-filing unsecured employee amounts (in addition to ongoing employee expenses) is necessary to:

a) preserve the Petitioners' going concern value;

b) ensure that the other activities provided for in the Interim Financing Budget can be carried out by the Petitioners' remaining employees;

c) mitigate the adverse effects of the Pulp Mill's closure in the communities in which the Petitioners operate. The Petitioners emphasize the significant negative consequences suffered by the lay-offs and terminations, particularly in the face of the COVID-19 pandemic;

d) preserve their relationships with the employees who are no longer working, many of whom are expected to be called upon to return to employment at the Pulp Mill in the future if the construction of the RETF is undertaken; and

e) preserve their relationship with Unifor. The Petitioners state that unions as a whole will inevitably be present in some form if the Petitioners resume operations. They say that preserving an effective working relationship with Unifor, consistent with Unifor's collective bargaining agreements, will provide an additional benefit to them, both during and after these proceedings.

[76] The Petitioners also reiterate that payment of these pre-filing employee amounts will signal their commitment to the stakeholders to develop and implement

a plan to recommence the Pulp Mill's operations and in doing so, alleviate financial hardship within what they describe is a critical stakeholder group.

[77] I appreciate that court approval to allow payment to employees, even for pre-filing unsecured amounts, is often granted. When a debtor is conducting ongoing operations during a proceeding, it will often be necessary to ensure that employment relationships are not disrupted so as to hinder the restructuring efforts.

[78] However, the starting point for this discussion continues to be that *all* pre-filing unsecured amounts are not to be paid in a *CCAA* proceeding, even if owed to employees. All pre-filing creditors are covered under the general stay of proceedings; any payment is the exception to the general rule. That starting point is intended to preserve the *status quo* between creditors of the debtor pending the debtor advancing a fair and equitable proposal at the end of the day in respect of all of its obligations.

[79] At that later stage, it is generally anticipated that unsecured creditors will be treated fairly and equitably in any plan of arrangement, usually by way of a *pro rata* payment, subject to certain minimum requirements with respect to employee claims, as set out in s. 6(5) of the *CCAA*.

[80] Two Ontario decisions, cited by Nova Scotia, are of assistance.

[81] The first decision is *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558 (Ont. S.C.J.) aff'd *Sproule v. Nortel Networks Corp.*, 2009 ONCA 833. In the lower court, Justice Morawetz (as he then was) was addressing requests from the union and former employees for payment of their pre-filing claims for retirement allowance payments, voluntary retirement options, vacation pay, benefit options and termination and severance pay.

[82] At para. 51 of *Nortel*, Morawetz J. noted that it was necessary to take into account the overall financial picture of the applicants, who opposed the applications. There, as here, the debtor was not in a position to pay their obligations to all creditors and a number of defaults were present, including those relating to the

unionized and former employees. At para. 57, Morawetz J. described that *Nortel* was not carrying on "business as usual", which is also the case here. The Court dismissed the application stating:

> [60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.
>
> . . .
>
> [80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

[83] In *Sproule*, the Court of Appeal agreed that the stay applied to these types of claims:

> [39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[84] The Court in *Nortel* asked the monitor to investigate whether an interim payment might be made to the employees in any event. That request was made, however, in very different circumstances where there were no significant secured creditors and a distribution to the unsecured creditors seemed likely in any event:

> [87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

[85] In *Windsor Machine & Stamping Ltd. (Re)*, [2009] O.J. No. 3195 (Ont. S.C.J.), the union brought an application to require the debtors to pay termination and

severance pay owing as a result of post-filing terminations. The major secured creditor objected. Justice Morawetz similarly rejected this application, citing the priority of that secured creditor:

> [43] First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.
>
> [44] Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.
>
> [45] Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

> [46] In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also *Indalex Limited*, [2009] O.J. No. 3165, CV-09-8122-00CL – July 24, 2009 on this point.)
>
> [47] I acknowledge that the situation facing the employees is unfortunate and that in *Nortel*, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

[86] The circumstances here are more resonant with the facts discussed in *Nortel* and *Windsor Machine*. Given that this proceeding is very much in its early days, I cannot conclude that a distribution to pre-filing unsecured claims (including to the employees) is likely at the end of the day. There are no ongoing operations; there is no cash with which to pay these amounts.

[87] Significantly, Nova Scotia, the major secured creditor, whose security would be primed by these payments, objects. In the absence of any objection by Nova Scotia, and with the general support of the Petitioners and the stakeholders appearing on this application, I might have come to a different conclusion.

[88] The Petitioners also argue that the Severance Obligations constitute inchoate priority charges under provisions of the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246 (the "*Code*"). They argue that these provisions would be triggered if an employee makes a successful claim to the Nova Scotia Labour Board (the "Board") and the Board issues an order. They refer to s. 88 of the *Code* that provides that amounts in an order are a debt due to the Board secured by a lien or mortgage that has priority over all other liens, charges, or mortgages. They also refer to ss. 90 and 90A of the *Code* with respect to potential actions by the Board. However, any such actions are currently stayed under the Initial Order, just as they

are with respect to any action that might have been taken by Nova Scotia as a secured creditor.

[89] This is an unpersuasive argument by the Petitioners in any event. It is well taken that a province cannot create priorities that alter the federal scheme of distribution in the event of a bankruptcy: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 86-87, 136: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Given that these proceedings are in their nascent days, it is anyone's guess on the outcome. A bankruptcy remains a possibility, however slight in the Petitioners' minds.

[90] I accept, without hesitation, that these hard working and dedicated employees will meet my decision with a great deal of disappointment, if not dismay. The reasons for the closure and shutdown are completely divorced from their commitment to their jobs. I also appreciate that this vulnerable group of stakeholders will suffer arising from my decision. I say this knowing that the Petitioners represented – or at least previously represented – a significant employer in the province and in Pictou County, particularly. I expect that many of these lost jobs, no doubt some with expertise involving work at pulp mills, cannot be easily replaced, if at all.

[91] The Petitioners have emphasized the need to maintain the goodwill of their workforce in the event that the RETF is constructed and operations recommence. Whether or not the Petitioners will achieve that objective is simply unknown at this time.

[92] Unfortunately, I conclude that there is no principled basis upon which I could exercise my discretion to grant this relief. The Petitioners have not advanced a persuasive case toward authorizing such payments in such nebulous circumstances, particularly when it would amount to prioritizing those unsecured creditors over the existing security of Nova Scotia and where Nova Scotia objects.

TERRAPURE

[93] Before and after the *CCAA* filing, Envirosystems Inc., dba Terrapure Environmental ("Terrapure") provided services to the Petitioners relating to the removal of wastewater. The pre-filing debt owed to Terrapure for its services is approximately $1.1 million.

[94] The Petitioners do not seek any relief in favour of Terrapure, such as a declaration that it is a "critical supplier". Indeed, by the date of this application, the Petitioners had found an alternate means to remove the wastewater and they advised that it is unlikely they will need any further services from Terrapure.

[95] Terrapure's position on this application is to support the approval of the Interim Financing Facility and the payment of the unsecured pre-filing claims of the employees, but only if Terrapure is similarly paid its pre-filing unsecured claim.

[96] The general discussion above regarding the general application of the stay of proceedings with respect to unsecured creditors equally applies to Terrapure. Nova Scotia similarly objects to any payment to Terrapure, since the means to make any such payment could only arise from the Interim Financing Facility.

[97] In my view, there is no basis to prefer Terrapure in this case by allowing payment of its pre-filing unsecured claim. All claims by unsecured creditors are equally covered by the stay under the Initial Order, including the claims by employees, as discussed above, and Terrapure.

[98] In the event that the Court did not approve payment of its pre-filing debt, Terrapure requested the addition of a term in the ARIO to confirm that it has no further obligation to provide services to the Petitioners. No one raised any objections to that provision and I grant that relief.

KEY EMPLOYEE RETENTION PLAN (KERP)

[99] The Petitioners seek approval of a KERP and the granting of a Court ordered KERP charge to a maximum of $342,207 (the "KERP Charge"). They say that the

KERP is for a select group of key employees to incentivize their continued retention, which is necessary if there is to be any viable prospect for the Petitioners to pursue their restructuring strategy.

[100] They propose that the KERP Charge rank directly below the Directors' Charge.

[101] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 27.

[102] As the Petitioners note, courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J.) and *U.S. Steel Canada*.

[103] In *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[104] In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

- Is this employee important to the restructuring process?
- Does the employee have specialized knowledge that cannot be easily replaced?
- Will the employee consider other employment options if the KERP is not approved?
- Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
- Does the Monitor support the KERP and a charge?

[105] More recently, in *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as

discussed in the relevant case law: arm's length safeguards, necessity and reasonableness of design.

[106] As Mr. Chapman describes, the KERP has been designed to facilitate and encourage the continued participation of select key employees of the Petitioners who are contemplated to either (a) provide necessary services up to the expiry of the stay period (to December 2020); or (b) guide the business through the restructuring and preserve value for stakeholders over the length of the case.

[107] The KERP consists of two independent programs: the Key Management Employee Retention Plan (the "Management KERP") and the Key Technical Employee Retention Plan (the "Technical KERP"). These plans would apply to a small number of employees: five under the Management KERP; two under the Technical KERP. Payments under the Technical KERP are conditional on the proceedings continuing on the date that each payment is to be made and do not amount to a long-term payment commitment if the restructuring fails.

[108] The Petitioners' evidence on this application fully supports an affirmative answer to all of the above questions set out in *Walter Energy*. These employees are important to the restructuring process; the Monitor describes a "knowledge and operational void" if their employment is not further secured in some fashion. Given the nature of the assets in question, I agree that these employees, both management and technical, have specialized knowledge that cannot be easily replaced.

[109] There is no evidence on this application that any of these employees are considering other employment options if the KERP is not approved. However, that lack of evidence is not fatal to approval of the KERP since that very scenario is intended to be avoided by approval of the KERP.

[110] The KERP was developed through a consultative process involving the Monitor. The Monitor supports the KERP and the KERP Charge, noting that without

securing this “human capital”, the ability of the Petitioners to restructure their affairs will be greatly impaired.

[111] The Monitor notes in particular that Mr. Chapman, a PEC employee and general manager of the Pulp Mill, is included in the KERP. The Monitor describes Mr. Chapman as a “key resource” and provides that his continued support is “critical” toward achieving a successful restructuring. Mr. Chapman has been the person providing significant evidence in support of the Petitioners in this proceeding to date, which speaks to that fact.

[112] No stakeholder opposes this relief. In my view, such relief is appropriate. I approve the KERP and I grant the KERP Charge on the terms sought.

ADMINISTRATION / DIRECTORS’ CHARGES

[113] The Petitioners have not sought an increase of the Administration Charge on this application. The Petitioners seek the continuation of the Administration Charge in its previously approved amount (not to exceed $500,000) to secure professional fees and disbursements of the Monitor, counsel to the Monitor and the Petitioners' counsel.

[114] The Petitioners have also determined that they do not require an increase of the Directors’ Charge at this time. The Petitioners seek the continuation of the Directors’ Charge in its previously approved amount (not to exceed $500,000) to secure the indemnity provided for in the Initial Order.

[115] Again, no opposition arises. In my view, continuing this relief from the Initial Order is appropriate and I grant it.

STAY EXTENSION

[116] The Petitioners seek an extension of the stay to December 31, 2020.

[117] Under s. 11.02(2) of the *CCAA*, the Court has broad jurisdiction to extend a stay of proceedings where the circumstances warrant and for any period the Court considers necessary. Baseline considerations include those set out in s. 11.02(3) of

the *CCAA*, including confirmation that the debtor is acting with due diligence and in good faith and that the relief sought is appropriate.

[118] The comments of court in *Timminco Limited (Re)*, 2012 ONSC 2515 aptly set out the statutory objectives intended to be achieved by the stay:

> [15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the [debtors] with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[119] Throughout this proceeding, and to this time, the Monitor confirms its view that the Petitioners have been working in good faith and with due diligence. The Monitor recommends the extension of the stay to December 31, 2020.

[120] It will be more than apparent from the discussion above and the orders I have granted, particularly as to the Interim Financing Facility, that I have concluded that an extension of the stay to December 31, 2020 is appropriate in the circumstances. As discussed above, there is somewhat of a "check" on the proceedings arising from the Monitor's report that will be filed before the end of October 2020.

[121] The stay period to December 2020 will allow the Petitioners to advance their objective of securing a restructuring option for the benefit of the stakeholders. I conclude that they should be afforded the opportunity to do so here.

UNIFOR APPLICATION

[122] Unifor seeks an order authorizing it to represent the current and former union members of the local, including pensioners, retirees, deferred vested participants, and their surviving spouses and dependants, employed or formerly employed by the Petitioners, in these proceedings. Unifor does not seek any court ordered funding to secure its participation or that of Pink Larkin, its counsel.

[123] The Petitioners support this relief and no stakeholder objects.

[124] As with much of the above relief, the Court has jurisdiction to exercise its discretion to grant the order sought under its broad statutory jurisdiction found in s. 11 of the *CCAA*.

[125] In *Canwest Publishing Inc.*, 2010 ONSC 1328, the Court discussed the factors typically considered in granting such relief. Justice Pepall (as she then was) set those out as follows:

> [21] Factors that have been considered by courts in granting these orders include:
>
> - the vulnerability and resources of the group sought to be represented;
> - any benefit to the companies under *CCAA* protection;
> - any social benefit to be derived from representation of the group;
> - the facilitation of the administration of the proceedings and efficiency;
> - the avoidance of a multiplicity of legal retainers;
> - the balance of convenience and whether it is fair and just including to the creditors of the Estate;
> - whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
> - the position of other stakeholders and the Monitor.

See also *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 61.

[126] I agree that these employees presently have a commonality of interest that is best represented in this proceeding as an entire group. Wanda Skinner is the president of the Unifor local. Ms. Skinner's affidavit #2 sworn July 28, 2020 supports the vulnerability of the unionized employees arising from the disastrous economic consequences to them of losing their jobs and benefits.

[127] Unifor clearly has a relationship with this cohort and is in the best position to advance the entire group's interests, at least at this time. That representation will be a benefit to the Petitioners in advancing this restructuring by facilitating discussions between them. The estate will incur no cost by reason of Unifor's representation, welcome news given the lack of cash resources available to the Petitioners.

[128] The order sought by Unifor is consistent with the order granted in the Fraser Papers Inc. restructuring: see *Fraser Papers Inc. (Re)*, 2009 CanLII 55115 and 2009 CanLII 63589 (Ont. S.C.J.).

[129] I am satisfied that the terms of the order sought are appropriate, with one exception. In para. 3 of the draft order, Unifor seeks authority to "determine, file, advance or compromise" any claims of its current or former employees. The only change I would make to that provision is to amend it to provide that any compromise proposed to be made by Unifor will be subject to court approval. This will ensure some oversight in respect of any decisions that Unifor seeks to make for the employee group they will represent.

"Fitzpatrick J."

TAB 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 1586

Date: 20201028
Docket: S209201
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 MOUNTAIN EQUIPMENT CO-OPERATIVE and 1314625 ONTARIO LIMITED

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners, Mountain Equipment Co-Operative and 1314625 Ontario Limited:	H. Gorman, Q.C. S. Boucher
Counsel for the Monitor, Alvarez & Marsal Canada Inc.:	H.L. Williams J. Enns
Counsel for Royal Bank of Canada, as Administrative Agent and Collateral Agent under Credit Agreement:	J. Sandrelli V. Cross
Counsel for Kingswood Capital Management LP, Kingswood Capital Opportunities Fund I, LP, Kingswood Capital Opportunities Fund I-A, LP and 1264686 B.C. Ltd.:	D. Chochla K. Jackson

Counsel for Plateau Village Properties Inc.:	C. Ramsay K. Mak P. Cho N. Carlson
Counsel for Midtown Plaza Inc.:	K. McEwan, Q.C. C. Smith R. Atkins W. Stransky
Counsel for RioCan Real Estate Investment Trust Company:	L. Galessiere
Counsel for Crestpoint Real Estate Investments Ltd., as authorized asset manager of 0965311 B.C. Ltd.:	B. Wiffen
Counsel for Les Galeries de la Capitale Holdings Inc. and manager Oxford Properties Group:	F. Viau
Counsel for First Capital Holdings (Alta) Corp. and First Capital (Ontario) Corp.:	K. Hashmi
Counsel for Concert Properties Limited:	H. Meredith
Counsel for Kevin Harding, spokesperson for steering committee for “SaveMEC” campaign:	C. Gusikowski P. Reardon
Counsel for BC Co-op Association and Co-operatives and Mutuals Canada:	E. Bridgewater
Place and Date of Hearing:	Vancouver, B.C. September 28-30 and October 1, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. October 2, 2020
Place and Date of Written Reasons:	Vancouver, B.C. October 28, 2020

INTRODUCTION

[1] On September 14, 2020, the petitioners, Mountain Equipment Co-operative and its wholly owned subsidiary, 1314625 Ontario Limited ("131"), sought and obtained relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). I will refer to the petitioners jointly by the first petitioner's well-known acronym, "MEC".

[2] On September 14, 2020, I granted an Initial Order in favour of MEC that included a stay until September 24, 2020, although that was later extended to the time of this comeback hearing. I also approved an interim financing facility to a total of $100 million (the "Interim Financing"), although draws were then limited to $15 million, consistent with the test set out in s. 11.2(5) of the *CCAA*. I appointed Alvarez & Marsal Canada Inc. ("A&M") as the Monitor. Finally, I approved charges usually granted in these proceedings: an Administration Charge ($1 million), a D&O Charge ($4.5 million) and an Interim Financing Charge ($102 million).

[3] At this comeback hearing, MEC seeks an Amended and Restated Initial Order (ARIO) to continue the relief granted in the Initial Order, with approval to access the entire amount under the Interim Financing. In addition, MEC seeks approval of a Key Employee Retention Program (KERP) and a related charge. Finally, MEC seeks an order approving a sale of substantially all of its assets, pursuant to a Sale Approval and Vesting Order (SAVO).

[4] Since September 14, 2020, formidable opposition has formed in response to MEC's application for approval to sell its assets under the SAVO.

[5] Many parties now seek an adjournment of MEC's application for the SAVO, objecting to any sale at this time for various reasons. Those parties include two landlords, Plateau Village Properties Inc. ("Plateau") and Midtown Plaza Inc. ("Midtown"), and Kevin Harding, spokesperson for the steering committee for the "SaveMEC" campaign. Mr. Harding also seeks an order appointing his law firm as representative counsel for certain members of MEC, with an accompanying charge for their expenses.

[6] MEC contends that it is critical that the sale occur without delay. MEC opposes all of the relief sought by the objecting parties.

[7] On October 1, 2020, I concluded the comeback hearing. On October 2, 2020, I granted the orders sought by MEC, including the SAVO, and dismissed the relief sought by the objecting parties, with reasons to follow. These are my reasons.

BACKGROUND

[8] MEC is a co-operative association incorporated under the *Cooperative Association Act,* S.B.C. 1999, c. 28 (the "*Co-op Act*").

[9] In 1971, almost 50 years ago, MEC was formed from the passion of many Vancouverites who loved to spend time outdoors and appreciated having the right equipment and gear to do so. Since then, MEC has become an iconic retailer of outdoor activity equipment and clothing, serving the needs of the public who share that passion for the outdoors. MEC sells many well-known brands and also has its own very successful private label for many products.

[10] MEC's ownership is unique. MEC currently has approximately 5.8 million members, each having paid a $5 lifetime membership fee for the right to shop at MEC and participate in its governance as a co-operative member. Counsel advises that the breadth of MEC's membership in Canada is significant, representing some 22% of the Canadian working population.

[11] 131 owns a parcel of land that comprises the parking lot at the site of MEC's Ottawa Store. 131's assets are not significant in the overall circumstances. Similarly, MEC also owns an interest in a limited partnership which has nominal value.

[12] MEC has a significant history of community involvement. Since 1987, MEC has contributed approximately $44 million to organizations focused on conservation and outdoor recreation.

[13] MEC's head office is located at leased premises in Vancouver, BC. MEC operates online and also, operates 22 retail locations across Canada in BC, Alberta,

Manitoba, Ontario, Quebec and Nova Scotia. MEC leases its eastern distribution centre in Brampton, Ontario and most (16) of its store operations. MEC owns six store locations and its western distribution centre in Surrey, BC.

[14] As of September 7, 2020, MEC has approximately 1,516 employees: 1,143 active employees, 176 laid off employees, 118 employees on the Canada Emergency Wage Subsidy program and 79 employees on unpaid leave.

[15] MEC's board of directors (the "Board") has eight directors. As of September 10, 2020, MEC's senior management consists of seven officers. Philippe Arrata is MEC's Chief Executive Officer who has provided most of the sworn evidence on behalf of MEC in this proceeding.

[16] In 2015, MEC embarked on a significant growth plan. That plan resulted in six new stores and two new relocated stores in Vancouver and Toronto, a new head office, a new eastern distribution centre as well as significant investments in online retail resources. MEC has commitments for two additional new stores (Calgary North West and Saskatoon) that have not yet opened, which is a point of controversy on this application. Over the ensuing years, this growth plan was successful from a market expansion and sales perspective, but it also resulted in a higher fixed cost structure and increased debt levels.

[17] In August 2017, MEC, as borrower, and 131, as guarantor, entered into a credit agreement with the Royal Bank of Canada (RBC), as agent, and RBC, Canadian Imperial Bank of Commerce and the Toronto-Dominion Bank (collectively, the Lenders") for a senior secured asset-based revolving credit facility (the "Credit Facility").

[18] The Credit Facility initially allowed MEC to borrow up to a maximum of $130 million with a maturity date of August 3, 2020. Through various amendments implemented over 2020, that borrowing maximum was reduced to its present level, $100 million. The Lenders hold first priority security over all of MEC's assets.

[19] The results of MEC's growth strategy led to challenging fiscal circumstances. Since 2015, MEC's operating losses were approximately $80 million, offset to some extent by real estate transactions that realized capital gains. Even so, the net loss for the year ending February 23, 2020 was approximately $22.7 million, largely arising from increased costs, certain under-performing stores and liquidity strains.

[20] MEC's assets consist primarily of: owned and leased real property; equipment; inventory; accounts receivable; and intangible assets including certain trademarks on trade names, membership lists and goodwill. As of February 2020, MEC's recorded a book value of approximately $389 million in current and long-term assets.

[21] MEC's liabilities are comprised primarily of: amounts owed to suppliers; governments and employees; amounts owed to the Lenders under the Credit Facility; gift cards and provision for sales returns; lease obligations; and deferred lease liabilities. MEC's current and long-term liabilities, as reported in its February 2020 Financial Statements, totalled approximately $229.6 million.

EVENTS LEADING TO *CCAA* PROCEEDINGS

[22] In early 2020, MEC took steps to address its financial difficulties. MEC's Board brought in a new management team to focus on cost reduction and a return to profitability.

[23] On February 10, 2020, MEC engaged Alvarez and Marsal Canada Securities ULC ("A&M Securities") as a financial advisor to assist in a review of strategic alternatives, provide assistance to obtain and negotiate new financing. A&M Securities is an entity affiliated with A&M, the Monitor.

[24] In March 2020, the Board struck a special committee, comprised of three Board members (the **"**Special Committee"). The mandate of the Special Committee was to make recommendations to MEC's Board on strategic alternatives, including (a) transactions with a view to sell all or substantially all or any portion of MEC's assets (or a merger, amalgamation or some other strategic alliance involving MEC);

(b) pursuit of organic growth; (c) recapitalization, restructuring or reorganization; or (d) any other strategic alternative in the best interests of MEC.

[25] The efforts of the new management team, the Special Committee and A&M Securities led eventually to the implementation of a Sales and Investment Solicitation Process (SISP) that resulted in the proposed sale that MEC now seeks to have court approved.

[26] Under its initial mandate, A&M Securities made efforts toward identifying a satisfactory refinancing, including: establishing a data room; contacting a number of lenders; and, entering into a number of Non-Disclosure Agreements (NDAs) with lenders. However, MEC and A&M Securities' efforts to find a solution to MEC's very difficult financial difficulties were hampered by the COVID-19 pandemic that hit Canada in March 2020. As one might expect, the pandemic had a significant and negative impact on the retail sector generally and on MEC's already struggling operations. All of MECs stores closed as of March 18, 2020.

[27] As the Monitor notes, MEC's insolvency arose from an unsustainable 25 "bricks and mortar" store operating model, the "disastrous" impact from the pandemic on sales and cash flow and inadequate financing capacity to sustain ongoing losses and provide working capital.

[28] Although A&M Securities received a number of term sheets for a refinancing, none of them provided for a complete refinancing of MEC's debt that solved its serious financial challenges.

[29] On June 1, 2020, as permitted by the BC Registrar for all cooperative associations, MEC announced that its Annual General Meeting (AGM) (originally scheduled for June 23, 2020) would be postponed by up to six months due to the impact of COVID-19 and to allow MEC to focus on the urgent financial challenges impacting its business. The AGM is scheduled for December 10, 2020.

[30] On June 10, 2020, with the support of the Lenders, MEC expanded A&M Securities' engagement to explore whether there were other potential viable

refinancing options and to initiate a SISP. The Special Committee established guiding commercial principles in the design of the SISP to: provide maximum value to the broad stakeholder group; preserve the maximum number of store locations and jobs; and ensure that, if possible, the buyer preserved MEC's purpose, values and outreach programs.

[31] Again, A&M Securities followed the usual path in this effort, including establishing a data room, identifying potential interested purchasers, distributing an initial "teaser" letter to 158 parties and entering into confidentiality agreements with 39 interested parties. A&M Securities requested non-binding Letters of Intent (LOIs).

[32] By July 15, 2020, A&M Securities had received nine LOIs and reviewed and conducted due diligence on each of them. On July 16, 2020, A&M Securities presented the LOIs to the Special Committee for its consideration and later provided its recommendations with respect to having bidders move into "Phase 2" of the SISP process. On July 24, 2020, MEC's Board considered the Special Committee's recommendation with respect to the LOIs.

[33] On August 6, 2020, Phase 2 of the SISP process began with five recommended bidders who had submitted LOIs. The Phase 2 process established a final bid deadline of August 28, 2020. Four bids were received by that deadline, as were later reviewed by A&M Securities and the Special Committee.

[34] On September 4, 2020, MEC's Board, with the input of their advisors, identified Kingswood Capital Management LP ("Kingswood"), a US based private investment firm, as the successful bidder and negotiations began to finalize a purchase and sale agreement.

[35] As with many retailers, by mid-September 2020, the impact of the pandemic, which only exacerbated MEC's pre-existing difficulties, remained very relevant. In the months leading to September 2020, MEC realized a considerable increase in online sales, however, it still experienced a substantial reduction in sales compared to last year for that period ($98 million). By mid-September 2020, MEC has re-

opened many of its stores, however, five remain closed because of the pandemic. The stores that had re-opened were operating at a reduced sales volume.

[36] As of September 4, 2020, and primarily due to the pandemic, MEC owed approximately $4.6 million in rent deferrals or arrears in respect of its leases, and MEC had agreed to rent deferral plans with some of its landlords to repay these arrears by late 2021. Further, MEC had significant past due amounts owed to merchandise suppliers and other vendors.

[37] As of September 11, 2020, MEC owed approximately $74 million under the Credit Facility, leaving approximately $19 million available under the borrowing base. At that time, MEC was unable to repay the Credit Facility by the maturity date of September 30, 2020.

[38] All of these factors, together with MEC's ongoing lease, contractual and trade creditor obligations, led MEC to decide that it had no alternative but to seek a formal restructuring of its affairs in court proceedings and seek to conclude the Kingswood sale in those proceedings.

[39] On September 11, 2020, MEC and Kingswood entered into an asset purchase and sale agreement (the "Sale Agreement"). Under the Sale Agreement, Kingswood, through a Canadian-based subsidiary, agreed to purchase substantially all of MEC's assets. The Sale Agreement is conditional on MEC obtaining court approval through this *CCAA* proceeding.

[40] By the date of the filing (September 14, 2020), RBC had formally notified MEC of defaults under the Credit Facility. Despite MEC's challenging financial affairs, the Lenders confirmed their support for MEC in this *CCAA* proceeding and they continue to support MEC in terms of the relief presently sought.

GERM OF THE PLAN

[41] When I granted the Initial Order, MEC had outlined a restructuring plan. During the course of these proceedings, MEC indicated its intention to:

a) Immediately stabilize its cash flows and operations;

b) Develop a strategy that would address its liquidity issues and generate sufficient revenue to sustain operations through the *CCAA* process, including by streamlining operations;

c) Apply for the SAVO to approve the transaction with Kingswood, which would allow repayment to the Lenders and also allow MEC's business to emerge as a better capitalized operation with as little disruption as practicable; and

d) Establish and complete a claims process toward formulating a plan of compromise and arrangement for presentation to its creditors. The intention is to fund a plan from the proceeds arising from the Kingswood sale.

FUTHER *CCAA* RELIEF SOUGHT

[42] As stated above, MEC seeks to continue the relief sought in the Initial Order, with additional relief relating to: full approval of draws under the Interim Financing, approval of a KERP, extending the stay to November 3, 2020 and granting the SAVO.

[43] MEC's application is supported by the Monitor's First Report dated September 24, 2020 (the "First Report").

Interim Financing

[44] At the commencement of these proceedings, MEC indicated that it required the Interim Financing to support its operations and restructuring efforts. It was and is very apparent that MEC needs the Interim Financing for those purposes.

[45] MEC secured a financing commitment from the Lenders pursuant to a restructuring support agreement dated September 11, 2020 (the "Restructuring Support Agreement"). It was a condition of the Lenders' support under the Restructuring Support Agreement that they obtain a court-ordered security interest,

lien and charge over all of MEC's assets. One of the key financial terms of the Interim Financing was that it was subject to a calculation of borrowing availability, with a maximum principal amount of $100 million under the combined Credit Facility and the Interim Financing, funded in progressive advances on an as-needed basis.

[46] Pursuant to the Initial Order, I approved the Interim Financing, with draws limited to $15 million to the time of the comeback hearing, and approved the Interim Financing Charge. During the course of this hearing, I increased the draw limit to $23 million.

[47] Firstly, I was satisfied that the Interim Financing Charge complied with s. 11.2(1) of the *CCAA* in that it did not secure any of MEC's pre-filing obligations to the Lenders, as prohibited by that provision.

[48] The Interim Financing agreements are amendments to the Credit Facility, pursuant to which the Lenders will provide further liquidity to MEC despite any defaults under the Credit Facility. It is an express term of the Interim Financing that advances made under the Interim Financing cannot be used to satisfy pre-filing obligations under the Credit Facility or any other pre-filing debt. In addition, the Interim Financing Charge does not secure any of MEC's pre-filing obligations and includes a "carve out" to ensure that other secured creditors (such as those with Purchase Money Security Interests (PMSIs)) are not primed by the Charge.

[49] While the terms of the Interim Financing provide that post-filing receipts collected by MEC will be applied to pay down MEC's pre-filing debt under the Credit Facility, I agreed with MEC that mechanisms in interim financing agreements by which pre-filing obligations are paid from proceeds derived by post-filing operations do not contravene s. 11.2(1) of the *CCAA*.

[50] In *Performance Sports Group Ltd. (Re*), 2016 ONSC 6800, Justice Newbould concluded that a similarly crafted interim lending facility did not offend s. 11.2(1):

> [22] Section 11.2(1) of the *CCAA* provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP

> facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[51] Similar conclusions were reached in *Comark Inc. (Re)*, 2015 ONSC 2010 at paras. 17-29. Regional Senior Justice Morawetz (as he then was) accepted that the proposed interim financing facility would not result in a greater level of secured debt than was contemplated under the pre-filing facilities and would not prime PMSIs. Effectively, the court found that, since the proposed charge would increase while the pre-filing facility would be paid down by the use of the debtor's cash generated from its business, the proposed charge only secured post-filing advances made under the interim facility in compliance with s. 11.2(1) of the *CCAA*.

[52] In May 2020, Justice Romaine reached the same conclusion in a recent *CCAA* proceeding involving ENTREC Corporation (Alta QB, Calgary Judicial Centre; File No. 2001 06423).

[53] Secondly, I was satisfied that a consideration of the factors set out in s. 11.2(4) of the *CCAA* supported that the Interim Financing (then with limited draws) was appropriate. Those factors are:

> a) the period during which the company is expected to be subject to proceedings under this Act;
>
> b) how the company's business and financial affairs are to be managed during the proceedings;
>
> c) whether the company's management has the confidence of its major creditors;
>
> d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> e) the nature and value of the company's property;

f) whether any creditor would be materially prejudiced as a result of the security or charge; and

g) the monitor's report referred to in paragraph 23(1)(b), if any.

[54] The governing factors at the time of the granting of the Initial Order were:

a) MEC anticipated that it would seek an extension of the stay of proceedings at the comeback hearing for a further amount of time to allow it to complete the sale process without having to seek a further extension;

b) MEC's business and financial affairs were to be managed by MEC's Board and key management employees in consultation with the (then) proposed Monitor;

c) MEC had the confidence of the Lenders, its senior secured creditors and the proposed Interim Lenders. The Lenders supported the approval of the Interim Financing and the granting of the Interim Financing Charge;

d) Without the Interim Financing, MEC was not able to fund its operations and continue its restructuring efforts, and the value of its assets would have diminished as a result. In fact, the Credit Facility matured on September 30, 2020;

e) I was satisfied that no secured creditor would be materially prejudiced by the Interim Financing Charge, as the charge includes the carve out and preserved the pre-filing status *quo*; and

f) The proposed Monitor supported the approval of the Interim Financing and granting of the Interim Financing Charge.

[55] Finally, in light of s. 11.2(5) of the *CCAA*, I was satisfied that the terms of the financing were limited to those reasonably necessary for MEC's continued operations in the ordinary course of business during the period to the comeback

hearing. In addition, I was satisfied that the terms of the Interim Financing were consistent with ordinary commercial transactions of this nature, as also confirmed by the proposed Monitor. See *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234 at paras 79-90.

[56] The Interim Financing provides for a maturity date that is the earlier of a) November 30, 2020; b) the completion of a "Transaction" in relation to all or substantially all of MEC's assets, and sufficient to repay the Lenders in full, and is approved by the Court; and c) at the Lenders' option, the occurrence of any Event of Default (other than the commencement of the *CCAA* proceedings).

[57] MEC now seeks approval of the Interim Financing generally, which would allow it to request subsequent advances up to the $100 million limit until the next extension period on November 3, 2020.

[58] No creditor or stakeholder objects to the Interim Financing sought by MEC.

[59] The Cash Flow Forecast prepared in mid-September 2020 readily supported that MEC is in urgent need of interim funding during the restructuring. In the First Report, the Monitor noted that the Lenders had already advanced $9.4 million under the Interim Facility and confirmed that the full amount of the funding under the Interim Financing was required. No other source of financing was available; the Credit Facility expired on September 30, 2020. No creditor will be prejudiced, let alone materially prejudiced, by this funding.

[60] MEC's financial circumstances continue to be very challenging, even in the short term. Ongoing weekly losses of approximately $1.1-1.6 million are being incurred. In October 2020 alone, MEC projects losses of over $15 million.

[61] Having considered all of the factors in s. 11.2(4) of the *CCAA*, I have no hesitation concluding that approval of the full amount of the Interim Financing is appropriate. Without the Interim Financing, MEC is unable to continue its operations, a result that would have disastrous consequences to the larger stakeholder group, whether or not the SAVO is granted.

The KERP

[62] MEC seeks approval of a KERP. To secure obligations under the proposed KERP, MEC also seeks the granting of a third-priority court-ordered charge on MEC's assets in priority to all other charges, other than the Administration Charge and the D&O Charge (the "KERP Charge").

[63] MEC asserts that the KERP is necessary to allow it to maintain its business operations, complete the restructuring, including completing the sale to Kingswood and preserve asset value. MEC says that, without a KERP, its efforts would be seriously compromised.

[64] In July and September 2020, MEC's Board approved retention agreements (the "Retention Agreements") for eight key senior managers for total compensation of $778,000. The Retention Agreements were filed under seal in these proceedings, as summarized in Appendix E to the First Report.

[65] The Retention Agreements include provision for payment of compensation upon the earlier of certain dates, including a sale of all or substantially all of MEC's assets (or the merger, amalgamation or consolidation of MEC with another entity), the employee's termination without cause or, by certain dates in December 2020, depending on the employee. It is not certain that all executives offered Retention Agreements will remain with MEC through to conclusion of the restructuring.

[66] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 27.

[67] Courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J.) and *U.S. Steel Canada*. In *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for

example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and U.S. Steel Canada at paras. 28-33.

[68] In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

a) Is this employee important to the restructuring process?

b) Does the employee have specialized knowledge that cannot be easily replaced?

c) Will the employee consider other employment options if the KERP is not approved?

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?; and

e) Does the Monitor support the KERP and a charge?

[69] In *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as discussed in the relevant case law: a) arm's length safeguards, b) necessity, and c) reasonableness of design.

[70] The Monitor has reviewed the terms of the Retention Agreements and has concluded that the terms of the proposed KERP Charge are reasonable in the circumstances and customary in similar *CCAA* proceedings. The Monitor has also confirmed that the KERP will provide stability for MEC's business operations, particularly in the critical time period when MEC is attempting to stabilize its operations and, if the SAVO is granted, working to finalize the final negotiations with Kingswood, leading to a closing of that transaction. The Lenders have confirmed they are agreeable to the KERP and the KERP Charge as well.

[71] I accept the Monitor's assessment and conclusions with respect to the KERP. I conclude that the KERP is reasonable and necessary in the circumstances and I exercise my discretion to approve the KERP and grant the KERP Charge.

The Stay

[72] Clearly, an extension of the stay is necessary to allow MEC's restructuring efforts to continue, whether the SAVO is granted or not.

[73] No stakeholder objects to MEC's application for the ARIO, including an extension of the stay of proceedings. The Monitor confirms its view that MEC is acting in good faith and with due diligence.

[74] I am satisfied that an extension of the stay is appropriate until November 3, 2020, in accordance with s. 11.02 of the *CCAA*.

SISP/SAVO

[75] The main focus on this application has been in relation to MEC's application for the granting of the SAVO in favour of Kingswood, pursuant to s. 36(1) of the *CCAA*. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[76] Mr. Harding, Plateau and Midtown all seek an adjournment of MEC's application for the SAVO for "at least" two weeks. Plateau and Midtown also seek orders that would allow them to obtain further document discovery and cross-examine MEC's deponents, including Mr. Arrata and Mr. Robert Wallis. The parties seeking an adjournment are supported by the BC Co-op Association and Cooperatives and Mutuals Canada (the "Co-op Associations").

[77] I address the arguments advanced against MEC's application for the SAVO below. There is considerable overlap and interrelationship between the various categories below, so they should be read as a whole.

i) The Kingswood Sale Agreement

[78] MEC describes the key aims and elements of the Sale Agreement as:

a) Kingswood will continue to operate the business as a going concern under a similar name to MEC and will maintain the goodwill of the retail business;

b) the purchased assets comprise almost all of the assets currently used by MEC for the business;

c) Kingswood will retain at least 75% of the active employees of MEC;

d) Kingswood will acquire, or assume, the leases for at least 17 of MEC's retail locations. For those leases not being acquired or assumed, MEC has already or will provide disclaimers to the landlords;

e) Kingswood will assume liabilities including with respect to warranties, existing gift cards (estimated $13.2 million) and employees who accept offers of employment (estimated $2 million);

f) In order to protect goodwill with existing suppliers and contractors, Kingswood will assume liability for payments to certain inventory and other key vendors and suppliers (estimated $25 million) and will seek assignment of certain contracts; and

g) The Sale Agreement is not conditional on any financing or third-party approvals.

[79] The Court has had the benefit of reviewing certain confidential documents arising from the SISP, including the unredacted Sale Agreement and Confidential Appendix C to the First Report that were both filed under seal in this proceeding.

[80] Significantly, the Sale Agreement provides for a sale price (base amount of $120 million, subject to certain adjustments) that will repay the Lenders in full, maximize the ongoing number of operating stores and retention of a majority number of employees, and leave MEC with additional funds to support a *CCAA* plan that would see a distribution to unsecured creditors. The Board and Special Committee consider that the Kingswood offer was consistent with the guiding principles of the SISP as had been earlier established.

[81] I have reviewed the details of the other three bids received and reviewed by the Special Committee and MEC's Board prior to acceptance of Kingswood's offer. I agree that the Kingswood offer is clearly the most advantageous one, both in terms of price, continuity of business operations, retention of stores, retention of employees and assumed liabilities.

ii) The Monitor Issue

[82] As part of Plateau's objection to the SAVO, it seeks an order replacing A&M as Monitor with Ernst & Young Inc., pursuant to s. 11.7(3) of the *CCAA*.

[83] Plateau argues that, since A&M Securities, A&M's affiliate, was involved in the SISP, A&M is not appropriate to continue as Monitor in these proceedings. Plateau argues that, in the circumstances, the Monitor cannot opine on the adequacy of the SISP as required under s. 36(3)(b) of the *CCAA*.

[84] I will note at the outset that no one on this application, let alone Plateau, questions the professionalism of A&M. Rather, Plateau asserts that there is a perception of bias in respect of the Monitor's views of the SISP, which cannot stand in the face of the clear requirement that a monitor be independent and impartial while exercising its fiduciary obligations to all stakeholders. Plateau cites various authorities including: *United Used Auto & Truck Parts Ltd. (Re)*, [1999] B.C.J. No. 2754 at para. 20 (S.C.); *Winalta Inc. (Re)*, 2011 ABQB 399; *Can-Pacific Farms Inc. (Re)*, 2012 BCSC 760; and *Walter Energy Canada Holdings Inc. (Re)*, 2017 BCSC 53 at paras. 24-25.

[85] I have reviewed the terms of A&M Securities' engagements with MEC. As counsel note, s. 11.7(2) of the *CCAA* provides restrictions on who may be a monitor. A&M clearly did not fall within that restricted list and was able to accept an appointment as Monitor when the Initial Order was granted.

[86] Under the February 10, 2020 engagement, A&M Securities was providing consulting services with respect to identifying potential financing. A&M Securities' compensation was a fixed fee with hourly rates after a certain time period. I am unable to discern any conflict between that engagement and A&M's current one as Monitor that causes any concern.

[87] Similarly, the A&M Securities' June 10, 2020 engagement with MEC also provided for consulting services in respect of the SISP, also on an hourly basis.

[88] It is apparent that, by June 2020, MEC foresaw that it may be necessary to file under the *CCAA* in order to resolve the significant financial difficulties it faced. In the second engagement with A&M Securities, MEC specifically addressed that potential step. Paragraph 4 of the June 10, 2020 engagement agreement provided that MEC could choose to put A&M forward as the Monitor. MEC and A&M expressly agreed that no conflict would arise between the second engagement and that potential appointment. As the Monitor notes, this type of pre-planning for a potential monitor appointment is typically undertaken since it allows a debtor to seamless and efficiently transition into the restructuring process while taking advantage of efforts begun even prior to that time.

[89] Plateau places great emphasis on the reasoning and result found in *Nelson Education Ltd. (Re)*, 2015 ONSC 3580. In that case, Newbould J. considered an application to replace the monitor where the monitor was recommending a sale. The monitor had been a financial advisor to the company for two years prior to its appointment, and it had conducted a SISP prior to the *CCAA* filing that involved dealings with the second lien holders. Almost immediately after the filing, the debtor sought approval to sell the assets to the first lien holders, leaving nothing for the second lien holders.

[90] Justice Newbould found that replacement of the monitor was necessary since firstly, the monitor was in no position to comment independently on the validity of the SISP and, secondly, there was an appearance of a lack of impartiality:

> [30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the *CCAA* proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:
>
> > The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;
>
> [31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this *CCAA* proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

[91] A&M Securities' involvement with MEC was clearly in the context of finding a solution to MEC's financial difficulties in the short term. It is common ground that MEC could most likely have obtained *CCAA* protection in early 2020 and then conducted the search for financing and/or the SISP within those proceedings. MEC states that it had good reason not to obtain court protection at that time, as I will discuss later in these reasons. This is a distinguishing factor from *Nelson Education*, where the monitor had a much more extensive and historical relationship with the debtor and other stakeholders.

[92] Further, I can discern no conflict, whether real or apparent, arising from A&M Securities' previous involvement. Importantly, there is no success fee or compensation built into the second engagement that could possibly stand as an incentive for the Monitor to recommend the Kingswood sale (or any other sale) for

approval. Unlike *Nelson Education*, this is not a case where only one secured creditor is apparently benefitting from the proposed transaction. The Sale Agreement will benefit all the stakeholders generally, although in different degrees given their different priorities. Although clearly hindsight, I note that Newbould J. later approved the proposed transaction (*Nelson Education Ltd. (Re)*, 2015 ONSC 5557), about two-and-a-half months later, at no doubt considerable cost to the estate.

[93] In addition, as I will discuss in more detail below, there would be considerable cost and delay in replacing the Monitor at this time. The monitor engagement for MEC is not a simple affair and any new firm would take some time to fully assume that role and prepare a report – likely not even within "at least" two weeks, the delay sought by the objecting parties. Time is not on MEC's side in these urgent circumstances. See *Can-Pacific Farms* at para. 26.

[94] Finally, the s. 36(3)(b) factor – the monitor's approval of the process – is only one of the relevant factors that the court is to consider, among others. None of the s. 36(3) factors have primacy in respect of the court's consideration as to whether a sale should be approved. The previous involvement of the Monitor with MEC is a consideration, however, not a controlling one.

[95] Every sale approval application will be fact intensive toward ensuring that any proposed sale is fair and reasonable, after an appropriate sales process.

[96] I have no concerns arising from A&M's affiliate acting as MEC's financial advisor in the months leading to this proceeding. I decline to exercise my discretion to replace A&M as Monitor in these proceedings.

iii) The SISP

[97] Plateau and Midtown question the appropriateness of MEC filing for *CCAA* protection after having conducted the SISP. They say that the *CCAA* is being improperly used to approve a "quick slip sale" arising from a process that took place outside of the Court's supervision, without the Court's approval and without consultation with MEC's stakeholders.

[98] MEC began taking steps toward finding a solution to its financial difficulties many months before the *CCAA* filing. MEC asserts that, while the Court did not pre-approve the SISP, the SISP was extensive and properly canvassed the market to identify the best and highest value for its business.

[99] As the parties note, this is a classic “pre-packaged” proceeding, or “pre-pack”, as it is colloquially known. As in many previous *CCAA* proceedings, most of MEC’s restructuring efforts have taken place before the filing of the court proceeding, and the most obvious restructuring path presented now by MEC is the sale to Kingswood arising from the SISP.

[100] There is nothing inherently flawed in a “pre-pack” approach. There are often good reasons why a debtor company may choose such a course of action, more often than not arising from the real or perceived threats or disruptions to a business by pursuing options within a proceeding. The Monitor confirms its own experience and views in that respect, particularly relating to retail operations where it is critical to preserve going concern value.

[101] Here, MEC contends it ran the SISP prior to any *CCAA* proceedings to maintain stability in its business and to promote a going concern solution, all as supported by the Lenders, who were increasingly concerned about their credit exposure in light of the financial crisis faced by MEC. I readily accept that running a retail operation within *CCAA* proceedings, particularly with the uncertainty in the marketplace, both from a general economic view and by reason of the pandemic, would give rise to risk and potential disruption to future operations. I also accept that MEC had good reason to seek to avoid further risks and disruptions to its operations, given its already fragile economic state.

[102] Similar circumstances were considered in *Sanjel Corp. (Re)*, 2016 ABQB 257, where a SISP conducted outside of the proceedings was challenged. In that case, the SISP was conducted by a financial advisor for about four months prior to the *CCAA* filing. At that time, the accounting firm was identified as the potential monitor

and, when later appointed as monitor, recommended court approval of the sale that arose through the SISP.

[103] Justice Romaine discussed the concerns that arise where a court is presented with a "pre-pack" where court approval of a sale that arose from a pre-filing SISP is sought. Her comments are apt here and I would adopt them:

> [70] A pre-filing SISP is not of itself abusive of the *CCAA*. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the *CCAA* and must be considered against the *Soundair* principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.
>
> [71] Without prior court approval of the process, conducting a SISP outside of the *CCAA* means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[104] Justice Romaine's reasoning was followed by this Court in *Feronia Inc. (Re)*, 2020 BCSC 1372 where Justice Milman accepted the proposal trustee's recommendation in support of a sale achieved through a pre-filing sales process (paras. 50-57). The proposal trustee's affiliate firm had been engaged to assist with that sales process.

[105] The court's comments in *Sanjel* about a pre-filing SISP being more open to attack is certainly evident here.

[106] I will now address the actual financing and SISP process in more detail. Evidence of MEC and A&M Securities' efforts is found in Mr. Arrata's evidence as was supplemented by Mr. Wallis' evidence. Mr. Wallis is a MEC director and Chair of the Special Committee. The Monitor also addresses the financing and SISP process in its First Report.

[107] A&M Securities was engaged to secure new financing in February 2020, principally to replace the Credit Facility which was approaching maturity. Unfortunately, the pandemic wrought havoc with those efforts and MEC quickly moved to form a committee to address those issues. That informal committee was formally constituted as the Special Committee on March 27, 2020 with its mandate to pursue a broad range of strategic alternatives.

[108] Although the financing options being pursued were not successful, it was not for want of effort. The steps that A&M Securities designed to seek the financing, as listed above, can only be described as typical. Government aid programs were considered. Approximately 66 lenders were contacted; the listing of those lenders indicates a broad range of lending institutions, including two co-operatives. A May 12, 2020 term sheet provided to RBC by one lender was considerably below what the Lenders were owed and required first priority security that was not a realistic request from the Lenders' point of view given the financing amount.

[109] Mr. Harding, supported by the Co-op Associations, asserts that MEC could have asked its members for the necessary funding. Mr. Wallis addresses that matter, stating that the Special Committee considered but then rejected that option as impractical. In my view, his reasons are amply supportable and are reasonable in the circumstances: a public plea for such funding was unlikely to garner the very substantial amounts needed to repay the Lenders, even if it could be achieved, which was questionable, while creating negative impacts on MEC's business in the meantime.

[110] Finally, the Special Committee considered that the Lenders were very unlikely to grant an extension of the Credit Facility, without significant improvement in MEC's financial performance that, in the teeth of the pandemic, appeared also very unlikely.

[111] Having exhausted refinancing efforts, the Special Committee and the Board had no choice but to then consider a sale. After interviewing other financial advisors, the Special Committee decided that it was in MEC's best interests to continue with A&M Securities under the SISP, given its expertise and experience with MEC.

[112] Again, the Special Committee and the Board expressly considered whether the SISP should be conducted prior to any *CCAA* proceeding. They decided to do so in order to avoid the likelihood of a distressed-assets sale situation and to preserve MEC's relationships with vendors, customers and service providers with respect to its ongoing business operations in order to preserve going concern value.

[113] As with the refinancing efforts, A&M Securities' design of the SISP included the usual features (as listed above), in that it was structured and implemented in the same or similar manner as is typically done in a SISP in the course of *CCAA* proceedings. No party appearing on this application contended that the SISP steps were inappropriate or lacking, resting on the contention only that they weren't consulted in its implementation.

[114] The list of persons contacted was extensive, including Canadian and US private investment firms, retail conglomerates and even REI, a US co-operative that was in fact the inspiration for MEC in the first place. As stated above, Kingswood's bid was clearly the best bid of the four that MEC received.

[115] The Lenders' support, including under the Interim Financing, is premised on MEC seeking approval of the Kingswood transaction. I note this as a factor, although the Lenders' support is not surprising since the proposed transaction will generate sufficient funds to pay the Lenders in full. The Monitor's liquidation analysis would also suggest that the Lenders would be paid in full under that scenario.

[116] Another relevant factor in the Court's consideration of the adequacy of the SISP is the level of oversight throughout the process.

[117] The Special Committee and MEC's Board, both comprised of well-qualified and experienced business professionals, oversaw A&M Securities' efforts. Both Mr. Arrata and Mr. Wallis fully endorse those efforts as having produced the very best alternative for MEC in the circumstances. I have no reason to question their commercial and business judgment: *AbitibiBowater Inc.*, 2010 QCCS 1742 at para. 71. Mr. Wallis confirms that, despite rumours in the community, no MEC Board

members are receiving any incentives or compensation in respect of the Kingswood transaction. Further, the process was reviewed by the Lenders and their experienced professional advisors, again without objection.

[118] In my view, it is not surprising in the circumstances that the Monitor supports the SISP efforts as being sufficiently robust in the circumstances, particularly with its usual features and oversight. The Monitor states that the SISP is likely consistent with what the Monitor would have recommended in a court-supervised process, with which I agree. It is also worth emphasizing that the entire SISP process from June-September 2020 ran over a 100 day period, hardly a rushed process (i.e., even well beyond the "aggressive timelines" approved in *Sanjel* at paras. 75-77).

[119] I conclude that the SISP was a competitive process, was conducted in a fair and reasonable manner and adequately canvassed the market for options available to MEC.

iv) Harding / Co-Operative Association Issues

[120] Mr. Harding is the spokesperson for the steering committee of the "SaveMEC" campaign, involving who he describes as a "highly motivated, well organized group of Members, seeking to preserve MEC's status as a cooperative association with an operating business". They have been assisted through various online efforts, suggesting support from some 140,000 individuals, and contributions from 2,500 persons toward a legal fund of over $100,000. As I noted on October 2, 2020, the passion of the "SaveMEC" group members is evident, as it was with MEC's original founders.

[121] Like Plateau and Midtown, Mr. Harding seeks an adjournment of "at least" two weeks. He suggests that his group would like to explore opportunities to address MEC's liquidity crisis in the short term. He says that the very short notice given to MEC members in respect of these proceedings is challenging in terms of identifying alternatives; MEC gave notice to its members of this proceeding on September 14, 2020. Mr. Harding is supported in his submissions by the Co-op Associations' counsel.

[122] Mr. Harding indicates some “definitive” sources of funding have already been identified by his group. Unfortunately, none even come close to resolving the very significant financial issues faced by MEC, particularly given the amounts owing to the ever increasingly concerned Lenders who are owed in excess of $80 million in a very uncertain retail environment, MEC’s ongoing losses and MEC’s required working capital.

[123] Mr. Harding’s most significant complaint against the SAVO is that the members will “lose” their substantial financial interest in MEC through their membership. He points to MEC’s February 2020 balance sheet that indicated the book value of members’ shares was in excess of $192 million.

[124] In my view, this argument has little merit. Each MEC member only stands to “lose” their $5 investment, although I appreciate that collectively, the investment is significant. Based on the evidence presented on this application, the best bid which was received from Kingswood is not sufficient to repay the unsecured creditors in full, let alone provide for any return to MEC’s members. Accordingly, assuming the SISP has produced the best financial result in the circumstances, which I accept, MEC members have no real financial interest at this time.

[125] I appreciate that Mr. Harding only seeks a short period of time to confirm whether other more advantageous options are available. This argument also is not persuasive. I consider that the chances of SaveMEC coming up with an option within two weeks to stave off the Lenders, secure funding the cover the losses and necessary working capital and pay the unpaid creditors to be an extremely outside one, however sincere that intention and those efforts may be.

[126] I completely disagree with Mr. Harding that there is no prejudice to MEC, Kingswood or the Lenders if the sale is delayed until his group has a chance to investigate other options. As Mr. Wallis states in his Affidavit, set out below, there is significant prejudice to MEC and its stakeholders in terms of delay, cost, ongoing losses and deal risk. Mr. Harding’s group is risking nothing at this point; to the contrary, other broad stakeholder interests are very much “in the money” under the

Kingswood transaction in the sense of it providing recovery to creditors and preserving jobs and business relationships.

[127] I note that the broad stakeholder group who Mr. Harding seeks to represent includes many MEC members who stand to preserve their jobs and redeem the significant value in gift certificates, all by reason of the Kingswood sale.

[128] Mr. Harding also asserts that these *CCAA* proceedings must be conducted in a manner that respects the fundamental freedom of MEC members, namely the "freedom of association", that arises under s. 2(d) of the *Charter of Rights and Freedoms* (the "*Charter*").

[129] It is unusual to face *Charter* arguments in commercial matters or even *CCAA* proceedings. That said, I accept Mr. Harding's submissions that co-operatives provide important social and community benefits and that the right to join a co-operative and exercise collective rights through that means goes to the root of the protection offered by s. 2(d): *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 54, citing *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313. MEC is clearly an example of the exercise of that right, leading to it being, as Mr. Harding asserts, the largest co-operative in Canada.

[130] I cannot see, however, that MEC seeking court protection in its present circumstances offends any rights arising under s. 2(d) of the *Charter*. As MEC's counsel states, the *Charter* does not protect against an organization incurring losses and finding itself in insolvent circumstances, even if the organization is a co-operative.

[131] No one, including Mr. Harding, disputes that MEC qualified to seek court protection under the *CCAA*. Rather, he asserts that MEC members must be able to exercise their democratic right to shape the future of MEC, and particularly, he argues that any decision to sell MEC's assets cannot be made without the approval of MEC's members. The *Co-op Act*, s. 71(2), and MEC's Rules of Co-operation

(8.11) both provide that a sale of the whole or substantially the whole of the co-operative's undertaking requires a special resolution of the members.

[132] Mr. Harding's complaint that the members have been unfairly and oppressively denied participation in this important decision to sell MEC's assets is understandable; however, it but does not change the fact that such participation is a very unwieldly step, particularly with the pandemic, it would delay matters where urgency is required, and its relevance is questionable in any event given that the best evidence is that the members have no financial interest in MEC.

[133] I disagree with counsel for the Co-op Associations that the application of the *CCAA* in the face of the *Co-op Act* is an "unsettled area of law". Cooperatives are able to avail themselves of the *CCAA* if they are insolvent and they otherwise meet the statutory requirements.

[134] The *CCAA* expressly recognizes that participation by corporate shareholders (the equivalent of MEC's members here) toward approving a sale of the assets, is not a requirement before the court can exercise its jurisdiction under s. 36(1):

> 36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
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> [Emphasis added.]

[135] Mr. Harding suggests that MEC's affairs are being conducted in an oppressive manner by this attempt to sell MEC's assets without member approval. I see no utility in embarking upon an analysis of the oppression remedy under s. 156 of the *Co-op Act* in the present circumstances, although I would hasten to add that no such court ordered relief has been formally sought. Mr. Harding refers to the comments of this Court in *Radford v. MacMillan*, 2017 BCSC 1168, aff'd 2018 BCCA 335, concerning the assessment of reasonable expectations in the oppression analysis. In this Court in *Radford*, Justice Masuhara stated that expectations must be "realistic": para. 119.

[136] I hardly think the MEC members could conceivably realistically consider that they, and they alone, would dictate whether a sale would occur, when the co-operative is insolvent and their memberships presently have no value.

[137] It is unfortunate that Mr. Harding appears to be singularly focussed on preserving MEC as a co-operative entity to continue its business. Given the co-operative principle of "concern for community" embraced by MEC as part of its DNA, the "SaveMEC" campaign group and the Co-op Associations might have given some consideration to the fact that the Kingswood sale will benefit many persons in the community. The sale will ensure ongoing employment to most MEC employees, the maintenance of business relationships which support other jobs and repayment of at least some portion of the debt that MEC owes to its many unsecured creditors.

[138] Mr. Harding's application for an adjournment is dismissed.

v) Disclaimed Lease Issues

[139] Plateau and Midtown both seek an adjournment of MEC's application for the SAVO for "at least" two weeks. In addition, both seek an order that MEC produce substantial further documents in relation to the refinancing and sale efforts. Finally, they seek to cross-examine Mr. Arrata and Mr. Wallis on their affidavits.

[140] Plateau and Midtown's objection to the SAVO derives from the extremely unfortunate circumstances that arise from MEC's disclaimer of their store leases (in Calgary North West and Saskatoon respectively).

[141] In its petition materials, MEC has earlier identified that the Sale Agreement with Kingswood did not include an assignment of three leases, including those for the Saskatoon and Calgary North West stores. The Saint-Denis store had already been permanently closed; the Saskatoon and Calgary North West stores had not yet opened.

[142] In Mr. Arrata's Affidavit #1 sworn September 13, 2020, he stated that MEC expected to be disclaiming those leases, with the approval of the Monitor, in accordance with s. 32(1) of the *CCAA*.

[143] As forecast, after the Initial Order was granted, on September 15, 2020, MEC issued notices of intention to disclaim or resiliate all three leases. The Monitor approved these disclaimers in order to "reduce costs and downsize redundant operations". On September 22, 2020, MEC provided its reason for the disclaimer of Plateau's lease, citing its liquidity crisis, that Kingswood had decided not to acquire the leases and that the disclaimer was necessary to enhance the prospects of a viable compromise. The same considerations apply to Midtown's lease.

[144] In the First Report, the Monitor stated that it is also of the view that the disclaimers will enhance the prospect of a viable arrangement and further the restructuring of MEC, as contemplated by the Kingswood Sale Agreement.

[145] On September 30, 2020, Plateau filed a Notice of Application to prohibit the disclaimer of its lease by the deadline, and I assume that Midtown has done likewise.

[146] I agree that both Plateau and Midtown face challenging economic circumstances themselves by reason of the disclaimers. Both landlords have expended substantial sums of money in outfitting their developments for MEC, who was to have been the anchor tenant. Both landlords will suffer significant losses in respect of lost rental revenue and any indirect benefits that might have been derived by MEC's presence in their developments.

[147] Based on my conclusions that the SISP was fair and reasonable in the circumstances, I reject these landlords' request for any delay in approving the Kingswood sale and decline to exercise my discretion to do so. I see no reasonable prospect that these landlords will be in any better position after a delay of two weeks. I also see no need for further document production beyond the

documentation that MEC provided on September 26, 2020 in response to Plateau and Midtown's applications.

[148] Kingswood's decision not to take up these leases was made independently of MEC and, on the face of things, aligns with what Kingswood envisions by way of its future operations. The Sale Agreement provides for a *contraction* of MEC's operating stores to at least 17 locations; in that event, it hardly makes business sense that, at the same time, Kingswood would also agree to incur the considerable expense of fixturing, outfitting, staffing and supplying one or two *new* locations. None of the other three bidders expressed any interest in these locations either.

[149] As with Mr. Harding's argument, I also reject Plateau and Midtown's assertions that little or no prejudice arises from any adjournment. To the contrary, the unsecured creditor pool will be enhanced by an expeditious sale which obviates any further weekly losses being incurred by MEC. These landlords stand to gain by that enhanced pool of money in respect of their claims that will no doubt be filed, claims that will not increase whether or not the SAVO is granted. Plateau and Midtown have solely focussed on process issues, to the exclusion of other interests at play. They have failed to justify their position.

[150] Plateau and Midtown's arguments appear to conflate MEC's application for the SAVO with their right to contest the disclaimers. They suggest that, effectively, no sale can be considered by the court until the disclaimer issue is determined. No authority was cited in support for this proposition. Indeed, the sale application might just as easily have been considered and the Kingswood sale approved even before any disclaimer notice was issued.

[151] As MEC's counsel notes, MEC decided to be forthright from the outset in signalling this very bad news to these landlords.

[152] I appreciate that granting the SAVO to allow a sale of substantially all of MEC's assets to Kingswood can be interpreted as effectively determining the disclaimer issue. It will be difficult for the landlords to argue that the disclaimer

should be prohibited so as to allow MEC, which no longer operates its business, to take up the lease.

[153] However, this ignores the simple reality of the situation. MEC cannot force a buyer to take up these leases. In addition, MEC's dire financial circumstances, as revealed on this application, would hardly have supported a business decision to start up these stores even if the SAVO is not granted. There is no realistic chance that the Lenders would support such an endeavour under the Credit Agreement. Further, I see no basis upon which this Court would effectively require MEC to spend millions of dollars on these new stores under its *CCAA* jurisdiction. It is difficult to imagine that this Court would, in balancing the various interests at play in relation to the benefits of the Kingswood sale, require such a result to the detriment of the many stakeholders other than these two landlords.

[154] I would add that five other MEC landlords also appeared on this application. They indicated that they were not opposed to the granting of the SAVO or were not taking any position. I suspect that they are all hoping that their store locations will be viewed favourably by Kingswood when the at least 17 store "winners" are chosen to continue operations. If any of them are not in the "winner" category, any losses will be added to the unsecured creditor group to share in the net recovery under the Kingswood sale.

[155] Plateau and Midtown's applications for an adjournment, document discovery and cross-examination of Mr. Arrata and Mr. Wallis are dismissed.

vi) Should the Kingswood Transaction be Approved?

[156] The Court's approach in considering a proposed sale under s. 36 of the *CCAA* is informed by the *CCAA*'s statutory objectives, as was discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.

[157] The main objective is to avoid, if possible, the devastating social and economic costs of a liquidation of a debtor's assets: *Century Services* at para. 15. In achieving these remedial goals, the court must be cognizant of the various interests

at stake, including the debtor, the creditors, employees, counterparties, directors and shareholders: *Century Services* at paras. 59-60. As evident from my discussion above, many of those stakeholder interests were represented on this application and expressed their views. However, the court must also recognize and give effect to, to the extent possible, all stakeholder interests whether present on this application or not.

[158] As with many applications for relief under the *CCAA*, the Court must strive to balance what are often competing interests and objectives. That exercise is often within the rubric of the need to conclude that the relief is "appropriate". Appropriateness is assessed by inquiring whether the purpose of the order sought and the means it employs advances the statutory objectives or remedial purpose of the *CCAA*. As Justice Deschamps stated in *Century Services* at para. 70, the chance of achieving that goal is enhanced when "all stakeholders are treated as advantageously and fairly as the circumstances permit" [Emphasis added.]

[159] The relevant factors to be balanced and considered under s. 36(3) are reflective of a consideration of what can be, and is on this application, a broad range of interests.

[160] I have concluded that the refinancing efforts and the SISP were conducted in a fair and reasonable manner. There is no basis upon which to second guess the adequacy of the substantial efforts that were made by the Board, the Special Committee and A&M Securities in that respect.

[161] The Kingswood transaction that arose from that competitive process was clearly the best from the few bids that were received. All other bids paled in comparison, particularly in relation to the purchase price and commitments to ongoing store operations and employee retention. As noted in the Monitor's First Report, the consideration that MEC will receive is substantial. While the base purchase price is $120 million, the total indicative purchase price is actually $150 million, after accounting for the substantial liabilities that Kingswood will

assume in respect of vendor trade payables, employee obligations and gift card obligations.

[162] The process conducted outside of this *CCAA* proceeding was not a rushed affair. I accept that many of the stakeholders on this application consider that they have been ignored or disadvantaged by reason of the lack of prior consultation and the short notice given to them to respond to this application. In my view, MEC has provided reasonable and understandable explanations for proceeding in that manner. The Monitor provides further support in the First Report in stating that to proceed otherwise would have created significant uncertainty and disruption in MEC's day to day business and put MEC's business operations and a potential going concern sale at unnecessary risk.

[163] As the Monitor notes, the perfect financial storm faced by MEC, still exacerbated by the risks posed by the ongoing pandemic, does not give MEC the luxury of time here. What is needed is a timely solution, after, of course, the Court has fully reviewed the evidence and is satisfied that the requested relief is appropriate. There is no evidence to suggest that MEC's Board or Kingswood have manufactured the need for what is described as urgent relief by approval of the SAVO.

[164] I have also concluded that, although some minor delay could be accommodated with the time limits under the Restructuring Agreement and the Sale Agreement, the perceived benefits do not outweigh the risks that follow. I accept the evidence of Mr. Wallis as to why it is urgent to approve the Sale Agreement as soon as possible. He states:

> 45. [MEC] believe[s] that the approval of the Sale Agreement is a matter of urgency. Any extension or delay in obtaining Court approval and Closing may have serious and detrimental consequences for its business and stakeholders, including, but not limited to, its employees, members and suppliers. This is particularly the case given the extent of [MEC's] ongoing weekly operating losses, as shown in [MEC's] Cash Flow Forecast, and the importance that any potential purchaser of the Business would have to close this transaction in sufficient time to take advantage of the coming holiday sales period.

> 46. The projections reflect an erosion of the borrowing base under the Interim Financing Facility and cash availability becomes very tight under the borrowing base calculation towards the end of October. It is therefore imperative that matters progress as quickly as possible so that MEC's customers, suppliers, landlords and employees have confidence that MEC will continue as a successful going concern.
>
> 47. Given the recent rise in COVID-19 transmissions across Canada, there is also a real and unpredictable risk that increased COVID-19 rates and/or restrictions would result in further deterioration in sales below those set out in the Updated Cash Flow Forecast provided by the Monitor, which would in turn jeopardize the availability of the Interim Financing Facility or ability to meet the closing condition of requiring repayment of the Credit Facility. The Lenders have confirmed they require a timely completion of the Transaction.

[165] The work to be done to conclude all matters under the Sale Agreement and move toward a closing of the transaction will no doubt be complex and take some time. Many contractual matters need to be concluded by Kingswood with stakeholders, such as employees, landlords and suppliers, in advance of the closing. As noted by MEC and the Monitor, it is critical to the success of the ongoing business that the transaction close as soon as possible so that Kingswood can order additional inventory in advance of the "Black Friday" and holiday shopping season. Kingswood is able to close the transaction by mid-late October 2020.

[166] The Monitor has also conducted a liquidation analysis to compare the results of the Kingswood sale to that which might be achieved by an orderly liquidation of MEC's assets through a bankruptcy and/or receivership. Under the Kingswood sale, estimated recovery to unsecured creditors is between $0.30-50 on the dollar; in a liquidation, estimated recovery to unsecured creditors is between $0.30-60 on the dollar. What is significant as between these two scenarios, however, is that in a liquidation, there would be far greater creditor claims.

[167] The Kingswood sale avoids the devastating impact of a liquidation on employee's jobs, preserves many of the leases, trade supply agreements and service agreements, and provides value to many unsecured creditors by Kingswood's full assumption of liabilities. These latter considerations figure greatly in the Court's decision as to whether a sale should be approved. That decision is made

toward achieving the main statutory objectives under the *CCAA* which are to allow the business to continue, with all the economic, societal and community benefits that that option affords. Many of the indirect benefits are unquantifiable.

[168] I agree with the Monitor that, in all the circumstances, the Kingswood sale is commercially reasonable and, on balance, is more beneficial to MEC's stakeholders, and particularly its creditors, than any other alternative. I grant the SAVO on the terms sought.

Representative Counsel

[169] Mr. Harding also sought an order under s. 11 of the *CCAA* that Victory Square Law Office be appointed as representative counsel for MEC's members. He also sought a charge of $100,000 under s. 11.52 of the *CCAA* to secure anticipated fees in respect of participation, ranking behind the four court-ordered charges but ahead of the Lenders' security.

[170] I conclude that this relief might have been more seriously considered if there was any indicative value held by the MEC members and, if these proceedings had taken a different path where the members' interests were in play.

[171] Having concluded that the Kingswood sale should be approved, which will divest MEC of substantially all of its assets in the short term, I see little utility in granting this relief. As I discuss above, this sale will garner some net proceeds for the unsecured creditors, leaving no recovery for MEC's members.

[172] I would add that the Kingswood sale does not mean that MEC will cease to exist as a co-operative. It may be that MEC's members can still consider whether any options remain for them in that respect, particularly if a plan is approved and successfully executed to leave the co-operative intact in a legal sense but without the burden of any debt and, of course, with few assets.

[173] Mr. Harding is, of course, welcome to continue to participate in these proceedings on behalf of the “SaveMEC” group, as he wishes, which I assume can be done with counsel given the funds already raised.

[174] Mr. Harding’s application for appointment of representative counsel and a related charge is dismissed.

FINAL THOUGHTS

[175] I accept that this decision is a disappointing conclusion to the fate of what was an iconic Canadian retailer who has inspired the passion and commitment of many Canadians for outdoor activity. Like many Canadian retailers, MEC has fallen victim to economic forces, and perhaps questionable business judgments made years ago, all exacerbated by the cataclysmic and unprecedented impact of the COVID-19 pandemic throughout most of 2020.

[176] This result, however, will ensure the continuation of MEC’s business, albeit in another organization. While this sale transaction is not wrapped in the Canadian flag, the best evidence is that Kingswood will continue to support MEC’s core values and principles, being community engagement and promotion of a healthy outdoor lifestyle. More importantly, the ongoing operations will support Canadian individuals and their families and also businesses where jobs are disappearing quickly given ongoing economic disruptions. Creditors will be paid, or paid a substantial portion of what they are owed, no doubt to the relief of many.

[177] This is the core objective under a *CCAA* proceeding, and while that objective was not achieved here in a perfect manner, it was still achieved in a reasonable manner. That is all that anyone can ask.

“Fitzpatrick J.”

TAB 12

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.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 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, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.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.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[13] This exception also applies to the other charges granted.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

TAB 13

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual “pre-packaged” recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that

> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

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[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

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[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a “pre-packaged” restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor’s report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

_____

Pepall J.

Released: October 13, 2009

TAB 14

CITATION: Northstar Aerospace, Inc. (Re), 2012 ONSC 4546
COURT FILE NO.: CV-12-9761-00CL
DATE: 20120807

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTHSTAR AEROSPACE, INC., NORTHSTAR AEROSPACE (CANADA) INC., 2007775 ONTARIO INC. AND 3024308 NOVA SCOTIA COMPANY, Applicants

BEFORE: D. M. Brown J.

COUNSEL: M. Konyukhova, for the Applicants

Craig J. Hill, for Ernst & Young Inc., Court-Appointed Monitor

S. Weisz, for Fifth Third Bank as Pre-filing Agent and DIP Lender

C. Prophet, for Boeing Capital Loan Corporation

HEARD: August 7, 2012

REASONS FOR DECISION

I. Motion under the *CCAA* to authorize payment to critical supplier of pre-filing costs

[1] Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "CCAA Entities") applied for and were granted protection under the *Companies' Creditors Arrangement Act* (the "CCAA") pursuant to an Initial Order of this court dated June 14, 2012 (the "Initial Order"). Ernst & Young Inc. was appointed as Monitor (the "Monitor") of the CCAA Entities and FTI Consulting Canada Inc. ("FTI Consulting") was appointed Chief Restructuring Officer ("CRO") of the CCAA Entities.

[2] Certain of Northstar Canada's direct and indirect U.S. subsidiaries (the "Chapter 11 Entities") commenced insolvency proceedings (the "Chapter 11 Proceedings") pursuant to Chapter 11 of the United States Bankruptcy Code on June 14, 2012 in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court"). The CCAA Entities and the Chapter 11 Entities are sometimes collectively referred to herein as "Northstar".

[3] Northstar supplies components and assemblies for the commercial and military aerospace markets, and provides related services. Northstar provides goods and services to customers all over the world, including military defence suppliers, as well as the U.S. army. Northstar's products are used in the Boeing CH-47 Chinook helicopters, Boeing AH-64 Apache helicopters, Sikorsky UH-60 Blackhawk helicopters, AgustaWestland Links/Wildcat helicopters, the Boeing F-22 Raptor Fighter aircraft and various other helicopters and aircraft.

[4] The history of this proceeding is set out in previous endorsements of Morawetz J., most recently his Reasons dated July 30, 2012 (2012 ONSC 4423) approving the Heligear Transaction, vesting all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all restrictions, and authorizing and directing the Monitor, on the closing of the Heligear Transaction, to make distributions to the DIP Agent for the DIP Lenders and to the Lenders in accordance with their legal priorities.

[5] The Heligear Transaction has not yet closed.

[6] Changsha Zhongchuan Transmission Machinery Co., Ltd., a manufacturer of gears located in Hunan, The People's Republic of China, is the exclusive supplier to Northstar Canada of the gears that make up the components in gearboxes sold by Northstar to General Electric Company on an on-going basis. According to Nigel Meakin, a senior managing director of the CRO, the gears provided by Changsha are essential to Northstar's continued supply of gearboxes to GE on a timely basis in accordance with the Revenue Sharing Agreement between Northstar Canada and GE.

[7] Changsha rendered two invoices to Northstar Canada totaling US$ 135,226.06 prior to the Initial Order. Those invoices remain unpaid. Notwithstanding that paragraph 17 of the Initial Order requires Changsha to continue supplying goods to Northstar Canada, Changsha has informed the CCAA Entities that until the two invoices are paid, it will not supply further materials to Northstar Canada. The evidence discloses that re-sourcing the gears would take approximately 12 months, and the inability of Northstar to deliver gearboxes "may imminently impact GE production lines".

[8] Under the Heligear Transaction the amounts owing under the Changsha invoices might be treated as Cure Costs, making them payable by the CCAA Entities on closing. The CRO deposed, however, that given the urgency of obtaining supply from Changsha, it is necessary for payment of the invoices to be made whether or not the amounts are Cure Costs and, in any event, payment is required earlier than the closing date.

[9] The CCAA Entities therefore move for an order authorizing them to make a payment of US$ 135,223.06 to Changsha in respect of those amounts owing for supplies delivered prior to the commencement of these *CCAA* proceedings.

II. Positions of the parties

[10] The Monitor supports the relief requested. Fifth Third Bank does not oppose the relief sought; Boeing Capital supports the motion. All wish to see the Heligear Transaction close

quickly. No interested person appeared to oppose the motion or communicated its opposition to the CCAA Entities or the Monitor.

III. Analysis

[11] In *Cinram International Inc. (Re)*[1] Morawetz J. accepted, as an accurate summary of the applicable law on this issue, the following portions of the applicant's factum in that case:

> ***Entitlement to Make Pre-Filing Payments***
>
> 67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.
>
> *Canwest Global supra*, at paras. 41 and 43; Book of Authorities, Tab 1.
>
> 68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:
>
> a. whether the goods and services were integral to the business of the applicants;
>
> b. the applicants' dependency on the uninterrupted supply of the goods or services;
>
> c. the fact that no payments would be made without the consent of the Monitor;
>
> d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
>
> e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

[1] 2012 ONSC 3767

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global supra, at para. 43; Book of Authorities, Tab 1.

Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Re Priszm Income Fund (2012), 75 C.B.R. (5^{th}) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

[12] In the present case the evidence disclosed that the materials supplied by Changsha are integral to the business of the CCAA Entities, they depend on the uninterrupted supply of those goods, and they lack a sufficient inventory of the goods on hand to meet their needs, with the potential of imminently affecting the production lines of GE, one of their customers.

[13] The Monitor supports the order sought; no party opposes the motion.

[14] Although Changsha is subject to the critical supplier provisions of the Initial Order, the simple reality of the situation is that Changsha is located outside the jurisdiction of this court and the courts in the parallel U.S. Chapter 11 proceedings. Enforcement of the Initial Order against Changsha could not occur in a timely fashion. In my view, this practical reality weighs heavily in favour of granting the order sought, although granting the order, in a sense, rewards improper conduct by a critical supplier who has ignored an order of this court and has the effect of countenancing a form of hard-ball queue-jumping.

[15] That said, in light of the support by interested parties for the order sought, business realities must prevail in order to ensure the continued operation of Northstar Canada pending closing of the Heligear Transaction. Accordingly, I grant the order requested by the CCAA Entities and authorize them to pay Changsha the amount of US$ 135,223.06 in satisfaction of the two invoices.

D. M. Brown J.

Date: August 7, 2012

TAB 15

CITATION: McEwan Enterprises Inc., 2021 ONSC 6453
COURT FILE NO.: CV-21-00669445-00CL
DATE: 2021-10-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, and Trish Barrett* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

HEARD and DETERMINED: September 28, 2021

REASONS RELEASED: October 1, 2021

ENDORSEMENT

1. The initial hearing of this matter took place on September 28, 2021. At the conclusion of the hearing, I granted an Initial Order with reasons to follow. These are the reasons.

A. OVERVIEW

2. McEwan Enterprises Inc. ("MEI") is a full-service restaurant, catering, gourmet grocery and events company (the "Business") based in the Greater Toronto Area (the "GTA"). MEI was founded in 1987 by Mark McEwan, who leads the development, preparation and delivery of the culinary aspects of the Business.

3. Capitalized terms used but not defined herein have the meanings given to such terms in the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the "McEwan Affidavit").

4. MEI brings this application for an initial order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Counsel to MEI submits that the principal objectives of these CCAA proceedings are to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of MEI and its Business. As part of its restructuring efforts pursuant to these CCAA proceedings, MEI intends to seek to complete the sale and transfer of the Business pursuant to the proposed Transaction (as defined below).

5. MEI has been experiencing financial challenges for an extended period of time as a result of certain unprofitable McEwan Locations (as defined below), and the McEwan Group has not been profitable since 2017. MEI's financial challenges have been exacerbated by the impacts of the COVID-19 pandemic over the last approximately 18 months.

6. Counsel submits that MEI has made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, but has been unable to achieve a comprehensive out-of-court resolution.

7. After extensive review and consideration of its circumstances, and its options and alternatives, and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative in the circumstances would be a sale of substantially all of the McEwan Group's assets and the Business (the "Transaction") to the current owners of MEI, and the continuation of the Business with a reduced number of McEwan Locations. The continued involvement of Mr. McEwan as chef and operator of the Business, is premised on a continuation of Mr. McEwan's partnership with Fairfax (as defined below) as co-owners of the McEwan Group.

8. Having regard to its financial circumstances and ongoing challenges, MEI determined that it is necessary to seek protection under the CCAA in order to provide stability for the Business and preserve value, while MEI advances its efforts to restructure and right-size the Business, including pursuing the proposed Transaction.

9. Counsel advises that MEI intends to bring a subsequent motion to seek Court approval of the Transaction.

B. CURRENT CHALLENGES

10. The McEwan Group conducts the Business out of six restaurants (the "McEwan Restaurants"), as well as two food-hall locations and one gourmet grocery location (collectively with the McEwan Restaurants, the "McEwan Locations").

11. MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax Financial Holdings Limited ("Fairfax"), through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdco Inc., which owns a 45% equity interest in MEI.

12. Many of the McEwan Locations have been historically successful and profitable; however, certain locations have been underperforming for a number of years, causing an overall significant strain on MEI's profitability and liquidity. As a result of these financial challenges, in March 2020, MEI's shareholders provided approximately $1.1 million of additional equity financing to support the operations of the Business.

13. In an effort to address the COVID-19 pandemic challenges, MEI implemented extensive cost-saving and cash conservation measures, negotiated various rent concessions, and obtained

various government subsidies and support. Those efforts were insufficient to address MEI's liquidity needs during the COVID-19 pandemic. As a result, MEI needed to obtain additional financing, which it was able to obtain from one of its shareholders, Fairfax, by way of a number of unsecured loans provided in 2020 and 2021.

14. MEI has advised that it will also need further funding to continue operations while the impacts of the COVID-19 pandemic on the Business persist.

15. Counsel submits that after extensive review and consideration of its circumstances and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative that could be implemented in the circumstances that would preserve the value of the Business for the benefit of MEI's many stakeholders, would be the Transaction. On September 27, 2021, MEI entered into a purchase agreement with 2864785 Ontario Corp. (the "Purchaser"), pursuant to which, subject to Court approval, the parties would complete the Transaction (the "Purchase Agreement").

16. MEI believes that the implementation of the Transaction will result in a sustainable Business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations will also all be assumed. The Transaction also provides for the necessary funding for MEI's operations by way of the Transaction Deposit of up to $2.25 million for the period up to the closing of the Transaction.

17. MEI and its board of directors have determined that it is in the best interests of MEI and its stakeholders for MEI to file for protection under the CCAA in order to preserve the value of the Business and continue as a going concern while seeking to implement a restructuring of the Business, including the proposed Transaction.

18. Counsel submits that the commencement of these CCAA proceedings and the granting of a stay of proceedings (the "Stay of Proceedings") are necessary to provide stability to the Business, to preserve value and to permit MEI to restructure its affairs, and are in the best interests of MEI and its stakeholders.

19. MEI is also requesting that this Court exercise its discretion to extend the Stay of Proceedings in respect of the personal guarantees, indemnities and security granted by Mr. McEwan in his personal capacity in connection with certain of MEI's obligations, as well as in favour of 2860117 Ontario Limited (the "McEwan Subsidiary"), a wholly-owned subsidiary of MEI which holds MEI's 50% interest in the ONE Restaurant Partnership. The McEwan Subsidiary and Mr. McEwan are collectively referred to herein as the "Non-Filing Parties".

20. As set out in the Cash Flow Forecast, with the remaining availability under the Secured Credit Facilities and the funding from the Transaction Deposit (if approved by the Court), MEI is expected to have sufficient funding through the period of the Cash Flow Forecast.

21. Alvarez & Marsal Canada Inc. ("A&M") has consented to act as the monitor of MEI in these proceedings (in such capacity, the "Monitor").

22. In connection with A&M's appointment as the Monitor, it is contemplated that a Court-ordered charge will be granted over MEI's assets, property and undertaking (the "Property") in favour of the Monitor, its counsel, and MEI's counsel in respect of their fees and disbursements incurred prior to and following the commencement of these proceedings at their standard rates and charges (the "Administration Charge").

C. ISSUES

23. The issues to be considered on this application are whether:

(a) MEI is a "debtor company" to which the CCAA applies;

(b) the relief sought in the proposed Initial Order is available under the CCAA;

(c) the stay of proceedings under the Initial Order should be extended to the Non-Filing Parties; and

(d) the Charges (as defined below) should be granted.

D. ANALYSIS and FINDINGS

24. The CCAA applies to a "debtor company" where the total claims against such company exceeds $5 million. The terms "debtor company" is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.

25. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (See: *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 at paras. 21-22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 [*Stelco*];).

26. The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.

27. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay or proceedings and ancillary protection are not granted by the court. (see: *Stelco, supra* at para. 40).

28. Having reviewed the McEwan Affidavit and hearing submissions, I am satisfied that MEI meets both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition.

29. As at August 31, 2021, MEI has aggregate liabilities exceeding $10 million. Thus, total claims against MEI exceed the $5 million threshold amount under the CCAA.

30. Accordingly, I am satisfied MEI is a "debtor company" to which the CCAA applies.

31. Subject to the terms of the Initial Order, MEI intends to honour all of its obligations in respect of its employees, suppliers and service providers in the ordinary course, as well in respect of its customer gift cards and the Customer Program. Pursuant to the proposed Transaction, any and all outstanding amounts owing in respect of MEI's employee, trade or customer obligations will be assumed by the Purchaser upon implementation of the Transaction.

32. I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. (See: *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at paras. 41, 43; *Cinram International Inc., Re,* 2012 ONSC 3767 at para. 37 and Sch. C at paras. 66-71; and *Performance Sports Group Ltd., Re,* 2016 ONSC 6800 at para. 24 [*Performance Sports*]).

33. In arriving at this conclusion, I have taken into account a number of factors in authorizing the payment of pay pre-filing obligations, including: (a) whether the goods and services were integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) whether the applicant had sufficient inventory of the goods on hand to meet its needs; (d) the effect on the applicant's operations and ability to restructure if it could not make pre-filing payments; and (e) the fact that no payments would be made without the consent of the Monitor. (See: *Cinram, supra* at para. 37 and Sch. C at paras. 66-71; *Performance Sports, supra* at para. 25; and *JTI-Macdonald Corp., Re,* 2019 ONSC 1625 at para. 24 [*JTI-Macdonald*]).

34. Pursuant to the proposed Initial Order, it is proposed that the Monitor not be required to comply with the notification requirements of Section 23(1)(a) of the CCAA to: (a) publish a newspaper notice in respect of the CCAA proceedings; (b) send a notice to known creditors; or (c) make publicly available a list showing the names, addresses and estimated claim amounts of those creditors.

35. I am satisfied that pursuant to Section 23(1)(a) of the CCAA, the Court has the jurisdiction to grant an order not requiring compliance with the applicable notice provisions and/or varying

those requirements. The question is whether it is appropriate for the court to exercise its jurisdiction.

36. MEI believes that the issuance of a newspaper notice and the public posting of a list of individual creditors and their claims will not serve to provide any material benefit to the relevant parties, who are intended to not be impacted by these CCAA proceedings, and will add unnecessary costs. MEI believes that a notice issued by MEI to its creditors will be a more efficient and less disruptive means of notifying such parties in these circumstances.

37. I have not been persuaded that it is appropriate or necessary, in these circumstances to deviate from the notice provisions prescribed by the CCAA.

38. CCAA proceedings are public proceedings. The Supreme Court, in the recent decision *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37-38, confirmed that court proceedings are presumptively open to the pubic. It seems to me that, absent extenuating circumstances, any attempt to limit the publication of CCAA proceedings by altering the prescribed notice provisions is not consistent with the open court presumption which must be respected.

39. It is necessary to recognize that it is MEI that is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with MEI to alter the notice provisions to suit its purposes.

40. The CCAA sets out notice provisions, which I do not consider to be onerous. Further, the costs associated with a newspaper notice are, in my view, inconsequential when one considers the assets and liabilities of MEI.

41. However, in an effort to eliminate any possible confusion surrounding the publication of individuals whose claims are expected to be unaffected in these proceedings, I have authorized minor adjustments to the notice provisions which are reflected in the signed order.

Extending the Stay of Proceedings to the Non-Filing Parties

42. Courts have the authority under the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding. (See: CCAA, Sections 11 and 11.02(1); *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21 [*Tamerlane*]; *Laurentian University of Sudbury, Re*, 2021 ONSC 659 at para. 39 [*Laurentian*]; and *Lehndorff, supra* at paras. 5, 16, 21; BOA, Tab 3).

43. The Court has considered the following non-exhaustive list of factors in determining whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party. (See: *JTI-Macdonald, supra* at para. 15; *Laurentian, supra* at para. 40; *Cinram, supra* at para. 37 and Sch. C at paras. 63-64; *Lehndorff, supra* at para. 21).

44. MEI submits that it is appropriate to extend the Stay of Proceedings to the Non-Filing Parties given:

(a) Mr. McEwan has granted certain personal guarantees, indemnities and/or security in respect of certain of MEI's obligations, and the McEwan Subsidiary holds MEI's interests in the ONE Restaurant Partnership, an important part of the overall Business of MEI;

(b) if any enforcement proceedings were commenced against any of the Non-Filing Parties, it would cause significant disruption to MEI, would have a detrimental effect on MEI's restructuring efforts, and there could be a significant erosion of value to the Business to the detriment of all stakeholders; and

(c) the obligations which Mr. McEwan has guaranteed, indemnified and/or secured are not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed Transaction, thus MEI believes there would be no prejudice in granting the requested extension of the Stay of Proceedings.

45. I accept that the extension of the Stay of Proceedings in favour of the Non-Filing Parties is appropriate in these circumstances while MEI works to implements a restructuring of the Business, including the proposed Transaction, for the benefit of its many stakeholders.

46. MEI is also seeking approval of the Administration Charge in respect of certain administrative costs of these proceedings and the Directors' Charge in respect of the

indemnification of its directors and officers (the "Charges"). Pursuant to the proposed Initial Order, the Charges would rank in priority to all Encumbrances in favour of any person, except for any secured creditor of MEI. At the Comeback Hearing, MEI intends to seek an Order granting priority of the Charges ahead of all Encumbrances of those secured creditors given notice of the Comeback Hearing, other than the Encumbrances granted by MEI in favour of RBC.

47. The proposed Initial Order provides that the priority of the Charges, as among them, shall be as follows: (a) First – the Administration Charge; and (b) Second – the Directors' Charge.

48. MEI is seeking the granting of the Administration Charge over the Property to secure the fees and disbursements of the Monitor and its counsel, and MEI's counsel, in each case incurred at their standard rates and charges in the amount of $225,000, at this time.

49. Section 11.52 of the CCAA provides the Court with the jurisdiction to grant an administration charge.

50. MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Administration Charge given that:

(a) the proposed restructuring of MEI will require the involvement of professional advisors;

(b) the proposed beneficiaries of the Administration Charge have each contributed and will continue to contribute to MEI's restructuring efforts;

(c) there is no unwarranted duplication of roles; and

(d) the amount of the requested Administration Charge reflects the estimated costs of these proceedings to be incurred in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

51. MEI is seeking the Directors' Charge over the Property to secure the indemnification of the Directors and Officers pursuant to the Initial Order for any liabilities they may incur during the CCAA proceedings in their capacities as directors and officers in the amount of $600,000, at this time.

52. Section 11.51 of the CCAA provides the Court with the authority to grant a charge relating to directors' and officers' indemnification on a priority basis.

53. MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:

(a) it is possible for the Directors and Officers to be held personally liable for certain of MEI's obligations during the course of these CCAA proceedings;

(b) MEI's D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage for the Directors and Officers under such D&O Policy;

(c) the proposed Directors' Charge would apply only to the extent that the Directors and Officers do not have coverage under the D&O Policy;

(d) the Directors' Charge would only cover liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

(e) the Directors and Officers have been actively involved in MEI's efforts to address the current circumstances of MEI, including the review and consideration of MEI's financial circumstances, efforts to manage and address MEI's challenging liquidity position, overseeing MEI's negotiations with landlords, the pursuit of restructuring alternatives, and the preparation for and commencement of these CCAA proceedings;

(f) to carry on business during the CCAA proceedings and to complete a successful restructuring for the benefit of MEI and its stakeholders, MEI requires the active and committed involvement of the Directors and Officers; and

(g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the Directors and Officers in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

54. MEI believes that that the proposed amounts of each of the Charges are appropriate for the period from and after the granting of the Initial Order (if approved) until the date of the Comeback Hearing. MEI expects to request at the Comeback Hearing that the Administration Charge be increased to $350,000 and that the Directors' Charge be increased to $1.45 million.

55. I accept these submissions and accordingly I am satisfied that the Administration Charge and the Directors' Charge should be included in the Initial Order.

DISPOSITION

56. I am satisfied, for the foregoing reasons, that MEI meets all of the qualifications established for relief under the CCAA. An Order has been signed to reflect the foregoing. The comeback hearing has been scheduled for Thursday, October 7, 2021 at 9:00 a.m.

Chief Justice G.B. Morawetz

Date: October 1, 2021

TAB 16

CITATION: Re: Performance Sports Group Ltd., 2016 ONSC 6800
COURT FILE NO.: CV-16-11582-00CL
DATE: 20161101

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

BEFORE: Newbould J.

COUNSEL: *Peter Howard and Kathryn Esaw* , for the Applicants

Robert I. Thornton and Rachel Bengino, for the Proposed Monitor Ernst & Young Inc.

Bernard Boucher and John Tuzyk, for Sagard Capital Partners, L.P

David Bish and Adam Slavens, for Fairfax Financial Holdings Limited

Robert Staley, for the board of directors of Performance Sports Group Ltd.

Joseph Latham and Ryan Baulke, for the Ad Hoc Committee of certain term lenders

Tony Reyes and Evan Cobb, for Bank of America, the ABL DIP lender

HEARD: October 31, 2016

ENDORSEMENT

[1] On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

[2] PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

[3] The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

[4] The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

[5] The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

[6] As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

[7] The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

[8] Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

[9] Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

[10] The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

[11] Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

[12] As at September 30, 2016, the Applicants had assets with a book value of approximately $594 million and liabilities with a book value of approximately $608 million.

[13] The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

[14] The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately $330.5 million plus $1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term

Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately $159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

[15] A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.

c. The PSG Entities' financial results have been negatively affected by currency fluctuations.

d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance

expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

[16] The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

[17] As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of $575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

[18] I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of $5 million.

[19] There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

(a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of $200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of $160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional $25 million of liquidity as compared to what is currently provided under the ABL Facility.

(b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of $361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately $331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately $30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

[20] The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing

indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

[21] I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility. The Monitor[1] is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

[22] Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the

[1] Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst &Young in this decision as the Monitor.

ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

[23] The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

(a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;

(b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;

(c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;

(d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 – all of whom are entitled to be paid for their services under U.S. bankruptcy law; and

(e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

[24] There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent

jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72 at para. 43.

[25] I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of $10,000 will require Monitor approval.

[26] The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

[27] The PSG Entities seek an administrative charge in the amount of $7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and

counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

[28] I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

[29] Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
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> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[30] Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of

proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

[31] In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

[32] It appears clear, however, that an administration charge under section 52.11(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

[33] The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

[34] Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107 and *Fraser Papers Inc. (Re),* 2009 CanLII 32698.

[35] In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

[36] A standard directors' charge for $7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Newbould J.

Date: November 1, 2016