Clerk's Stamp

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**BOOK OF AUTHORITIES FOR THE BENCH BRIEF OF SNDL INC. TO BE HEARD ON NOVEMBER 1, 2024 AT 2:00 P.M.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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LIST OF AUTHORITIES

Case Law

1. *Canadian Airlines Corp. (Re)*, **2000 ABQB 442**, leave to appeal denied **2000 ABCA 238**, aff'd 2001 ABCA 9, leave to appeal to S.C.C. refused July 12, 2001
2. *Target Canada Co., Re,* **2016 ONSC 316**
3. *Canwest Global Communications Corp. (Re)*, **2010 ONSC 4209**
4. *9354-9186 Québec inc. v. Callidus Capital Corp.*, **2020 SCC 10**
5. *CannTrust Holdings Inc., et al. (Re)*, **2021 ONSC 4408**
6. *Crystallex International Corp., Re*, **2013 ONSC 823**
7. *Sino-Forest Corporation (Re)*, **2012 ONCA 816**
8. *Bul River Mineral Corporation (Re)*, **2014 BCSC 1732**
9. *Olympia & York Developments Ltd. (Re)*, **[1993] OJ No 545**, **1993 CanLII 8492**
10. *Menegon v. Phillip Services Corp.*, **[1999] CarswellOnt 3240**, **1999 CanLII 15004**
11. *Re, Doman Industries Ltd. (Trustee of)*, **2003 BCSC 376**
12. *SNV Group Ltd. (Re) (Trustee of)*, **2001 BCSC 1644**

Statutes

13. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. **6(1), 6(8), and 22.1**
14. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. **2(1)**

Evidence

15. Affidavit #1 of John Arbuthnot IV, sworn July 12, 2024 (body of affidavit only)
    (a) Exhibit 2 of First Arbuthnot Affidavit
    (b) Exhibit 3 of First Arbuthnot Affidavit
    (c) Exhibit 4 of First Arbuthnot Affidavit
    (d) Exhibit 22 of First Arbuthnot Affidavit
16. Amended and Restated Initial Order pronounced on July 24, 2024
17. Form 4 – Notice by Debtor Company to Disclaim or Resiliate, dated August 30, 2024

18. Schedule 1 to Application of 2759054 Ontario Inc. o/a Fika Herbal Goods filed October 21, 2024

TAB 1

Re Canadian Airlines Corporation, 2000 ABQB 442

Date: 20000627

Action No. 0001-05071

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT* (ALBERTA) S.A. 1981, c. B-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE M. S. PAPERNY

I. INTRODUCTION

[1] After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the ***Companies' Creditors Arrangement Act*** ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

[2] The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

[3] Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

[4] CAC and CAIL are corporations incorporated or continued under the ***Business Corporations Act*** of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

[5] In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

[6] By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

[7] CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. (“CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

[8] CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

[9] Canadian’s financial difficulties significantly predate these proceedings.

[10] In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

[11] In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by

pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

[12] Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

[13] The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

[14] The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

[15] The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

[16] In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 (“Senior Secured Notes”) and U.S. $100,000,000 of unsecured notes in August, 1998 (“Unsecured Notes”).

[17] The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial

performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

[18] As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the **oneworldTM** Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

[19] Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

[20] Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

[21] Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

[22] Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

[23] Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity

investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

[24] In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

[25] On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

[26] On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

[27] There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

[28] Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

[29] On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on

October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

[30] As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

[31] Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

[32] After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

[33] On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

[34] As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
> b) sales for future air travel were down by approximately 10% compared to 1998;
> c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

[35] In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

[36] If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

[37] On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

[38] Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

[39] Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

[40] Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described

above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

[41] On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

[42] Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

[43] Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[44] Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

[45] On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

[46] Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

[47] On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

[48] On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

[49] The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

[50] The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

[51] The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.
Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

[52] There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

[53] The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable

alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

[54] In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

[55] There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

[56] Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

[57] Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

[58] The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the ***Alberta Business Corporations Act*** ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. ANALYSIS

[59] Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

[60] Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.

[61] A leading articulation of this three-part test appears in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example ***Re Sammi Atlas Inc***. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and ***Re T. Eaton Co.***, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

[62] Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

[63] I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC (“Resurgence”), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading “Fair and Reasonable”.

2. Matters Unauthorized

[64] This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in ***Olympia & York Developments Ltd.* v. *Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in ***Cadillac Fairview (Re)*** (1995), 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

[65] In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario

Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

[66] Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

[67] Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

> a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and
> b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

[68] The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

> (a) consolidating all of the issued and outstanding common shares into one common share;
> (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
> (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

[69] Reorganizations under section 185 of the ABCA are subject to two preconditions:
a. The corporation must be "subject to an order for re-organization"; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

[70] The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

[71] The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

[72] Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) – consolidation of Common Shares	167(1)(f)
(b) – change of designation and rights	167(1)(e)
(c) – cancellation	167(1)(g.1)
(d) – change in shares	167(1)(f)
(e) – change of designation and rights	167(1)(e)
(f) – cancellation	167(1)(g.1)

[73] The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

[74] In R. Dickerson et al, ***Proposals for a New Business Corporation Law for Canada***, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

[75] The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

[76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

[77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of ***Royal Oak Mines Inc.***, [1999] O.J. No. 4848 and ***Re T Eaton Co.,*** *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

[78] Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

[79] In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

[80] The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

[81] I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in ***Savage v.***

Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

[82] The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

[83] These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

[84] To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

[85] Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

[86] The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

[87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on ***Barrette v. Crabtree Estate,*** [1993], 1 S.C.R. 1027 at 1044 and ***Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of)*** (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

[89] With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words **"excluding the claims excepted by s. 5.1(2) of the CCAA"** immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

[90] In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

[91] Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

[92] While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

[93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in ***Olympia and York Dev. Ltd. v. Royal Trust Co.***, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.***, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); ***Northland Properties Ltd.* v. *Excelsior Life Insurance Co. of Canada***, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of ***Olympia & York Developments Ltd.,*** *supra**:***

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

[98] However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example ***Quintette Coal Ltd.,*** (1992) 13 C.B.R. (3rd) 14 (B.C.S.C) and ***Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*** (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

[99] The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

[100] The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

[101] The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, ***Hochberger* v. *Rittenberg*** (1916), 36 D.L.R. 450 (S.C.C.)

[102] ***In Northland Properties Ltd. (Re)*** (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[103] Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There

is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in ***Northland Properties Ltd. (Re)***.

[104] If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

[105] The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

[106] The authorities which address minority creditors' complaints speak of "substantial injustice" (***Keddy Motor Inns Ltd. (Re)*** (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (***Campeau Corp. (Re)*** (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); ***Skydome Corp. (Re)*** (1999), 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (***Quintette Coal Ltd. (Re)***, (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and ***Northland Properties (Re)***, *supra* at 9.

[107] Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

[108] Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The

affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

[109] The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

[110] The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

[111] As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

[112] The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

[113] Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

[114] While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

[115] The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

[116] The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

[117] The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

[118] It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

[119] Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

[120] There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

[121] The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

[122] For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

[123] Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

[124] There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

[125] If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

[126] The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are <u>not</u> treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

[127] Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

[128] CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

[129] Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the ***Aeronautics Act*** and the ***Canada Transportation Act***, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

[130] Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million , which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

[131] There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

[132] The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses

can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

[133] There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million . There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

[134] The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

[135] The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

[136] Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

[137] When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the

future. As Farley J. stated in ***Re T. Eaton Co.*** (1999) O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

[138] The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in ***T. Eaton Co,*** *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

[139] Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

[140] Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: ***Re Diligenti v. RWMD Operations Kelowna*** (1976), 1 B.C.L.R. 36 (S.C).

[141] The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in ***First Edmonton Place,*** *supra* at 57***:***

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

[142] While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: ***Pente Investment Management Ltd. v. Schneider Corp.*** (1998), 42 O.R. (3d) 177 (C.A.).

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company,*** *supra*.

[144] To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

[145] It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

[146] Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

[147] The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this

moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

[148] The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

[149] It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

[150] At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to all creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

[151] Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

[152] The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

[153] Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

[154] The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The

evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

[155] Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

[156] I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

[157] Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

[158] The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

[159] The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any

vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

[160] They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

[161] Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

[162] That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

[163] The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased <u>after</u> the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

[164] In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

[165] The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

[166] These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

[167] The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

[168] The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

[169] The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

[170] Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion , it is not unfair that shareholders receive nothing.

e. The Public Interest

[171] In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

[172] In his often cited article, ***Reorganizations Under the Companies' Creditors Arrangement Act*** (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

[173] In ***Re Repap British Columbia Inc.*** (1998), 1 C.B.R. 449 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In ***Re Quintette Coal Ltd.,*** *supra,* Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include ***Canadian Red Cross Society (Re)***, (1998),5

C.B.R.(4th) (Ont. Gen. Div.) and ***Algoma Steel Corp. v. Royal Bank of Canada (Trustee of***), [1992] O.J. No. 795 (Ont. Gen. Div.)

[174] The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

[175] More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

[176] The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

[177] The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the ***Transportation Act*** , which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

[178] In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d)

316 (N.BQ.B), ***Quintette Coal***, *supra* and ***Repap***, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to ***Algoma Steel v. Royal Bank of Canada***., *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

[179] Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in ***Re Sammi Atlas Inc***., (1998), 3C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

[180] I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

[181] The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

[182] Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

[183] This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

[184] I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

[185] The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

HEARD on the 5th day of June to the 19th day of June, 2000.
DATED at Calgary, Alberta this 27th day of June, 2000.

_____

J.C.Q.B.A.

APPEARANCES:

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For the Petitioners

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For JHHD Aircraft Leasing No. 1 and No. 2

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J. Medhurst-Tivadar
For Canada Customs and Revenue Agency

R. Wilkins, Q.C.
For the Calgary and Edmonton Airport Authority

TAB 2

CITATION: Target Canada Co. (Re), 2016 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15

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: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for 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")

Linda Galessiere and *Gus Camelino* for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *Daniel Hamson* for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark and Melaney Wagner for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

Harvey Chaiton for the Directors and Officers of the Applicants

Stephen M. Raicek and *Mathew Maloley* for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada

Vern W. DaRe for Doral Holdings Limited and 430635 Ontario Inc.

Stuart Brotman for Sobeys Capital Incorporated

Catherine Francis for Primaris Reit

Kyla Mahar for Centerbridge Partners and Davidson Kempner

William V. Sasso, Pharmacist Representative Counsel

Varoujan C. Arman for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.

Brian Parker for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.

Roger Jaipargas for Glentel Inc., Bell Canada and BCE Nexxia

Nancy Tourgis for Issi Inc.

HEARD: December 21, 2015 & December 22, 2015

SUPPLEMENTARY WRITTEN SUBMISSIONS: December 30, 2015, January 6, 2016 and January 8, 2016

ENDORSEMENT

[1] The Applicants 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 ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

[2] On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

[3] These are the reasons.

[4] The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

[5] The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

[6] The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

[7] The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner,

[1] Capitalized terms not defined herein have the same meaning as set out in the Plan.

CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

[8] The Monitor also supports the motion.

[9] The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

[10] In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

[11] By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

[12] The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

[13] The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

[14] Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

[15] The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

[16] The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

[17] In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

[18] The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 – Breach of paragraph 19A of the Amended and Restated Order

[19] First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

[20] Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for

> the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

[21] The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> "A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order…[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation."

[22] The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;
>
> (a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and
>
> (b) a fair and reasonable balancing of interests.

[23] Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP – it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

[24] The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 – Breach of paragraph 55 of the Claim Procedure Order

[25] Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

[26] The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

[27] The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

[28] In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

[29] In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

[30] Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[31] Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

[32] Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

[33] Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

[34] The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

[35] Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

[36] The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

[37] With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

[38] Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

[39] The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

[40] The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

[41] If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

[42] Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

[43] The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or 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 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 shareholders of the company, to be summoned in such manner as the court directs.

[44] Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.).

[45] Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd.*, Re, 2009 NSSC 163, 55 C.B.R. (5th) 205).

[46] Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

[47] Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

[48] Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

[49] Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of

the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

[50] The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List], affirmed 2008 ONCA 587, (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

[51] Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

[52] With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

[53] The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

[54] As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

[55] At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

[56] Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

[57] The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

[58] Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

[59] The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

[60] With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

[61] Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

[62] In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp*., Re, 2013 ONSC 823, 2013 CarswellOnt 3043 [Commercial List]. Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

[63] In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,

> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.
>
> Likewise, the Claims Procedure Order, as amended, clearly provides that:
>
> (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
>
> (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
>
> (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.
>
> There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order…

[64] With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc.*, Re, 2003 ABQB 745, 20 Alta. L.R. (4th) 264, aff'd 2004 ABCA 31, 346 A.R. 28, where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

[65] Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

[66] Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[67] In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

[68] Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

[69] As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

[70] Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Re Quintette Coal Ltd*. (1992), 13 C.B.R. (3d) 146 (B.C.S.C.); *Re Dairy Corp. of Canada Ltd*., [1934] O.R. 436 (Ont. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co*. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Re Northland Properties Ltd*. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at p. 182, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re BlueStar Battery Systems International Corp*. (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

[71] As explained below, the Plan cannot meet the required criteria.

[72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to

release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

[73] The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

[74] The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

[75] The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

[76] Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

[77] However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

[78] Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

[79] This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

[80] Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having

any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be

considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

[87] Accordingly, the Plan is not accepted for filing and this motion is dismissed.

[88] The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

[89] At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

_____

Regional Senior Justice G.B. Morawetz

Date: January 15, 2016

TAB 3

CITATION: Re: Canwest Global Communications Corp. 2010 ONSC 4209
COURT FILE NO.: CV-09-8396-00CL
DATE: 20100728

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 11 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 CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

BEFORE: Pepall J.

COUNSEL: *Lyndon Barnes, Jeremy Dacks and Shawn Irving* for the CMI Entities
David Byers and Marie Konyukhova for the Monitor
Robin B. Schwill and Vince Mercier for Shaw Communications Inc.
Derek Bell for the Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for the Special Committee of the Board of Directors
Robert Chadwick and Logan Willis for the Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

ORAL REASONS FOR DECISION

[1] This is the culmination of the *Companies' Creditors Arrangement Act*[1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring

[1] R.S.C. 1985, c. C-36 as amended.

was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

[2] The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

[3] The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

[4] In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

[5] The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

[6] It is contemplated that the Plan will be implemented by no later than September 30, 2010.

[7] The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

[8] On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

[9] Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

[10] In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

[11] Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

[12] Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

[13] The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

[14] Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the Plan must be fair and reasonable.

See *Re: Canadian Airlines Corp.*[2]

(a) Statutory Requirements

[15] I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

[16] Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan

[2] 2000 A.B.Q.B. 442 at para. 60, leave to appeal denied 2000 A.B.C.A 238, aff'd 2001 A.B.C.A 9, leave to appeal to S.C.C. refused July 12, 2001.

Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

[17] In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Re Canadian Airlines*[3].

[18] The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

[19] The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Re Canadian Airlines*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an

[3] Ibid,at para. 64 citing *Olympia and York Developments Ltd. v. Royal Trust Co*. [1993] O.J. No. 545 (Gen. Div.) and *Re: Cadillac Fairview Inc*. [1995] O.J. No. 274 (Gen. Div.).

> insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

[20] My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

[21] In assessing whether a proposed plan is fair and reasonable, considerations include the following:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

[22] I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing

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[4] Ibid, at para. 3.

accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Re Armbro Enterprises Inc.*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

[23] Similarly, in *Re: Uniforêt Inc.*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

[24] I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the

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[5] (1993), 22 C.B.R. (3rd) 80 (Ont. Gen. Div.).

[6] *Ibid*, at para. 6.

[7] (2003), 43 C.B.R. (4th) 254 (QEUE. S.C.).

guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

[25] Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

[26] The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

[27] I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

[28] The Plan does include broad releases including some third party releases. In *Metcalfe v. Mansfield Alternative Investments II Corp.*[8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

[29] In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

[30] In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have

[8] (2008), 92 O.R. (3rd) 513 (C.A.).

already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

[31] Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

[32] In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

[33] The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Re Air Canada*[10] and *Re Calpine Canada Energy Ltd.*[11] I am satisfied that the agreement is fair and reasonable and should be approved.

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[9] The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

[10] (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

[11] (2007), 35 C.B.R. (5th) 1.

[34] It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods v. Merrill Lynch Capital Partners Inc.*[12] and *Re Laidlaw Inc*[13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

[35] Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

[36] In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements;

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[12] (1996), 43 CBR (4th) 10.

[13] (2003), 39 CBR (4th) 239.

(b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *Re: A & M Cookie Co. Canada*[14] and *Mei Computer Technology Group Inc.*[15]

[37] I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

[38] A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

[39] In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Pepall J.

Released: July 28, 2010

[14] [2009] O.J. No. 2427 (S.C.J.) at para. 8/

[15] [2005] Q.J. No. 2293 at para. 9.

TAB 4

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.

& Young Inc. c. Essar Global Fund Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation c. 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. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 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. c. 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 c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. c. 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. c. 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; *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 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. c. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry c. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915; *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway c. 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. c. 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.
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> . . . 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.
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> . . . 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 5

CITATION: CannTrust Holdings Inc., et al. (Re), 2021 ONSC 4408
COURT FILE NO.: CV-20-00638930-00CL
DATE: 20210624

ONTARIO
SUPERIOR COURT OF JUSTICE
(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 CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOO) INC. AND ELMCLIFFE INVESTMENTS INC.

BEFORE: Justice L. A. Pattillo

COUNSEL: *Paul Steep, Jamey Gage, Shane D'Souza* and *Trevor Courtis,* for the Applicants

Steven Graff and *Jonathan Yantzi*, for the Monitor, Ernst & Young Inc.

Alex Morrison and *Karen Fung*, for Ernst & Young Inc.

David Wingfield and *Serge Kalloghlian,* for the CCAA Canadian Representatives

Steven Weisz, Pat Corney, James Johnson and *Michael H. Rogers*, for the CCAA U.S. Representatives

David Bish, for the Underwriters

Paul le Vay and *Carlo Di Carlo,* for Eric Paul

Peter Howard and *Brian Pukier*, for the Litwin Group

Rachel Corrigan U.S. lawyers, for the Litwin Group

John Salmas, for Cortland Credit Lending Corporation

Michael Wright, *Michael Robb* and *Alex Dirnson,* for Zola Finance Holdings Ltd. and Igor Gimelshtein

Linc Rogers, *Andrea Laing*, *Ryan Morris*, *Caitlin McIntyre* and *Justin Manoryk,* for KPMG LLP

Alistair Crawley and *Jonathan Preece,* for Peter Aceto

Michael Krygier-Baum and *Barry Papazian,* for Newline Canada Insurance Limited

David Vaillancourt, for Arch Insurance Canada Ltd.

Colin Empke, for Chubb Insurance Company of Canada and Allied World Assurance Company

Heather Gray, for Allianz Global Risks US Insurance Company

HEARD: June 10 and 16, 2021

ENDORSEMENT

Introduction

[1] The Applicants, CannTrust Holdings Inc. ("CT Holdings"), CannTrust Inc. ("CT"), CTI Holdings (Osoyoos) Inc. ("CTI") and Elmcliffe Investments Inc. ("Elmcliffe") move for an order approving and sanctioning the second amended and restated plan of compromise, arrangement and reorganization of CT Holdings, CT and Elmcliffe under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c, C-36 ("CCAA") and the *Business Corporations Act*, dated June 2, 2021 (the "Plan") and ancillary relief arising therefrom.

Overview

[2] CT Holdings is a public company and is a licensed producer of cannabis in Canada with facilities in Vaughn and Fenwick (Niagara), Ontario. Following audits by Health Canada at its facilities in June and July 2019, shipments of all its cannabis products were stopped and its cannabis licenses were partially suspended.

[3] On July 8, 2019, CT Holdings publicly announced that it was growing cannabis in breach of federal law, resulting in an immediate and substantial decline in the price of its shares. Shortly thereafter, numerous action and Class Actions (collectively the "Securities Claims") were commenced against CT Holdings and others in several provinces in Canada and at the federal and state level in the United States, claiming damages in excess of $500 million.

[4] Despite extensive efforts to resolve its issues, by March 2020, the Applicants determined it was in the best interest of themselves and their stakeholders to commence CCAA proceedings. On March 31, 2020, the Applicants obtained an initial order pursuant to the CCAA which included a stay of proceedings. Ernst & Young Inc. was appointed the Monitor. Subsequently, counsel in the lead securities class actions in Canada and the US were appointed CCAA Representative Counsel.

[5] Since commencing CCAA proceedings, the Applicants have completed each of the business restructuring objectives including completion of the remainder of its remediation work, reinstatement of its cannabis licenses, resumption of production and processing operations and a return to the recreational and medical cannabis markets.

[6] On May 8, 2020, the Applicants obtained a Mediation Order appointing the Honourable Dennis O'Connor, Q.C. to conduct a mediation process between CT Holdings, the plaintiffs and representative plaintiffs in the Securities Claims, co-defendants and insurers with a view to reaching a resolution of some or all of the securities and related claims between the various parties.

[7] On January 19, 2021, following extensive negotiations, facilitated by Mr. O'Connor, the Applicants entered into a Restructuring Support Agreement ("RSA") with the representative plaintiffs in the Ontario Class Action and the U.S. Class Action (the "Securities Claimants"). In general, the RSA provides for the settlement of the Class Actions against the Applicants and the support of the Securities Claimants to enable the Applicants to emerge from the CCAA proceedings.

[8] The settlement framework is set out in Schedule "B" to the RSA and provides, in part, for the establishment of a Securities Claimants Trust (the "Trust") for the benefit of Securities Claimants; that CT Holdings will contribute $50 million and assign all its securities related claims to the Trust and will provide information and cooperation to the Securities Claimants in the prosecution of the continuing litigation; a court order will be obtained, either as part of the Sanction Order or otherwise, barring any claims against the Settlement Parties asserted in the Actions or based on events giving rise to the Actions, including contribution and set-off claims; and if the amounts obtained by the Trust through settlement or prosecution of claims exceeds $250 million net of fees and expenses, CT Holdings will be entitled to receive payments up to the settlement amount of $50 million;

[9] The RSA further provides that additional Settlement Parties can be added to it, providing them the benefit of its provisions. Subsequently, additional settlements have been reached with co-defendants resulting in the Trust having received an additional $83 million.

[10] On May 28, 2021, meetings of four classes of Affected Creditors were held in accordance with a Meeting Order obtained on April 16, 2021, at which the March draft Plan was overwhelmingly approved by each class of creditors both by the numbers voting and by the value of their claims.

[11] In general, the Plan which the Applicants seek approval of, implements the framework for the settlement of all Securities Claims and addresses the other claims and contingent claims against the Applicants, to enable them to continue to carry on business and avoid the social and economic consequences of liquidation. It is supported by the Monitor, the Chief Restructuring Officer (FTI Consulting Canada Inc.) and a broad constituency of stakeholders including the General Unsecured Creditors and the Securities Claimants (the Class Action plaintiffs and other Settling Parties who have joined the RSA).

[12] As a result of many of the issues between the stakeholders and the Applicants being resolved during the proceedings, at the commencement of the hearing, only Zola Finance Holdings Ltd. and Igor Gimelshtein (the "Zola Plaintiffs"), KPMG LLP and Newline Insurance Co. opposed the motion. Further, prior to the conclusion of the hearing, Newline advised it had resolved its issues with the Applicants and was no longer opposing leaving only the Zola Plaintiffs and KPMG in opposition.

Discussion

[13] There is no issue between the parties concerning the requirements that must be met for court approval of a plan of compromise or arrangement under the CCAA. They are well established: a) there must be strict compliance with all statutory requirements; b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA and prior orders of the court in the CCAA proceedings; and c) the plan must be fair and reasonable. See: *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 22; *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 14.

The Zola Plaintiffs

[14] Included in the orders sought is a request for approval of the Allocation and Distribution Scheme ("A&DS"). The Zola Plaintiffs support the Plan but take issue with one aspect of the A&DS.

[15] The A&DS sets out a process for securities claimants who purchased shares in CT Holdings between January 1, 2018 and September 17, 2019 to seek compensation from the net proceeds from settlements or prosecution of actions or assigned claims by the Trust. It arose out of the RSA and was developed by Class Action lead plaintiffs and Class Action counsel with input from an expert financial economist.

[16] The Class Actions are based on allegations of misrepresentation by CT Holdings, among others. They allege CT Holdings share price was artificially inflated by different amounts at different periods of time during the share purchase period because different alleged misrepresentations began at different times and because artificial inflation declined incrementally after certain actions were taken by CT Holdings. The compensation is based, in part, on artificial "share inflation" at the time the shares were acquired and disposed of.

[17] The allegation in the Ontario Class Action is that CT Holdings made separate misrepresentations about compliance at each of the Vaughan and Niagara facilities. The former between June 1, 2018 and September 30, 2018, and the latter from October 1, 2018 forward. The October 1, 2018, date is based on CT Holdings public announcement that the illegal growing in Niagara began in October 2018.

[18] The A&DS provides for an artificial inflation amount between June 1 and September 30, 2018 (when only the Vaughan misrepresentation was outstanding) of $1.29 and $5.02 from October 1, 2018 onward reflecting the effect of both the Vaughan and Niagara misrepresentations on the share price.

[19] The Zola Plaintiffs take issue with the date provided for in the A&DS when CT Holdings began to misrepresent the operations in its Niagara facility. They submit that the October 1, 2018 date is arbitrary and not fair and reasonable and request that the court revise the date to a date a few weeks earlier in September 2018. In support, they have filed the affidavit of Mr. Gimelshtein, Zola's former CFO, who has extensive knowledge of cannabis operations.

[20] Mr. Gimelshtein's evidence is that the October 1, 2018 date is not a logical start date for when CT Holdings illegal growing began at its Niagara facility because the decision and preparation to begin the illegal operation would have begun one to two weeks and up to four weeks before the growth start date.

[21] The Zola Plaintiffs purchased 3 million shares of CT Holdings between September 26 and 28, 2018. There is no question therefore, based on the compensation formula in the A&DS that they will receive significantly less compensation for their loss than if they purchased the shares a few days later. But that does mean that A&DS should be amended as they request.

[22] I am satisfied, based on the evidence, that the compensation formula set out in the A&DS has been developed on a rational basis and is reasonable having regard to the interests of the Securities Claimants as a whole. The CCAA Representatives case theory about when the misrepresentations began and upon which the compensation formula is reasonable and supported by the evidence. While I have concerns about Mr. Gimelshtein's evidence given his obvious conflict, the conception of the illegal growing as deposed by him could still have taken place in October based on CT Holdings public statement.

[23] In my view, the A&DS is fair and reasonable, and I therefore reject the Zola Plaintiffs' objection.

KPMG

[24] KPMG Inc. was the auditor for the applicants during the material time. It is also a Co-Defendant in the Securities Claims. It has objected to the Plan since the first iteration in March 2021. While some of its objections have been resolved along

the way including during the break between the hearing dates, the following issues remain:

1) Was KPMG improperly excluded from voting at the Creditors' Meetings as a result of the creditors being improperly classified, resulting in the vote not reflecting a true consensus of affected creditors;

2) Whether the assignment of the Applicants' claim for auditor's negligence against KPMG to the Trust in the Plan is fair and reasonable; and

3) Whether the Bar Order terms in paragraph 7.3 of the Plan, and specifically the Judgment Reduction Provision in Article7.3(2) is fair and reasonable.

Exclusion from Voting

[25] In my view, KPMG's complaint that it was excluded from voting at the creditors' meeting is one that should have been raised by it at the hearing for the Meetings Order. Instead, KPMG submits that in order to have an opportunity to rectify its concerns with the Applicants regarding the draft Plan, it withdrew its objection to the Meetings Order while reserving all of its rights and arguments with respect to opposing the Plan. That reservation is incorporated into the Meetings Order and acknowledged by the Applicants.

[26] Parties are encouraged to resolve issues with a CCAA plan prior to court approval of the Meetings Order, if possible. A plan that cannot meet the sanction approval criteria at that stage will result in a meeting order not being granted: *Target Canada Co. (Re)*, 2016 ONSC 316. This is particularly so, in my view, where the issue concerns the classification of creditors and whether a creditor has a right to vote on the plan, as here.

[27] That said, KPMG's claim against CT Holdings is a claim for contribution and indemnity as a co-defendant in the Securities Claims. While it is an equity claim under the CCAA, it is derivative to the claims of the Securities Claimants. The Securities Claimants were classified as their own class. Even if KPMG was placed in that class, given the nature of its claim, in my view, it would not have had the right to vote as a result of the rule against double proofs which would apply.

[28] The "rule against double proof" provides that there cannot be two proofs of claim filed for the same debt, even though there may be two separate contracts or sources of liability in respect of that debt: *Aslan (Re)*, 2014 ONCA 245 at para. 16. Further, the rule extends to voting: *Quintette Coal Ltd. (Re)*, 1991 CanLII 303 (B.C.S.C.) at para. 35.

[29] Accordingly, I agree with the Applicants that the classification of the Affected Creditors was appropriate in the circumstances and having regard to the nature of KPMG's claim, it and the other non-settling defendants were not entitled to a vote at the creditors' meetings.

Assignment of Claims

[30] KPMG takes issue with the manner in which the purported assignment of the Applicants' auditor's negligence claim against it is provided for in the Plan.

[31] The SRA provides as part of the settlement between the Applicants and the Securities Claimants, that the Plan provide that the Applicants assign their "Assigned Claims" (if any) to the Trust on the date of the Plan's implementation (para. 3.01(c)). The SRA defines "Assigned Claims" as follows:

> "Assigned Claims" means the claims of CannTrust Holdings against any Co-Defendant that is a Non-Settlement Party and, if applicable, the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for loss or damage up to the date of the CCAA Sanction Order and arise from or relate to the Securities-Related Matters.

[32] The Plan, as well as its earlier iteration in March 2021, provides for the assignment of "Assigned Claims" (if any) to the Trust prior to the Implementation Date. Other than the addition of CannTrust Opco as an assignor, the March draft contained a definition of "Assigned Claims" similar to the one in the SRA.

[33] The definition of "Assigned Claims" in the Plan for approval provides as follows:

> "Assigned Claims" means (i) the claims of CannTrust Holdings and CannTrust Opco against any Co-Defendant that is a Non-Settlement Party, other than contribution and indemnity claims and, if applicable, (ii) the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for the loss or damage up to the date of the Sanction Order and arise from or relate to the Securities-

> Related Matters, and without limiting the generality of the foregoing (iii) the claims of CannTrust Holdings and CannTrust Opco in contract and tort against KPMG LLP as of the Filing Date.

[34] In addition, the bar in respect of claims over by a Settlement Party against a Co-Defendant in Article 7.3(3) of the Plan was also amended subsequent to the March draft "for greater certainty" to exclude all Assigned Claims. It now reads:

> 7.3(3) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, all Claims or the Channelled Claims, which were or could have been brought by a Settlement Party in the Actions or otherwise against a Co-Defendant that is a Non-Settlement Party, excluding for greater certainty all Assigned Claims, will be permanently and forever barred, estopped, stayed and enjoined.

[35] To make matters even more confusing, on June 16, 2021, the day before the resumption of the hearing of the motion, the Applicants provided yet another revision to the proposed definition of "Assigned Claims" in the Plan. The June 16th definition reads:

> "Assigned Claims" means (i) if applicable, the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for loss or damage up to the date of the CCAA Sanction Order and arise from or relate to the Securities-Related Matters, and (ii) the claims of CannTrust Holdings and CannTrust Opco in contract and tort arising from the audit and professional services of KPMG LLP as of the Filing Date.

[36] KPMG submits, relying on *Target*, that the Applicants should not be permitted to amend the initial definition of "Assigned Claims" contained in the March version of the Plan which was approved by the creditors and in the alternative that the definition of "Assigned Claims" in both the June 2 Plan and the June 16 revised definition should be amended to strike out the specific reference to CannTrust Holdings and CannTrust Opco's claim against it. It further submits that the wording in Article 7.3(3) of the Plan excluding "Assigned Claims" from the bar order for all cross-claims by Settlement Parties against Co-Defendants should be removed.

[37] The Applicants submit that the principle in *Target* does not apply given there was never any agreement with KPMG concerning the Plan and the Plan provides that the Applicants can amend it at any time. In addition, both the Applicants and the Securities Claimants submit that the assignment of the KPMG audit claim was

an important factor in reaching their settlement and there is no basis in law for not allowing the assignment.

[38] I agree with the Applicants that the principle discussed in *Target*, to the effect that a proposed CCAA plan which contravenes an agreement previously reached between the debtor and a stakeholder will not be sanctioned, is not applicable. There is no evidence there was ever any agreement between KPMG and the Applicants in respect the Assigned Claims. Further, and as noted by the Applicants, Article 10.3 of the Plan provides that it can be amended by them subsequent to the Meeting.

[39] I have no issue with CannTrust Holdings and CannTrust Opco assigning any claims it may have to the Trust as long as such assignment is not inconsistent with the Plan or otherwise contrary to law. I accept the evidence on behalf of the Securities Claimants that the assignment of the Applicant's claims, including its claim against KPMG for auditors' negligence, is an important element of the settlement with the Applicants. I have a concern, however, with the way in which the Applicants have provided for the assignment in the Plan.

[40] More specifically, the Plan includes a bar on any claim the Applicants may have for contribution and indemnity or other claims over against a Co-Defendant that is a Non-Settlement Party – i.e., KPMG (Article 7.3(3)). At the same time, however, the Applicants seek to exclude "all Assigned Claims" from that bar. The result is that while the Applicants are barred from bringing a contribution and indemnity claim or claims against their Co-Defendants, by assigning that claim, their assignee can. In other words, it permits the Applicants to do indirectly what they can't do directly. In my view, the removal of the bar for all Assigned Claims is neither fair nor reasonable.

[41] Further, I also see no reason why the definition of "Assigned Claims" has to specifically refer to CannTrust Holdings and CannTrust Opco's claims against KPMG other than to provide some sort of legitimacy to the assignment as a result of the court's sanction of the Plan. Specific reference to the claim against KPMG is neither necessary nor appropriate. Any assignment should permit the defendant to raise all defences available to it both in respect of the assigned claim as well as the assignment, including a defence to a claim for contribution and indemnity arising from the bar order in Article 7.3(3) of the Plan.

The Judgment Reduction Provision

[42] KPMG submits that the Bar Order in Article 7.3 of the Plan and specifically

the Judgment Reduction Provision in Article 7.3(2), is unfair and prejudicially affects its rights.

[43] The initial version of the Plan circulated in March 2021 purported, among other things, to release CT Holdings from all securities related indemnity claims. As a result, in the event of joint and several liability of a non-settling defendant in the remaining Securities Action, that defendant would be liable for the full amount of the judgment, including CT Holdings' portion of the liability, without recourse to CT Holdings for contribution and indemnity.

[44] Prior to the motion for the Meetings Order, the Applicants amended the Bar Order provision in Article 7.3 of the Plan to provide for a Judgment Reduction Provision as follows:

> 7.3(2) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, any judgment or other award obtained by a Securities Claimant or the Securities Claimant Trust in respect of any Securities-Related Claim against a Non-Settlement Party or other Person that is not a Released Party shall be reduced by the amount, if any, that the court or other tribunal adjudicating the Securities-Related Claim determines would have been recovered by such Non-Settlement Party or other Person pursuant to a Securities-Related Indemnity Claim held by it against a Released Party in respect of such Securities-Related Claim but for the release of such Securities-Related Indemnity Claim pursuant to the CCAA Plan or the CCAA Sanction Order, determined as of the moment before the Effective Time and, for greater certainty, taking into account (i) the Cash Contribution to be made by CannTrust Holdings to the Securities Claimant Trust and (ii) all other Securities-Related Indemnity Claims of other Non-Settlement Parties or other Persons participating in any recovery on a *pro rata* basis.

[45] KPMG submits that the Judgment Reduction Provision is fundamentally flawed and is not fair and reasonable to the non-settling defendants. It submits that the Bar Order in Article 7.3 deviates from the provisions a *Pierringer* arrangement by not limiting the non-settling defendants' joint and several liability to the Security Claimants in the Securities Claims to several liability resulting in prejudice to the non-settling defendants, including KPMG.

[46] While the Applicants acknowledge that a *Pierringer* arrangement is otherwise appropriate in respect of the settlement of partial claims in class actions, they submit the settlement here occurs within a CCAA proceeding and therefore different considerations apply involving the balancing of the interests of all stakeholders. Accordingly, they submit the Judgment Reduction Provision is

appropriate and places the non-settling defendants, including KPMG, in an economically neutral position. Even if the non-settling defendants had a claim over against the Applicants in the Securities Claimants' action, given that they are insolvent, that claim would not be satisfied leaving the non-settling defendants liable for 100% of the Securities Claimants damages. Further, the Judgment Reduction Provision gives the non-settling defendants a credit for the $50 million the Applicants paid to the Trust as part of its settlement with the Securities Claimants.

[47] The Applicants submit that the Judgment Reduction Provision is appropriate in the circumstances and rely on *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 and *Arrangement relative à 9323-7055 Québec Inc. (Aquadis International Inc.)*, 2018 QCCA 1345.

[48] A *Pierringer* arrangement facilitates settlement between a plaintiff and a defendant in circumstances where other defendants remain against whom the plaintiff wishes to proceed to trial and who have a crossclaim for contribution and indemnity against the settling defendant. The purpose of a *Pierringer* arrangement is to enable the settlement while maintaining a level playing field for the remaining defendants in the action: *Endean* at para. 52. See too: *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 27, [2013] 2 S.C.R. 623 at paras. 23-26.

[49] The essential provisions of a *Pierringer* arrangement are as follows: 1. The settling defendant settles with the plaintiff; 2. The plaintiff discontinues its claim against the settling defendant; 3. The plaintiff continues its action against the non-settling defendant but limits its claim to the non-settling defendant's several liability; 4. The settling defendant agrees to co-operate with the plaintiff in the action against the non-settling defendant; 5. The settling defendant agrees not to seek contribution and indemnity from the non-settling defendants; and 6. The plaintiff agrees to indemnify the settling defendants against any claims over by the non-settling defendant: *Endean* at para. 52. As noted in *Sable Offshore* at para. 26, it is inherent in *Pierringer* agreements that non-settling defendants can only be liable for their share of the damages and are therefore severally, not jointly, liable with the settling defendants.

[50] The objectives of a *Pierringer* arrangement include promoting settlement while ensuring fairness to the non-settling defendants. They have been endorsed by courts in Canada for some time and approved in CCAA proceedings. See: *Hollinger Inc.*, Re, 2012 ONSC 5107.

[51] The settlement between the Applicants and the Securities Claimants as provided for in the RSA contains some but not all the provisions of a *Pierringer* arrangement. It provides for the settlement of the Securities Claimants action against the Applicants; for the co-operation of the Applicants in the continuing action; and for what is referred to as a "Bar Order" which provides that the "Definitive Documents" which include the Plan and the Sanction Order, will provide, among other things, a bar of any and all claims against the Applicants that relate to or arise out of, among other claims, any claims for contribution and indemnity by any non-settling defendants (RSA, s. 3.02(c)). That bar is provided for in Article 7.3(1) of the Plan.

[52] Notably, there is no agreement in the SRA that the Securities Claimants will limit their claims against the non-settling defendants to their several liability or that they will indemnify the Applicants in respect of any claims over against the applicants by the non-settling defendants.

[53] Article 7.3 of the Plan provides for the bar orders required by the SRA. In response to the concerns expressed, in part, by KPMG, rather than limiting the liability of the non-settlings defendants in the Securities Claims to several liability, the Applicants added the Judgment Reduction Provision in Article 7.3(2).

[54] In my view, Article 7.3 of the Plan as it is currently drafted is not fair to the non-settling defendants, including KPMG. While it bars any claims, including contribution and liability, against the Applicants, it fails to restrict the Securities Claimants' claims in the Action against the non-settling defendants to several liability. Having elected to settle with the Applicants, the Securities Claimants bear the risk of an inadequate settlement. By enabling the Securities Claimants to continue their action against the non-settling defendants and recover 100% of their damages, that risk shifts to the non-settling defendants. Rather than balancing the interests of the stakeholders therefore, it favours the Securities Claimants (one group of creditors) over the non-settling defendants (another group of creditors).

[55] Importantly, while there is evidence of the importance of the assignment to the settlement between the Applicant and the Securities Claimants, there is no evidence of the importance of the Securities Claimants being able to maintain their claims against the non-settling defendants and recover 100% of the damages while barring the non-settling defendants right to contribution and indemnity.

[56] The Applicants submit, relying on *Endean*, that because they are insolvent, the non-defendants' right to contribution and indemnity is worthless. While that is true now, it will not necessarily be the case at some point in the future when the issue of any claim over will be decided and when the Applicants have emerged from these insolvency proceedings and hopefully have become a successful and credit worthy corporation.

[57] Nor do I consider that the Judgment Reduction Provision in Article 7.3(2) of the Plan operates to cure the failure to limit the non-settling defendants' joint and several liability to several only. Reducing the non-settling defendants' liability by the amount of the settlement paid by the Applicants has no relationship to the non-settling defendants' several liability to the plaintiffs.

[58] A true *Pierringer* arrangement has no regard to the settlement amount, nor does it have to be disclosed (*Sable Offshore*). The protection for the non-settling defendant (who is not a party to the settlement agreement) is the plaintiff's agreement to limit its claim to the non-settling defendant's several liability, not a credit for the settlement amount against 100% of the liability.

[59] The Applicants submit that *Aquadis* supports the Judgment Reduction Provision. I disagree. *Aquadis* concerned the approval of a proposed settlement of some defendants in a products liability claim where the *Québec Civil Code* provides for 100% liability of each person in the chain of the goods, from the seller to the manufacturer with a right of subrogation. In approving the judgment reduction provision, which effectively indemnified the non-settling parties for any portion of the damages the court may determine it could have effectively recovered from the settling party, the court equated it to a *Pierringer* arrangement. In my view, in circumstances such as here, where there is joint and several liability of the defendants and the non-settling defendants' liability can be restricted to several liability, a judgment reduction provision is neither necessary nor appropriate.

[60] The Applicants rely on *Endean* to support the Judgment Reduction Provision. In *Endean* the trial judge reduced the non-settling defendant's liability by apportioning a percentage of liability to entities who were bankrupt and had not been sued. The Court of Appeal held that liability should be allocated between the defendants and that interpreting the bar order in a *Pierringer* agreement to apply to bankrupt non-defendants was not appropriate. Overall, however, the Court affirmed the underlying policy goals sought to be achieved by a *Pierringer* arrangement.

[61] I also disagree with the way in which the Applicants have drafted the Judgment Reduction Provision to provide for the assessment of recoverability. Apart from being confusing and potentially difficult to determine, by providing for a time when the Applicants were insolvent ("as of the moment before the Effective Time") rather than, as noted above, at some point in the future when a non-settling defendant would actually seek to recover indemnity and after the Applicants have emerged from insolvency proceedings is not appropriate.

[62] For those reasons, I do not consider the Plan, and specifically Article 7.3(2) and the wording of Article 7.3(3) referred to, to be fair and reasonable in the circumstances and as a result, I am not prepared to approve or sanction the Plan in its current form.

Conclusion

[63] For the above reasons, therefore, I dismiss the sanction motion with leave to bring it back on, if, and when the issues I have identified have been addressed.

[64] In the interim and to allow that process to occur, I extend the stay in the proceeding to July 30, 2021.

L. A. Pattillo J.

Released: June 24, 2021

TAB 6

CITATION: Re Crystallex International Corporation, 2013 ONSC 823
COURT FILE NO.: CV-11-9532-00CL
DATE: 20130205

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

BEFORE: Newbould J.

COUNSEL: Markus Koehnen and Jeffrey Levine, for Crystallex International Corporation

Jay A. Carfagnini, Fred Myers and Christopher Armstrong, for Computershare Trust Company of Canada

David R. Byers and Maria Konyukhova, for Ernst & Young Inc., Monitor

R. Shayne Kukulowicz, Jane O. Dietrich and Ryan C. Jacobs for Tenor Special Situations Fund LP

John T. Porter, for J.A. Reyes

Erik Penz, for Forbes & Manhattan Inc. and Aberdeen International Inc.

DATE HEARD: January 31, 2013

E N D O R S E M E N T

[1] Crystallex moves to extend the stay of proceedings originally granted in the Initial Order and for directions on how to proceed in this CCAA application. The Noteholders move for an order directing a meeting of creditors to vote on a plan of arrangement delivered by the

Noteholders with their motion record and staying Crystallex from commencing or continuing any proceedings against the Noteholders by way of claim, defence or set off.

[2] On November 30, 2012 I approved a claims procedure order to establish a process for the identification and determination of claims against Crystallex and its current and former officers and directors except for the debt claims of the Noteholders which were to be dealt with in a subsequent order. At that time the issue regarding the debt claims of the Noteholders was not made apparent. It now appears from the material filed that Crystallex asserts that the Noteholders may have mis-used confidential information received from Crystallex in earlier litigation contrary to the implied undertaking rule and that as a penalty the Court has the power to deny the Noteholders the ability to propose a plan, vote on a plan and/or limit Noteholder recovery to the principal amount they paid for their Notes.

[3] Thus the directions that Crystallex seeks on its motion deal with the procedure for the Noteholders proving their claims and the resolution of the alleged improper use of information by the Noteholders.

[4] Crystallex says that it would like to complete a plan of arrangement and that it has tried without success to negotiate a plan with the Noteholders. It says that the next logical step in the process would be to have creditors prove their claims but that the Noteholders have taken steps in the general proof of claim process to make that extremely expensive. They have filed proofs of claim against Crystallex and 25 present and former directors and officers asserting a number of causes of action and have reserved their rights to discovery for all of those claims. In accordance with the claims procedure order of November 30, 2012, the proof of claim against Crystallex does not include a claim on the debt owing under the Notes.

[5] In the proofs of claim by the Ad Hoc Committee of Noteholders of Crystallex against Crystallex and against 12 directors and 13 officers of Crystallex, the claims filed are for unliquidated claims that are described in the proofs of claim as:

> "all Claims it may hold… Including, without limitation, any Claims it may hold for negligence, oppression, defamation, unlawful interference with economic interest, intimidation, abuse of process, derivative actions, malicious prosecution,

> breach of all duties owed by Crystallex to the Creditor by statute, by agreement, at law or in equity and any Claims arising as a result of any action or omission of Crystallex (but excluding, for the avoidance of doubt, the Noteholder Claim, which is not subject to the Claims Procedure Order), all plus interest and costs on a full indemnity basis."

[6] It became apparent during argument on the motions that these claims filed by the Ad Hoc Committee of Noteholders were made as a matter of retaliatory tactics to the claim of Crystallex.

[7] There have been without prejudice negotiations between Crystallex and the Noteholders for several months, some taking place in mediations with Justice Campbell. Each side has plenty of criticism of the other and blames the other side for the lack of progress in the negotiations. If there is a resolution between Crystallex and the Noteholders, the Crystallex claim of mis-use of information and the damage claims by the Ad Hoc Committee of Noteholders will go away. It is unfortunate that these competing claims have been made at this late date in the negotiations. They are not helpful to a resolution. All sides agree that a resolution between Crystallex and the Noteholders is critical so that the main business of Crystallex will be to pursue the arbitration against Venezuela and the expense of litigating against each other will stop.

[8] The Noteholders say that the best way to create a framework is for a meeting of creditors to be called to vote on their plan of arrangement. They ask that the meeting be held on March 6, 2013 and that if the plan is approved the sanction hearing be scheduled for March 19, 2013. That process, it is said, will put a tight timeline on Crystallex and the Noteholders which will facilitate a settlement. In my view, ordering a meeting of creditors to vote on the Noteholders' plan of arrangement is not appropriate at this time, for a number of reasons.

[9] First, the plan contains a number of provisions that are contrary to the terms of the DIP facility with Tenor and thus the plan could not be implemented in its present form. I am in agreement with Tysoe J. (as he then was) in *Re Doman Industries Ltd*. (2003), 41 C.B.R. (4th) 29 that if the court does not have jurisdiction to approve a plan, it would be inappropriate to authorize the calling of a meeting of creditors to consider the plan. Mr. Myers says that the Noteholders are now negotiating with Tenor to see if the issues can be resolved, but in my view

the process proposed by the Noteholders puts the cart before the horse. The plan appears to have been quickly drafted without due regard to all applicable circumstances.

[10] Second, the Noteholders sprung their plan on Crystallex and the other stakeholders only a few days before the motion by including it in their motion record. It was not preceded by a term sheet or discussed with Crystallex and apparently its contents are entirely new to Crystallex. This is hardly a preferred way to have done it. The plan is complex and Crystallex has given it to its financial expert to review. This is not a situation in which the creditors can say that all avenues for a resolution with the debtor have been exhausted and that they require their plan to be voted on in the absence of a plan by the debtor being put forward.

[11] Third, there are large issues outstanding in the present state of play that should be dealt with if a vote is to take place. The claims against Crystallex and the officers and directors now made by the Noteholders would need to be dealt with. The officers and directors would be expected to make indemnity claims against Crystallex. The issue raised by Crystallex regarding the alleged mis-use of information and the effect on the right of the Noteholders to vote would also need to be dealt with.

[12] The Noteholders say that all of this can be dealt with at the stage of the court application for sanction approval. They point to *Re Sino-Forest* 2012 ONCA 816 in which a number of issues, including the validity and quantum of any claim, had not been determined and yet an order was made requiring the holding of a meeting to vote on a plan. However, that was an unusual case and the order was made on the consent of all parties. That is not the situation here at all.

[13] In my view the motion by the Noteholders to now have a meeting to vote on its plan of arrangement is tactical and raised to get a perceived leg up in negotiations. It is dismissed, without prejudice to the Noteholders to later bring it back on if so advised. I decline to deal with the issue raised by Crystallex as to whether a plan would require the consent of Crystallex.

[14] I am also of the view that the request of Crystallex to require the Noteholders to disclose records should not be granted at this time. The parties should concentrate on negotiating if at all

possible a resolution leading to a consensual plan. There should be a down tooling on both sides of litigation threats in order to facilitate further negotiations.

[15] I have of course not been a party to any of the negotiations between Crystallex and the Noteholders, and thus do not know what has been discussed. I do not wish, however, to leave the impression that I view the fault of unsuccessful negotiations to lie at the feet of only one side. From what I can discern, it appears to me that both sides bear some blame.

[16] The Monitor has been involved in the negotiations of Crystallex and the Noteholders and is of the view that their positions are not so far apart as to be insurmountable and that the entrenchment of the parties may be softening. There is evidence that the parties are still willing to negotiate.

[17] Mr. Near, the designated director of Crystallex responsible for conducting negotiations with the Noteholders, views the new plan by the Noteholders as an opportunity for a fresh start. Mr. Koehnen said that Crystallex intends to deliver a response to the Noteholders within three weeks from the date of the hearing of this motion. Mr. Myers in his letter to Mr. Kent of January 24, 2013 referred to the possibility of a consensual plan and in court stated that the parties should be put in a room under time pressure in order to negotiate. I agree with that sentiment so long as the playing field is as level as may be possible.

[18] An extension of the stay of proceedings is required. At the conclusion of the hearing I reserved my decision but ordered that the stay be continued pending the release of this decision.

[19] Crystallex in its factum takes the position that an extended stay while Crystallex pursues an arbitration award or settlement would be the least costly as it would obviate the need to litigate the claims filed by the Noteholders and would preserve the rights of the Noteholders to pursue their claim when they knew the results of the arbitration. Mr. Koehnen did not push this during argument. Mr. Reyes, a shareholder, also takes this position and relies on a statement of Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 14 that the best outcome of a CCAA proceeding is achieved when the stay of proceedings

provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed.

[20] In my view, without deciding whether such an order is legally possible, to make such an order now would not be helpful to the process. This should not, however, be viewed as any indication that serious negotiations on the part of both parties are not expected to occur in a timely fashion.

[21] The stay of proceedings was last ordered in December to be extended on consent to January 31, 2013. The motion that day had requested an extension to May 17, 2013 and the cash flow prepared by Crystallex and contained in the Monitor's report indicated sufficient cash to carry on to at least May 31, 2013. An updated cash flow has been prepared for the period up to May 31, 2013 which Crystallex and the Monitor believe remains appropriate.

[22] In my view, it is appropriate to extend the stay of proceedings to May 17, 2013 on the following conditions:

(a) Crystallex is to deliver its response to the Noteholders's plan no later than February 21, 2013.

(b) The parties are directed to attend a further mediation session with Campbell J., to be held subject to Campbell J.'s schedule, within one month from today's date.

(c) If there is no resolution of all issues, a 9:30 appointment is to be held with me to discuss further steps that need be taken. No motion by either side is to be brought without my approval.

[23] Order to go in accordance with these reasons.

Newbould J.

DATE: February 05, 2013

TAB 7

In the Matter of a Plan of Compromise or Arrangement of
Sino-Forest Corporation

[Indexed as: Sino-Forest Corp. (Re)]

114 O.R. (3d) 304

2012 ONCA 816

Court of Appeal for Ontario,
Goudge, Hoy and Pepall JJ.A.
November 23, 2012

Debtor and creditor -- Arrangements -- Shareholders of company commencing class actions against company, underwriters and auditors for misrepresentation -- Plaintiffs alleging that misrepresentations artificially inflated price of company's shares -- Company successfully seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Underwriters and auditors filing proofs of claim against company seeking contribution and indemnity for any amounts they might be ordered to pay as damages in class actions -- Supervising judge not erring in finding that those claims were equity claims within meaning of s. 2(1) of CCAA despite fact that underwriters and auditors were not holders of an equity interest -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1).

The appellant underwriters provided underwriting services in connection with three S Co. equity offerings and four S Co. note offerings. The appellant auditors served as S Co.'s auditors at the relevant time. Shareholders of S Co. brought

proposed class actions against S Co. and, among others, the underwriters and auditors, alleging that S Co. repeatedly misrepresented its assets and financial situation and its compliance with generally accepted accounting principles in its public disclosure, that the auditors and underwriters failed to detect those misrepresentations, and that the auditors misrepresented that their audit reports [page305] were prepared in accordance with generally accepted auditing standards. They claimed that the misrepresentations artificially inflated the price of S Co.'s shares and that proposed class members suffered damages when the shares fell after the truth was revealed. S Co. successfully sought protection pursuant to the provisions of the Companies' Creditors Arrangement Act ("CCAA"). The auditors and underwriters filed proofs of claim seeking contribution and indemnity for, among other things, any amounts that they were ordered to pay as damages to the plaintiffs in the class actions. S Co. applied for an order that the claims against it arising from the ownership, purchase or sale of an equity interest in the company, including shareholder claims, and any indemnification claim against it related to or arising from the shareholder claims, including the claims for contribution or indemnity, were equity claims under the CCAA. The application was granted. The underwriters and auditors appealed.

Held, the appeal should be dismissed.

The definition of equity claim in s. 2(1) of the CCAA focuses on the nature of the claim, and not the identity of the claimant. The appellants' claims for contribution and indemnity were clearly equity claims, despite the fact that the appellants did not have an equity interest in S Co. Parliament adopted expansive language in defining "equity claim". Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)". The Supreme Court of Canada has repeatedly held that the words "in respect of" are of the widest possible scope, conveying some link or connection

between two related subjects. It was conceded that the shareholder claims against S Co. were claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of para. (d) of the definition of "equity claim". There was an obvious link between the appellants' claims against S Co. for contribution and indemnity and the shareholders' claims against S Co. Parliament also defined equity claim as "including a claim for, among others", the claims described in paras. (a) to (e). The Supreme Court has held that the phrase "including" indicates that the preceding words -- "a claim that is in respect of an equity interest" -- should be given an expansive interpretation, and include matters which might not otherwise be within the meaning of the term. Accordingly, the appellants' claims, which clearly fell within para. (e), were included within the meaning of the phrase "claim that is in respect of an equity interest". Parliament chose not to include language in s. 2(1) restricting claims for contribution or indemnity to those made by shareholders. If only a person with an equity interest could assert an equity claim, para. (e) would be rendered meaningless. No legislative provision should be interpreted so as to render it mere surplusage. Looking at s. 2(1) as a whole, it appeared that the remedies available to shareholders were all addressed by s. 2(1)(a) to (d). The logic of s. 2(1)(a) to (e) therefore also supported the notion that para. (e) referred to claims for contribution and indemnity not by shareholders, but by others. The definition of "equity claim" was sufficiently clear to alter the pre-existing common law.

Cases referred to

Blue Range Resource Corp. (Re), [2000] A.J. No. 14, 2000 ABQB 4, [2000] 4 W.W.R. 738, 76 Alta. L.R. (3d) 338, 259 A.R. 30, 15 C.B.R. (4th) 169, 94 A.C.W.S. (3d) 223; CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, 171 D.L.R. (4th) 733, 237 N.R. 373, J.E. 99-861, 122 B.C.A.C. 1, 133 C.C.C. (3d) 426, 29 C.E.L.R. (N.S.) 1, 23 C.R. (5th) 259, 41 W.C.B. (2d) 411; [page306] Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359, 132 D.L.R. (4th) 223, 88 O.A.C. 161, 26 B.L.R. (2d) 88, 38 C.B.R. (3d) 1, 61 A.C.W.S. (3d) 18 (C.A.); EarthFirst Canada Inc. (Re), [2009] A.J. No. 749, 2009 ABQB 316, 56 C.B.R. (5th) 102; Goodyear Tire & Rubber

Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, [1956] S.C.J. No. 37, 4 D.L.R. (2d) 1, 28 C.P.R. 25, 56 D.T.C. 1060; In Re: Mid-American Waste Systems, Inc., 228 B.R. 816 (Bankr. Del. 1999); Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, 239 F.T.R. 159, 223 D.L.R. (4th) 17, 300 N.R. 321, J.E. 2003-506, 2003 D.T.C. 5185, 120 A.C.W.S. (3d) 532; National Bank of Canada v. Merit Energy Ltd., [2002] A.J. No. 6, 2002 ABCA 5, [2002] 3 W.W.R. 215, 317 A.R. 319, affg [2001] A.J. No. 918, 2001 ABQB 583, [2001] 10 W.W.R. 305, 95 Alta. L.R. (3d) 166, 294 A.R. 15, 28 C.B.R. (4th) 228, 107 A.C.W.S. (3d) 182 (Q.B.); National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, [1990] S.C.J. No. 95, 74 D.L.R. (4th) 197, 115 N.R. 42, J.E. 90-1410, 32 Q.A.C. 250, 50 C.C.L.I. 1, [1990] I.L.R. 1-2663 at 10478, 23 A.C.W.S. (3d) 74; Nelson Financial Group Ltd. (Re), [2010] O.J. No. 4903, 2010 ONSC 6229, 75 B.L.R. (4th) 302, 71 C.B.R. (5th) 153 (S.C.J.); Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42, 2003 SCC 42, 230 D.L.R. (4th) 257, 308 N.R. 271, 177 O.A.C. 235, J.E. 2003-1790, 7 Admin. L.R. (4th) 177, 31 C.C.E.L. (3d) 1, [2003] CLLC 220-062, 125 A.C.W.S. (3d) 85; R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041, 18 A.C.W.S. (2d) 2; R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, 182 D.L.R. (4th) 1, 249 N.R. 201, [2000] 4 W.W.R. 21, J.E. 2000-264, 142 Man. R. (2d) 161, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, 44 W.C.B. (2d) 479; Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., [2011] O.J. No. 3827, 2011 ONSC 5018, 83 C.B.R. (5th) 123, 206 A.C.W.S. (3d) 464 (S.C.J.) [Leave to appeal refused [2012] O.J. No. 31, 2012 ONCA 10, 90 C.B.R. (5th) 141, 211 A.C.W.S. (3d) 264]; Stelco Inc. (Re), [2006] O.J. No. 276, 14 B.L.R. (4th) 260, 17 C.B.R. (5th) 78, 145 A.C.W.S. (3d) 194 (S.C.J.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 [as am.], 121 [as am.]

Bankruptcy Code, 11 U.S.C.S. 502(e)(1)(B)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as

am.], ss. 2(1) [as am], (a)-(e), 6(8), 22.1 [as am.]
Negligence Act, R.S.O. 1990, c. N.1 [as am.], s. 2
Securities Act, R.S.A. 2000, c. S-4, s. 203(1) [as am.], (10)
Securities Act, R.S.B.C. 1996, c. 418, s. 131(1) [as am.], (11)
Securities Act, R.S.N.L. 1990, c. S-13, s. 130(1), (8)
Securities Act, R.S.N.S. 1989, c. 418, s. 137(1), (8)
Securities Act, R.S.O. 1990, c. S.5, s. 130(1) [as am.], (8)
Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12)
Securities Act, R.S.Q., c. V-1.1, ss. 218 [as am.], 219, 221 [as am.]
Securities Act, S.N.B. 2004, c. S-5.5, s. 149(1), (9)
Securities Act, S.N.W.T. 2008, c. 10, s. 111(1), (12)
Securities Act, S.Nu. 2008, c. 12, s. 111(1), (12)
Securities Act, S.Y. 2007, c. 16, s. 111(1), (13)
The Securities Act, C.C.S.M. c. S50, s. 141(1), (11)
The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 137(1), (9)
Authorities referred to
Driedger, Elmer A., Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) [page307]

APPEAL from the order of Morawetz J., [2012] O.J. No. 3627, 2012 ONSC 4377 (S.C.J.) declaring that the appellants' claims were equity claims within the meaning of the Companies' Creditors Arrangement Act.

Peter H. Griffin, Peter J. Osborne and Shara Roy, for appellant Ernst & Young LLP.

Sheila Block and David Bish, for appellants Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Kenneth Dekker, for appellant BDO Limited.

Robert W. Staley, Derek J. Bell and Jonathan Bell, for respondent Sino-Forest Corporation.

Benjamin Zarnett, Robert Chadwick and Julie Rosenthal, for respondent Ad Hoc Committee of Noteholders.

Clifton Prophet, for monitor FTI Consulting Canada Inc.

Kirk M. Baert, A. Dimitri Lascaris and Massimo Starnino, for respondent Ad Hoc Committee of Purchasers.

Emily Cole, for respondent Allen Chan.

Erin Pleet, for respondent David Horsley.

David Gadsden, for respondent Pyry (Beijing).

Larry Lowenstein and Edward A. Sellers, for respondent board of directors.

BY THE COURT: --

I Overview

[1] In 2009, the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA"), was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.

[2] This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation. [page308]

[3] The appellants argue that the supervising judge erred in concluding that the claims at issue are equity claims within

the meaning of the CCAA and in determining the issue before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

[4] For the reasons that follow, we conclude that the supervising judge did not err and accordingly dismiss this appeal.

II The Background

(a) The parties

[5] Sino-Forest is a Canadian public holding company that holds the shares of numerous subsidiaries, which in turn own, directly or indirectly, forestry assets located principally in the People's Republic of China. Its common shares are listed on the Toronto Stock Exchange. Sino-Forest also issued approximately $1.8 billion of unsecured notes, in four series. Trading in Sino-Forest shares ceased on August 26, 2011, as a result of a cease-trade order made by the Ontario Securities Commission.

[6] The appellant underwriters [See Note 1 below] provided underwriting services in connection with three separate Sino-Forest equity offerings in June 2007, June 2009 and December 2009, and four separate Sino-Forest note offerings in July 2008, June 2009, December 2009 and October 2010. Certain underwriters entered into agreements with Sino-Forest in which Sino-Forest agreed to indemnify the underwriters in connection with an array of matters that could arise from their participation in these offerings.

[7] The appellant BDO Limited ("BDO") is a Hong Kong-based accounting firm that served as Sino-Forest's auditor between 2005 and August 2007, and audited its annual financial statements for the years ended December 31, 2005 and December 31, 2006.

[8] The engagement agreements governing BDO's audits of Sino-Forest provided that the company's management bore the primary responsibility for preparing its financial statements in accordance with generally accepted accounting principles ("GAAP") [page309] and implementing internal controls to

prevent and detect fraud and error in relation to its financial reporting.

[9] BDO's audit report for 2006 was incorporated by reference into a June 2007 prospectus issued by Sino-Forest regarding the offering of its shares to the public. This use by Sino-Forest was governed by an engagement agreement dated May 23, 2007 in which Sino-Forest agreed to indemnify BDO in respect of any claims by the underwriters or any third party that arose as a result of the further steps taken by BDO in relation to the issuance of the June 2007 prospectus.

[10] The appellant Ernst & Young LLP ("E&Y") served as Sino-Forest's auditor for the years 2007 to 2012, and delivered auditors' reports with respect to the consolidated financial statements of Sino-Forest for fiscal years ended December 31, 2007 to 2010, inclusive. In each year for which it prepared a report, E&Y entered into an audit engagement letter with Sino-Forest in which Sino-Forest undertook to prepare its financial statements in accordance with GAAP, design and implement internal controls to prevent and detect fraud and error, and provide E&Y with its complete financial records and related information. Some of these letters contained an indemnity in favour of E&Y.

[11] The respondent Ad Hoc Committee of Noteholders consists of noteholders owning approximately one-half of Sino-Forest's total noteholder debt. [See Note 2 below] They are creditors who have debt claims against Sino-Forest; they are not equity claimants.

[12] Sino-Forest has insufficient assets to satisfy all the claims against it. To the extent that the appellants' claims are accepted and are treated as debt claims rather than equity claims, the noteholders' recovery will be diminished.

(b) The class actions

[13] In 2011 and January of 2012, proposed class actions were commenced in Ontario, Quebec, Saskatchewan and New York State against, amongst others, Sino-Forest, certain of its officers, directors and employees, BDO, E&Y and the underwriters. Sino-

Forest is sued in all actions. [See Note 3 below] [page310]

[14] The proposed representative plaintiffs in the class actions are shareholders of Sino-Forest. They allege that Sino-Forest repeatedly misrepresented its assets and financial situation and its compliance with GAAP in its public disclosure; the appellant auditors and underwriters failed to detect these misrepresentations; and the appellant auditors misrepresented that their audit reports were prepared in accordance with generally accepted auditing standards ("GAAS"). The representative plaintiffs claim that these misrepresentations artificially inflated the price of Sino-Forest's shares and that proposed class members suffered damages when the shares fell after the truth was revealed in 2011.

[15] The representative plaintiffs in the Ontario class action seek approximately $9.2 billion in damages. The Quebec, Saskatchewan and New York class actions do not specify the quantum of damages sought.

[16] To date, none of the proposed class actions has been certified.

(c) CCAA protection and proofs of claim

[17] On March 30, 2012, Sino-Forest sought protection pursuant to the provisions of the CCAA. Morawetz J. granted the initial order which, among other things, appointed FTI Consulting Canada Inc. as the monitor and stayed the class actions as against Sino-Forest. Since that time, Morawetz J. has been the supervising judge of the CCAA proceedings. The initial stay of the class actions was extended and broadened by order dated May 8, 2012.

[18] On May 14, 2012, the supervising judge granted an unopposed claims procedure order which established a procedure to file and determine claims against Sino-Forest.

[19] Thereafter, all of the appellants filed individual proofs of claim against Sino-Forest seeking contribution and indemnity for, among other things, any amounts that they are

ordered to pay as damages to the plaintiffs in the class actions. Their proofs of claim advance several different legal bases for Sino-Forest's alleged obligation of contribution and indemnity, including breach of contract, contractual terms of indemnity, negligent and fraudulent misrepresentation in tort, and the provisions of the Negligence Act, R.S.O. 1990, c. N.1.

(d) Order under appeal

[20] Sino-Forest then applied for an order that the following claims are equity claims under the CCAA: claims against Sino-Forest arising from the ownership, purchase or sale of an equity [page311] interest in the company, including shareholder claims ("shareholder claims"); and any indemnification claims against Sino-Forest related to or arising from the shareholder claims, including the appellants' claims for contribution or indemnity ("related indemnity claims").

[21] The motion was supported by the Ad Hoc Committee of Noteholders.

[22] On July 27, 2012, the supervising judge granted the order sought by Sino-Forest and released a comprehensive endorsement.

[23] He concluded that it was not premature to determine the equity claims issue. It had been clear from the outset of Sino-Forest's CCAA proceedings that this issue would have to be decided and that the expected proceeds arising from any sales process would be insufficient to satisfy the claims of creditors. Furthermore, the issue could be determined independently of the claims procedure and without prejudice being suffered by any party.

[24] He also concluded that both the shareholder claims and the related indemnity claims should be characterized as equity claims. In summary, he reasoned that

-- the characterization of claims for indemnity turns on the characterization of the underlying primary claims. The shareholder claims are clearly equity claims and they led to and underlie the related indemnity claims;
-- the plain language of the CCAA, which focuses on the nature

of the claim rather than the identity of the claimant, dictates that both shareholder claims and related indemnity claims constitute equity claims;

-- the definition of "equity claim" added to the CCAA in 2009 broadened the scope of equity claims established by pre-amendment jurisprudence;

-- this holding is consistent with the analysis in Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., [2011] O.J. No. 3827, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (S.C.J.), which dealt with contractual indemnification claims of officers and directors. Leave to appeal was denied by this court, [2012] O.J. No. 31, 2012 ONCA 10, 90 C.B.R. (5th) 141; and

-- "[i]t would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the underwriters, through a claim for indemnification, to be treated as creditors [page312] when the underlying actions of shareholders cannot achieve the same status" (para. 82). To hold otherwise would run counter to the scheme established by the CCAA and would permit an indirect remedy to the shareholders when a direct remedy is unavailable.

[25] The supervising judge did not characterize the full amount of the claims of the auditors and underwriters as equity claims. He excluded the claims for defence costs on the basis that while it was arguable that they constituted claims for indemnity, they were not necessarily in respect of an equity claim. That determination is not appealed.

III Interpretation of "Equity Claim"

(a) Relevant statutory provisions

[26] As part of a broad reform of Canadian insolvency legislation, various amendments to the CCAA were proclaimed in force as of September 18, 2009.

[27] They included the addition of s. 6(8):

> 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 22.1, which provides that creditors with equity claims may not vote at any meeting unless the court orders otherwise, was also added.

[28] Related definitions of "claim", "equity claim" and "equity interest" were added to s. 2(1) of the CCAA:

> 2(1) In this Act,
>
> . . . . .
>
> "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the Bankruptcy and Insolvency Act;
>
> . . . . .
>
> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation, [page313]
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> "equity interest" means
>
> (a) in the case of a company other than an income trust, a share in the company -- or a warrant or option or another right to acquire a share in the company -- other than one that is derived from a convertible debt, and
>
> (b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt[.]

(Emphasis added)

[29] Section 2 of the Bankruptcy and Insolvency Act, R.S.C.

1985, c. B-3 ("BIA") defines a "claim provable in bankruptcy". Section 121 of the BIA in turn specifies that claims provable in bankruptcy are those to which the bankrupt is subject.

> 2. "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
>
> . . . . .
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(Emphasis added)

(b) The legal framework before the 2009 amendments

[30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:

> Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
>
> The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential. [page314]
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement.

(Citations omitted) [See Note 4 below]

(c) The appellants' submissions

[31] The appellants essentially advance three arguments.

[32] First, they argue that on a plain reading of s. 2(1), their claims are excluded. They focus on the opening words of the definition of "equity claim" and argue that their claims against Sino-Forest are not claims that are "in respect of an equity interest" because they do not have an equity interest in Sino-Forest. Their relationships with Sino-Forest were purely contractual and they were arm's-length creditors, not shareholders with the risks and rewards attendant to that position. The policy rationale behind ranking shareholders below creditors is not furthered by characterizing the appellants' claims as equity claims. They were service providers with a contractual right to an indemnity from Sino-Forest.

[33] Second, the appellants focus on the term "claim" in para. (e) of the definition of "equity claim", and argue that the claims in respect of which they seek contribution and indemnity are the shareholders' claims against them in court proceedings for damages, which are not "claims" against Sino-Forest provable within the meaning of the BIA and, therefore, not "claims" within s. 2(1). They submit that the supervising judge erred in focusing on the characterization of the underlying primary claims.

[34] Third, the appellants submit that the definition of "equity claim" is not sufficiently clear to have changed the existing law. It is assumed that the legislature does not intend to change the common law without "expressing its intentions to do so with irresistible clearness": Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42, 2003 SCC 42, at para. 39, citing Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, [1956] S.C.J. No. 37, at p. 614 S.C.R. The appellants argue that the supervising judge's interpretation of "equity claim" dramatically alters the common [page315] law as reflected in National Bank of Canada v. Merit Energy Ltd., [2001] A.J. No. 918, 2001 ABQB 583, 294 A.R. 15, affd [2002] A.J. No. 6, 2002 ABCA 5, 317 A.R. 319. There, the court

determined that in an insolvency, claims of auditors and underwriters for indemnification are not to be treated in the same manner as claims by shareholders. Furthermore, the Senate debates that preceded the enactment of the amendments did not specifically comment on the effect of the amendments on claims by auditors and underwriters. The amendments should be interpreted as codifying the pre-existing common law as reflected in National Bank of Canada v. Merit Energy Ltd.

[35] The appellants argue that the decision of Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. is distinguishable because it dealt with the characterization of claims for damages by an equity investor against officers and directors, and it predated the 2009 amendments. In any event, this court confirmed that its decision denying leave to appeal should not be read as a judicial precedent for the interpretation of the meaning of "equity claim" in s. 2(1) of the CCAA.

(d) Analysis

(i) Introduction

[36] The exercise before this court is one of statutory interpretation. We are therefore guided by the following oft-cited principle from Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.

[38] The appellants' arguments do not give effect to the expansive language adopted by Parliament in defining "equity claim" and read in language not incorporated by Parliament. Their interpretation would render para. (e) of the definition meaningless and defies the logic of the section.

(ii) The expansive language used

[39] The definition incorporates two expansive terms.

[40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of [page316] an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)" (emphasis added).

[41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. In CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, at para. 16, citing R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, at p. 39 S.C.R., the Supreme Court held as follows:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

(Emphasis added in CanadianOxy)

That court also stated as follows in Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, at para. 26:

> The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters.

(Citations omitted)

[42] It is conceded that the shareholder claims against Sino-Forest are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of para. (d) of the definition of "equity claim". There is an obvious link between the appellants' claims against Sino-Forest for contribution and indemnity and the shareholders'

claims against Sino-Forest. The legal proceedings brought by the shareholders asserted their claims against Sino-Forest together with their claims against the appellants, which gave rise to these claims for contribution and indemnity. The causes of action asserted depend largely on common facts and seek recovery of the same loss.

[43] The appellants' claims for contribution or indemnity against Sino-Forest are therefore clearly connected to or "in respect of" a claim referred to in para. (d), namely, the shareholders' claims against Sino-Forest. They are claims in respect of equity claims by shareholders and are provable in bankruptcy against Sino-Forest.

[44] Second, Parliament also defined equity claim as "including a claim for, among others", the claims described in paras. (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words -- "a claim that is in respect of an equity interest" -- should be given an expansive [page317] interpretation, and include matters which might not otherwise be within the meaning of the term, as stated in National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, [1990] S.C.J. No. 95, at p. 1041 S.C.R.:

> [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
>
> [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.

[45] Accordingly, the appellants' claims, which clearly fall within para. (e), are included within the meaning of the phrase a "claim that is in respect of an equity interest".

(iii) What Parliament did not say

[46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of

an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.

(iv) An interpretation that avoids surplusage

[47] A claim for contribution arises when the claimant for contribution has been sued. Section 2 of the Negligence Act provides that a tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort. The securities legislation of the various provinces provides that an issuer, its underwriters and, if they consented to the disclosure of information in the prospectus, its auditors, among others, are jointly and severally liable for a misrepresentation in the prospectus, and provides for rights of contribution. [See Note 5 below] [page318]

[48] Counsel for the appellants were unable to provide a satisfactory example of when a holder of an equity interest in a debtor company would seek contribution under para. (e) against the debtor in respect of a claim referred to in any of paras. (a) to (d). In our view, this indicates that para. (e) was drafted with claims for contribution or indemnity by non-shareholders rather than shareholders in mind.

[49] If the appellants' interpretation prevailed, and only a person with an equity interest could assert such a claim, para. (e) would be rendered meaningless, and as Lamer C.J.C. wrote in R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, at para. 28:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.

(v) The scheme and logic of the section

[50] Moreover, looking at s. 2(1) as a whole, it would appear that the remedies available to shareholders are all addressed by s. 2(1)(a) to (d). The logic of s. 2(1)(a) to (e) therefore also supports the notion that para. (e) refers to claims for

contribution or indemnity not by shareholders, but by others.

(vi) The legislative history of the 2009 amendments

[51] The appellants and the respondents each argue that the legislative history of the amendments supports their respective interpretation of the term "equity claim". We have carefully considered the legislative history. The limited commentary is brief and imprecise. The clause-by-clause analysis of Bill C-12 comments that "[a]n equity claim is defined to include any claim that is related to an equity interest". [See Note 6 below] While, as the appellants submit, there was no specific reference to the position of auditors and underwriters, the desirability of greater conformity with United States insolvency law to avoid forum shopping by debtors was highlighted in 2003, some four years before the definition of "equity claim" was included in Bill C-12.

[52] In this instance, the legislative history ultimately provided very little insight into the intended meaning of the amendments. We have been guided by the plain words used by Parliament in reaching our conclusion. [page319]

(vii) Intent to change the common law

[53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law. National Bank of Canada v. Merit Energy Ltd., an Alberta decision, was the single case referred to by the appellants that addressed the treatment of auditors' and underwriters' claims for contribution and indemnity in an insolvency before the definition was enacted. As the supervising judge noted, in a more recent decision, Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., the courts of this province adopted a more expansive approach, holding that contractual indemnification claims of directors and officers were equity claims.

[54] We are not persuaded that the practical effect of the change to the law implemented by the enactment of the definition of "equity claim" is as dramatic as the appellants suggest. The operations of many auditors and underwriters extend to the United States, where contingent claims for

reimbursement or contribution by entities "liable with the debtor" are disallowed pursuant to 502(e)(1)(B) of the U.S. Bankruptcy Code, 11 U.S.C.S. [See Note 7 below]

(viii) The purpose of the legislation

[55] The supervising judge indicated that if the claims of auditors and underwriters for contribution and indemnity were not included within the meaning of "equity claim", the CCAA would permit an indirect remedy to the shareholders when a direct remedy is not available. We would express this concept differently.

[56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity. [page320]

IV Prematurity

[57] We are not persuaded that the supervising judge erred by determining that the appellants' claims were equity claims before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

[58] The supervising judge noted, at para. 7 of his endorsement, that from the outset, Sino-Forest, supported by the monitor, had taken the position that it was important that these proceedings be completed as soon as possible. The need to address the characterization of the appellants' claims had also been clear from the outset. The appellants have not identified any prejudice that arises from the determination of the issue at this stage. There was no additional information that the appellants have identified that was not before the supervising judge. The monitor, a court-appointed officer, supported the motion procedure. The supervising judge was well positioned to

determine whether the procedure proposed was premature and, in our view, there is no basis on which to interfere with the exercise of his discretion.

V Summary

[59] In conclusion, we agree with the supervising judge that the appellants' claims for contribution or indemnity are equity claims within s. 2(1)(e) of the CCAA.

[60] We reach this conclusion because of what we have said about the expansive language used by Parliament, the language Parliament did not use, the avoidance of surplusage, the logic of the section and what, from the foregoing, we conclude is the purpose of the 2009 amendments as they relate to these proceedings.

[61] We see no basis to interfere with the supervising judge's decision to consider whether the appellants' claims were equity claims before the completion of the claims procedure.

VI Disposition

[62] This appeal is accordingly dismissed. As agreed, there will be no costs.

Appeal dismissed.

Notes

Note 1: Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Note 2: Noteholders holding in excess of $1.296 billion, or 72 per cent, of Sino-Forest's approximately $1.8 billion in noteholders' debt have executed written support agreements in favour of the Sino-Forest CCAA plan as of March 30, 2012. These include noteholders represented by the Ad Hoc Committee of Noteholders.

Note 3: None of the appellants are sued in Saskatchewan and all are sued in Ontario. E&Y is also sued in Quebec and New York and the appellant underwriters are also sued in New York.

Note 4: The supervising judge cited the following cases as authority for these propositions: Blue Range Resource Corp., (Re), [2000] A.J. No. 14, 2000 ABQB 4, 259 A.R. 30; Stelco Inc. (Re), [2006] O.J. No. 276, 17 C.B.R. (5th) 78 (S.C.J.); Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359 (C.A.); Nelson Financial Group Ltd. (Re), [2010] O.J. No. 4903, 2010 ONSC 6229, 71 C.B.R. (5th) 153 (S.C.J.); EarthFirst Canada Inc. (Re), [2009] A.J. No. 749, 2009 ABQB 316, 56 C.B.R. (5th) 102.

Note 5: Securities Act, R.S.O. 1990, c. S.5, s. 130(1), (8); Securities Act, R.S.A. 2000, c. S-4, s. 203(1), (10); Securities Act, R.S.B.C. 1996, c. 418, s. 131(1), (11); The Securities Act, C.C.S.M. c. S50, s. 141(1), (11); Securities Act, S.N.B. 2004, c. S-5.5, s. 149(1), (9); Securities Act, R.S.N.L. 1990, c. S-13, s. 130(1), (8); Securities Act, R.S.N.S. 1989, c. 418, s. 137(1), (8); Securities Act, S.Nu. 2008, c. 12, s. 111(1), (12); Securities Act, S.N.W.T. 2008, c. 10, s. 111(1), (12); Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12); Securities Act, R.S.Q., c. V-1.1, ss. 218, 219, 221; The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 137(1), (9); Securities Act, S.Y. 2007, c. 16, s. 111(1), (13).

Note 6: We understand that this analysis was before the Standing Senate Committee on Banking, Trade and Commerce in 2007.

Note 7: The United States Bankruptcy Court for the District of Delaware in In Re: Mid-American Waste Systems, Inc., 228 B.R. 816 (Bankr. Del. 1999) indicated that this provision

applies to underwriters' claims, and reflects the policy rationale that such stakeholders are in a better position to evaluate the risks associated with the issuance of stock than are general creditors.

TAB 8

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re),* 2014 BCSC 1732

Date: 20140915
Docket: S113459
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Counsel for CuVeras, LLC:	William C. Kaplan, Q.C. Peter Bychawski
Counsel for Eldon Clarence Stafford	J. Roger Webber, Q.C.
Counsel for Gordon Preston and Carol Preston	Robert M. Curtis, Q.C.

Counsel for the Monitor, Deloitte Restructuring Inc.	Tevia R.M. Jeffries
Place and Date of Hearing:	Vancouver, B.C. September 3 and 5, 2014
Place and Date of Judgment:	Vancouver, B.C. September 15, 2014

Introduction

[1] These are longstanding proceedings under the *Companies' Creditors Arrangement A*ct, R.S.C., 1985, c. C-36 (the "*CCAA*"), having been commenced some three and a half years ago in May 2011. Since that time, the petitioners have made slow and steady progress toward the goal of presenting a plan of arrangement to their creditors and certain equity participants.

[2] The principal petitioners, being Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"), are the owners of certain mining properties and related assets in the Kootenay region of British Columbia. As a result of these proceedings, Bul River and Gallowai now have some indication that the mine is viable. This has been accomplished mainly due to the participation of CuVeras, LLC ("CuVeras") who has, since late 2011, provided interim financing which allowed this further development work to continue to this point in time.

[3] Some years ago, Bul River and Gallowai completed a claims process to identify not only trade creditors but also claims of its common and preferred shareholders. Now that Bul River and Gallowai, with the assistance and sponsorship of CuVeras, are on the cusp of preparing a plan of arrangement for consideration by the stakeholders, those claims have become of central importance.

[4] Some of the claims that were advanced through the claims process were not critically considered by either the petitioners or the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"). However, at this late date, the characterization of certain claims and the validity of certain claims have been put in issue and will have a profound impact on the manner in which these restructuring proceedings go forward.

[5] At present, the general intention is that the restructuring will take place along the lines of a Letter of Agreement between the petitioners and CuVeras dated May 23, 2014. By that agreement, a newly formed British Columbia entity ("Newco") will be created and the shares in Newco will be distributed to CuVeras and other related parties and also to non-voting preferred shareholders. Trade creditors will also

participate in Newco. This Letter of Agreement is the product of some history, sometimes contentious, between the petitioners and CuVeras which was discussed in the court's earlier reasons: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645.

[6] One of the claims is that advanced by Gordon and Carol Preston (the "Preston Claim"), which CuVeras contends is an equity claim as opposed to a debt claim. Another claim is that advanced by Eldon Stafford (the "Stafford Claim"), which CuVeras contends is not a valid claim against Bul River or Gallowai. The substance of the issue before the court therefore is two-fold: (a) the proper categorization of the Preston Claim and (b) whether the Stafford Claim is a valid claim against the petitioners.

[7] As will become apparent from the discussion below, the resolution of these issues will significantly impact how any restructuring plan can be crafted and will also impact all stakeholders in terms of how the Newco shares will be distributed between the various stakeholders. There is some urgency in resolving these last issues before the restructuring can proceed. All involved, including the Monitor, state that it is necessary for the petitioners to exit this *CCAA* proceeding as quickly as possible. At this time, a plan of arrangement sponsored by CuVeras is the only option available to the petitioners so as to avoid a liquidation and bankruptcy.

Background

[8] The petitioners are also known as the Stanfield Mining Group (the "Group"). The Group carried on the business of developing a mining property situated near the Bull River just outside of Fernie, British Columbia. It is effectively controlled by the estate of Ross Stanfield ("Stanfield") which holds 100% and 99.9% of the voting common shares in the parent companies, Zeus Mineral Corporation and Fort Steele Mineral Corporation, respectively. As stated above, the two principal companies involved in the development and operation of the mine within the Group are Bul River and Gallowai.

[9] The mine, known as the Gallowai Bul River Mine, is not currently in production. There has been significant underground development to this point such

that the petitioners and CuVeras consider that with a relatively modest further investment the mine could be placed into production.

[10] Bul River and Gallowai were incorporated in the 1980s. Commencing in the mid-1990s, Stanfield began raising funds for the development of the mine. The marketing program focused on "sophisticated investors" which are, through securities regulation statutes, defined as persons with a net worth in excess of $1 million willing to invest a minimum of $100,000 in a given venture. The persons targeted by Stanfield's marketing campaign were farmers in Alberta, particularly around Edmonton, Red Deer and Medicine Hat, as well as farmers from the area around Regina, Saskatchewan.

[11] Until 2010, Stanfield engaged in a sophisticated marketing program to sell redeemable preferred non-voting shares to these investors. Over that period of time, approximately $229 million was invested in consideration of which preferred shares in Bul River and Gallowai were issued.

[12] The marketing program involved repeated representations as to the ore content of the mine. Stanfield continually referred to the mine as an "elephant" mine, meaning that the mineral resources were enormous. Over the years, the program included visits to the mine site and presentations to potential investors by Stanfield. Those presentations referred to the history of the mine and the future prospects of the mine, including development plans and the levels of ore content (copper, gold and platinum). The presentations also involved discussion as to when production would commence and typically production was forecast to commence within a foreseeable period of time, be it one or two years from the date of the meeting.

[13] The same representations were also made in written materials, including a report from Phillip De Souza ("De Souza"), a professional engineer.

[14] Some potential investors executed subscription agreements for shares during those visits to the mine or immediately thereafter. Some returned to the mine for

subsequent tours and subsequent purchases. In some instances, Stanfield recruited current investors to further market the preferred shares to other investors.

[15] These representations by Stanfield were made in the face of contemporaneous reports which questioned the value of the resources announced by the Group. These included papers published by the British Columbia Ministry of Energy and Mines in 2000 in which it was reported that they were unable to confirm the gold grades reported by the Group. In 2006, a professional conduct hearing in Alberta was held arising from charges that De Souza's report was "deficient and misleading". The panel issued reasons which were published in January 2008 in which it concluded that De Souza's conduct constituted unskilled practice and unprofessional conduct.

[16] Eventually, Stanfield's activities caught the attention of various provincial securities regulators. In May 2010, the British Columbia Securities Commission (the "Commission") issued a Notice of Hearing against Stanfield, Bul River and Gallowai seeking to order them to produce an independently prepared technical report fully compliant with NI 43-101 (Standards of Disclosure for Mineral Projects) that would include an estimate of the mineral resources available at the mine.

[17] Ross Stanfield died on August 3, 2010.

[18] By the fall of 2010, in addition to being faced with the Commission proceedings, certain preferred shareholders had taken legal action against the Group in light of the failure to comply with redemption obligations arising in respect of the preferred shares. Stanfield's grandson, George Hewison, is the sole beneficiary of Stanfield's estate. He stepped in to continue the work of the Group as best he could. In late 2010 or early 2011, undertakings were given to the securities regulators in British Columbia and Alberta by which the petitioners agreed not to issue any new securities without their consent.

[19] The evidence would later establish that the representations made by Stanfield regarding the mine resources were false. A technical report was later prepared by

Rosco Postle and Associates Inc. ("RPA") in March 2011 that provided some review of the available mineral resources at the mine. Both the RPA report and a later report prepared by Snowden Mining Industry Consultants in March 2013 would indicate that while there is valuable ore in the mine, the quantity of the resources is markedly less than what was indicated in the representations made to investors.

[20] On May 26, 2011, the Group sought and obtained creditor protection pursuant to the *CCAA* and an Initial Order was granted at that time.

[21] At the time of the *CCAA* filing, the Class A common voting shares in Bul River and Gallowai were held by the Stanfield estate. Other Class B and Class E common non-voting shares were held by investors.

[22] As of the date of filing, the petitioners had no secured creditors. The petition referenced debt obligations of $904,000 to trade suppliers and two unsecured judgments totalling $386,135. Various preferred non-voting shares were held by investors in Classes C, D and F. The petition materials indicated that amounts owing for "redeemable shares" (i.e., the preferred shares) were approximately $137,718,557. The holders of both common and preferred shares comprise some 3,500 individual investors.

[23] The subscription agreements for the preferred shares provided that the shares were redeemable at the end of five years from the date of the subscription together with a "preferred cumulative annual dividend" of 12.75%. There is no evidence of any significant redemption of the preferred shares. Rather, as redemption dates arose, preferred shareholders were approached to execute extension agreements extending their redemption rights from a given date to a date defined by the commencement of production from the mine. Many preferred shareholders signed those extension agreements, some did not. For those who did not, some of them demanded redemption of their shares. For the most part, those investors were told that there was no money to redeem the shares.

[24] Accordingly, the largest liability faced by the petitioners is that arising from the preferred shares. The preferred shareholders appear to have certain claims arising from their holdings. Firstly, they have a claim for payment of the redemption amount plus the accumulated dividend. Secondly, they may have a claim for misrepresentation against the Group, giving rise to potential remedies of rescission of their subscription agreements, damages, or both.

The Claims Process

[25] In August 2011, the Group prepared a list of creditors (the "Creditor List") in support of seeking a claims process order. The list actually included not only trade claims but also shareholder claims. Not surprisingly, the purpose of the claims process was to assist the Group in developing its restructuring plan.

[26] On August 19, 2011, the court approved a Claims Process Order, which authorized the petitioners to conduct a claims process for the determination of any and all claims against them (the "Claims Process"). The Claims Process Order defined "claims" that were to be determined in the Claims Process as follows:

> … indebtedness, liability or obligation (including an equity obligations arising from the ownership of equity shares) …
>
> … all obligations of or ownership interests in the Petitioners or any of them arising from or relating to the holding of a Share.

[27] Under the Claims Process Order, all "Known Creditors" (defined in the Claims Process Order as all creditors shown on the books and records of the petitioners as having a claim in excess of $250), including holders of shares, were to receive a claims package from the petitioners that included an instruction letter, a Notice of Dispute, a Proof of Claim, and a copy of the Claims Process Order (the "Claims Package"). The Claims Process was also advertised in certain publications. The Creditor List indicating such Known Creditors was posted on the Monitor's website, as was noted in the Claims Package, such that both creditors and shareholders were able to view it. The process of determining claims was as follows:

a) all creditors and shareholders were given the opportunity to review the Creditor List;

b) in the event a creditor or shareholder agreed with the "Claim Particulars" listed in the Creditor List (which included the number and class of shares), the creditor or shareholder did not need to file a Proof of Claim with the petitioners. In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;

c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;

d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;

e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and

f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving

> the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

[28] The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

[29] Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

[30] The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for

> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] Claims process orders are an important step in most restructuring proceedings. In *Timminco Limited (Re)*, 2014 ONSC 3393, Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[32] The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all

> stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[33] Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

[34] This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

[35] The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

[36] The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In

accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

[37] A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

[38] Section 121(1) of the *BIA* addresses which claims are "provable claims":

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[39] In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

[40] Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd. (Re)*, [1923] 2 C.B.R. 599 (Ont. S.C.), 3 D.L.R. 1176; *Farm Credit Corporation v. Dunwoody Limited,* [1988] 68 C.B.R. (N.S.) 255 (Alta. C.A.), 51 D.L.R. (4th) 501, leave to appeal to S.C.C. refused, 73 C.B.R. (N.S.) xxvii (note), 100 60 D.L.R. (4th) vii (note);

Central Capital Corp. (Re), [1995] 29 C.B.R. (3d) 33 (Ont. Gen. Div.), O.J. No. 19 ("*Central Capital*"), aff'd [1996] 27 O.R. (3d) 494 (C.A.), 38 C.B.R. (3d) 1 ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270 (N.S.S.C.), 152 N.S.R. (2d) 172.

[41] In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

[42] In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[43] As I have stated above, the broad jurisdiction of the court under s. 11 of the *CCAA* allows the court to make such orders as are "appropriate". While the above factors have been considered in the past, there is no finite list that detracts from a consideration of all relevant circumstances. Nevertheless, the general considerations of delay and prejudice typically arise, just as they do in this case.

[44] I return to the factual circumstances relating to the Claims Process and the Claims Process Order. The petitioners were themselves responsible for reviewing the Proofs of Claim and/or Notices of Dispute submitted in the Claims Process. The

principal individual involved in the review was Mr. Hewison who did so with the assistance of counsel. It is apparent that the only factors considered in his review included whether a claim related to a trade debt or whether it related to an equity interest in the petitioners.

[45] The Prestons argue that the Claims Process was well known to everyone and that its purpose was to establish the amount and nature of all claims. This is clearly self-evident, but back in late 2011, it was the case that the course of the restructuring proceedings was anything but certain. In fact, the ability of the petitioners to continue the proceedings was tenuous and they were scrambling to find interim financing which they eventually secured with CuVeras in November 2011. By that time, the Claims Process was essentially completed. Even so, understandably, the parties were concerned to proceed as quickly as possible to obtain further technical reports on the proven or inferred mine resources in order to determine whether a viable mine even existed. They did receive those later reports, which included a further RPA report and the Snowden report. In these circumstances, Mr. Hewison did not undertake any substantive review of the claims.

[46] The Prestons further say that, since they faithfully complied with the Claims Process Order, it would be patently unfair to now revisit the characterization of their claim. While they raise the matter of the three year plus delay, no elements of prejudice have been alleged. In my view, the delay, while relevant, will have little effect on the ability of the parties to address the substance of the matter. Nor have any rights been extinguished or compromised by reason of any delay. Accordingly, the objective of certainty has less force in this case where the plan of arrangement has yet to be formulated and the claimants have yet to consider that plan and vote on it. I note that similar considerations were at play in *Timminco* where it was apparent that no plan would ever be put to the creditors.

[47] Finally, the Prestons argue that the Claims Process Order constituted the sole form of adjudication of the validity and nature of the claims submitted. It is true, of course, that the petitioners had an opportunity to consider these claims.

[48] As discussed below, the petitioners did not forward any Notice of Disallowance in respect of the Proofs of Claim later filed by the Prestons and Mr. Stafford. Mr. Hewison considered that the Stafford Claim should be categorized as an "investment" in the mine. Further, with respect to the Preston Claim, he was not aware of the significance of the distinction between an equity claim and a debt claim. In retrospect, and now knowing what type of plan of arrangement is possible, Mr. Hewison recognizes that this was in error. It appears that a combination of factors - including Mr. Hewison's lack of familiarity with the past transactions, inadequate record keeping, lack of resources and distraction in terms of larger issues more relevant to the survival of the mine - all contributed to a less rigorous review and analysis of these claims.

[49] It is the case, however, that the petitioners were acting in good faith, albeit without a full appreciation of the issues arising in respect of these claims and the also the consequences of their inaction.

[50] More importantly, aside from the petitioners, other stakeholders have a significant interest in whether a claim is valid or not and that any claim be properly characterized. Based on the anticipated form of the restructuring plan, the inclusion of the Stafford Claim and characterization of the Preston Claim will impact the recovery of these stakeholders. These other creditors or stakeholders of the petitioners did not have any opportunity up to this point in time to review the claims. I would again note that the Claims Process Order did not contemplate any review of the claims by these other stakeholders, such as was the case in *Steels Products* (see paras. 13-15).

[51] Nor has the Monitor participated in any review of these claims. I do not say this as any criticism of the Monitor as the Claims Process Order did not expressly provide for any such independent review. Nor does the Claims Process Order contemplate that any other independent review of the claims be completed which might have highlighted the issues. The Monitor did report on the Claims Process from time to time (particularly, its report from June 2012 and January 2013),

however, no such issues were identified. As such, the Monitor did not conduct a critical review of the claims, similar to what a trustee in bankruptcy might have done under s. 135 of the *BIA*.

[52] In these circumstances, and in retrospect, the Claims Process lacked procedural safeguards that might have avoided this problem: *Steels Products* at paras. 38-39.

[53] In these circumstances, I disagree with the Prestons that the Claims Process Order constitutes an adjudication of these issues by which CuVeras or any other stakeholder is estopped in bringing these issues forward. It is clear that to this point, no such adjudication has occurred.

[54] As I have indicated above, a Claims Process Order is intended to be a fair, reasonable and transparent method of determining and resolving claims against the estate. In certain circumstances, these objectives fail to be achieved through no fault of the participants. That does not preclude the court from considering the issues on their merits so as to achieve the fundamental objective under the *CCAA* to facilitate a restructuring based on valid claims. This would also include a consideration of the proper characterization of the Preston's claim: *Steels Products* at para. 42.

[55] Simply put, if the Claims Process results in a claim being advanced which is not truly a debt of the petitioners or results in a claim being improperly characterized, the fairness and transparency of these proceedings are inevitably compromised such that the objectives of the *CCAA* will not be fulfilled.

[56] My comments in *Steels Products* apply equally here:

> [46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[57] Even at this late stage in the proceedings, and considering the ongoing supervisory role of the court, I consider that it is appropriate to address the issues relating to both the Preston Claim and the Stafford Claim on their merits. This is particularly so given the significant repercussions to other stakeholders and the lack of any prejudice to the Prestons and Mr. Stafford.

Discussion

(a) The Preston Claim

[58] The Preston Claim is advanced as a debt claim in these proceedings, a position that is disputed by CuVeras who contends that in fact, it is an equity claim as defined in the *CCAA*.

(i) The Proof of Claim

[59] The Creditor List referenced the Prestons as holding various Class E (2,102) and Class F (2,400) preferred shares.

[60] In October 2011, the Prestons, through their counsel, submitted a Proof of Claim and Notice of Dispute.

[61] The genesis of the claim was as described in a Statement of Claim filed in the Alberta Court of Queen's Bench against Gallowai on May 27, 2010. The claim was as follows: in October 2004, the Prestons subscribed for 2,400 Class F preferred shares in Gallowai in consideration of the payment to Gallowai of $120,000; Gallowai is alleged to have covenanted to redeem the preferred shares at the expiry of five years after the allotment date; the Prestons demanded redemption of the shares and the payment of dividends which was to be by way of issuance of Class E shares; Gallowai refused to respond to their demands; and the Prestons claimed the right to redeem the Class F preferred shares for $120,000 plus either dividends in the form of Class E common shares or, alternatively, cash payment of dividends at 12.75% per annum.

[62] On November 19, 2010, default judgment was granted in favour of the Prestons for the claimed amount of $120,000 plus the cash dividend interest rate for

a total judgment of $214,527.10 including court ordered costs. The Prestons attempted to register their judgment in British Columbia in June 2011 after the court ordered a stay arising under the Initial Order, but nothing turns on that step.

[63] The Proof of Claim indicates that the Prestons were advancing both a trade claim for the judgment amount and also a claim for non-voting shares arising from the allegation that they continue to hold the 2,102 Class E shares noted on the Creditor List.

(ii) Historical Approach to Equity Claims

[64] Before I turn to the current statutory regime arising from amendments to the *CCAA* and *BIA* in 2009, I will review the authorities which applied before these amendments were enacted.

[65] Historically, equity and debt claims have been treated differently in an insolvency proceeding given the fundamental difference in the nature of such claims. That different treatment resulted in the subordination of equity to debt claims. The basis for this judicially developed principle was that equity investors are understood to be higher risk participants. Creditors, on the other hand, have been held by the courts to have chosen a lower level of risk exposure that should generally result in priority over equity investors in an insolvency context.

[66] In *Sino-Forest Corporation*, 2012 ONCA 816, affirming 2012 ONSC 4377, the Court of Appeal commented with approval on the analysis of Morawetz J. in the court below:

> [30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:
>
> > Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
> >
> > The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited

> upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement [citations omitted].

[67] See also *Central Capital* at paras. 41-42; *Central Capital* (ONCA) at 510-11, 519.

[68] In light of that key distinction, courts in the past have embarked upon a consideration as to the true characterization of certain claims in an insolvency context. There is considerable authority that in making that determination, the court will consider the true substantive nature or character of the claim, rather than the form of the claim.

[69] The leading case is the Supreme Court of Canada's decision in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 ("*CDIC*"). In that case, the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:

a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;

b) the characterization of a transaction under review requires the determination of the intention of the parties;

c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[70] One type of financial instrument that typically has elements of both equity and debt are preferred shares, where arguably rights of redemption and rights to payment of dividends evidence debt characteristics.

[71] The issue of the characterization of preferred shareholder claims in an insolvency context was addressed in *Central Capital* (ONCA). In that case, the court had to characterize a claim arising from the right of retraction in respect of certain preferred shares. Although differing in the result, the majority opinions and the dissenting opinion at the appellate court level were consistent in an approach toward determining the *substance* of the claim in terms of whether it was a "provable debt". In dissent, Finlayson J.A. stated:

> … I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation.
>
> (at 509).
>
> ...
>
> Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants.
>
> (at 512).

Justice Laskin specifically addressed the "substance of the relationship" at 535-36. In addition, Weiler J.A. focused on the "true nature" of the transaction or relationship:

> In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The court must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3

> S.C.R. 558, 97 D.L.R. (4th) 385. In this case, the decision is not an easy one. Where, as here, the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the CCAA.
>
> (at 519).

[72] In *Blue Range Resource Corp. (Re)*, 2000 ABQB 4, Madam Justice Romaine found that a shareholder's claim for alleged share loss, transaction costs and cash share purchase damages was in substance an equity claim or a claim by the shareholder for a return of its investment. See also *EarthFirst Canada Inc. (Re)*, 2009 ABQB 316.

[73] In *Return on Innovation v. Gandi Innovations* , 2011 ONSC 5018, leave to appeal refused, 2012 ONCA 10, the Court was characterizing indemnity claims advanced by certain individual directors and officers against the debtor, the Gandi Group. That indemnity claim arose by reason of a claim by TA Associates Inc. against them for damages for claims relating in part to TA's US$50 million equity investment in the Gandi Group. Mr. Justice Newbould at the Ontario Superior Court concluded that TA's claim was an equity claim and that therefore, the indemnity claim was also, in substance, an equity claim.

[74] I have also been referred to *Dexior Financial Inc. (Re)*, 2011 BCSC 348. Mr. Justice Masuhara there found the claim to be an equity claim even though the shareholder had given notice of an intention to seek retraction of the shares prior to the filing. Citing *CDIC* and *Central Capital* (ONCA), the Court found that the notice did not change the original intention or substance of the claim.

(iii) The New Statutory Approach

[75] In September 2009, Parliament enacted substantial amendments to the *BIA* and *CCAA* in relation to the treatment of claims arising from equity in an insolvency proceeding.

[76] One of the principle amendments was the prohibition that the court may not sanction a plan of arrangement unless all debt claims are to be paid in full before payment of any "equity claims". Section 6(8) of the *CCAA* provides:

> (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[77] The definitions of "equity claim" and "equity interest" are found in the *CCAA*, s. 2(1):

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (*a*) a dividend or similar payment,
>
> (*b*) a return of capital,
>
> (*c*) a redemption or retraction obligation,
>
> (*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);
>
> "equity interest" means
>
> (*a*) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt[.]

[78] Section 22.1 further restricts the right of creditors having equity claims from voting on a plan of arrangement:

> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

[79] Substantially these same amendments were made to the *BIA* in respect of proposal proceedings under that *Act* in ss. 2, 54(2)(d) and 60(1.7).

[80] The effect of the amendments was considered by Pepall J. (as she then was) in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229. In that case, the court had

no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the *CCAA*.

[81] The court in *Nelson Financial Group* noted that the introduction of section 6(8) in the *CCAA* provided greater certainty in the treatment to be accorded equity claims and lessened the "judicial flexibility" that previously prevailed in characterizing such claims.

[82] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, it also represented a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest Corporation* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might have previously escaped such characterization will now be caught by the *CCAA*.

[83] The claim of the Prestons is set out in their Statement of Claim. The claim is for the return of their capital investment under the redemption rights of the preferred shares. Their claim also included a claim to unpaid dividends, whether by cash payment or the issuance of other shares, being Class E common shares. It is clear that their claims, as evidenced by the Statement of Claim, fall within the definition of "equity claim" in subparas. (a)-(c).

[84] The Prestons do not dispute that their claim, as described and but for one qualification, would fall within the definition. They contend, however, that by reason of their obtaining default judgment against Gallowai, they have transformed their equity claim into a debt claim that is a provable claim in the *CCAA* proceeding.

(iv) The Effect of the Judgment

[85] The 2009 amendments have not affected the ability of the court to continue to analyze the *substance* of the claims, albeit in the context of the expanded definition of "equity claim". This is evident from the approach of the court in *Nelson Financial Group* at paras. 28 and 34.

[86] In *Sino-Forest Corporation*, the court found that certain Shareholder Claims for damages claimed in a class action lawsuit clearly fell within the definition of "equity claims": ONSC at para. 84. Further, certain Related Indemnity Claims were also advanced against the estate by the auditors who were named in the class action lawsuit. These auditors also faced claims for damages relating to their role in what were said to be misrepresentations in the financial statements that led to the loss of equity by the class members. Again, consistent with the historical approach of the courts, Morawetz J. focused on the "substance" of the claim: para. 85. He stated:

> [79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.
>
> [80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.
>
> …
>
> [82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

The Court of Appeal upheld this approach: *Sino-Forest Corporation* (ONCA) at paras. 37, 58.

[87] I would note in this regard that the Claims Process Order expressly provided:

> THIS COURT ORDERS that the categorization of Claims into Trade Claims, non-voting Shares, and Voting Shares does not in any way set classes or categories for the purposes of priority or voting on a restructuring plan issued by the Creditors and shall not prejudice any party or the Petitioners from applying at a later date to set such classes or priorities in connection with voting on a plan;

[88] The Prestons argue that their obtaining of a judgment against Gallowai has resulted in a replacement or transformation of their equity claim with a debt claim.

[89] The Prestons place considerable reliance on the decision in *I. Waxman & Sons Ltd. (Re)*, [2008] 89 O.R. (3d) 427 (S.C.), 40 C.B.R. (5th) 307, which was decided prior to the 2009 amendments to the *CCAA*. In that case, Morris sued I. Waxman & Sons Limited ("IWS") for lost profits, profit diversions and improper distributions for bonuses paid. He obtained judgment against IWS and asserted that claim in the later bankruptcy proceedings.

[90] The court began by noting that Morris' claim was not for his share of his current equity in IWS, but was, in substance, a claim related to dividends and diverted profits by way of bonuses. Justice Pepall found that the judgment was a debt claim:

> [24] There is support in the case law for the proposition that equity may become debt. For example, declared dividends are treated as constituting a debt that is provable in bankruptcy. As Laskin J.A. stated in *Central Capital Corp. (Re)*, "It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both." And later, "Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared, it is a debt on which each shareholder can sue the corporation." Similarly, in that same decision, Weiler J.A. stated, "As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his [portion]: see *Fraser and Stewart*, supra, at p. 220 for a list of authorities." In *East Chilliwack Fruit Growers Co-operative (Re)*, the B.C. Court of Appeal held that an agricultural co-operative member who had exercised a right of redemption and remained only to be paid was an unsecured creditor with a provable debt. Declared bonuses may also sometimes constitute debt: *Stuart v. Hamilton Jockey Club* [footnotes omitted].
>
> [25] Secondly, the claims advanced by Morris are judgment debts. As stated by Weiler J.A. in *Central Capital*, ". . . in order to be a provable claim within the meaning of s.121 of the BIA, the claim must be one recoverable by legal process: *Farm Credit Corp. v. Holowach (Trustee of)*." Clearly a

> judgment constitutes a claim recoverable by legal process. By virtue of the judgment, the money award becomes debt and it is properly the subject of a proof of claim in bankruptcy. In this regard, the facts in this case are unlike those in *Re Blue Range Resource Corp. (Re),* or *National Bank of Canada v. Merit Energy Ltd.* Those cases involved causes of action that had been asserted in court proceedings, but in neither case had judgment been rendered [footnotes omitted].

[91] In my view, *Waxman* is of little assistance to the Prestons.

[92] Firstly, the facts are distinguishable by reason of the fact that the Preston Claim is for recovery of their capital or equity, rather than simply a return on capital as was the case in *Waxman*. I would note that the Preston default judgment obtained in 2010 does include the dividend interest on the preferred shares. What is somewhat anomalous is that this was claimed in the alternative to the issuance of the Class E common shares. Even so, the Prestons in their Statement of Claim did advance a claim for 2,102 Class E common shares and continue to do so by their Proof of Claim, all consistent with what the petitioners had ascribed to them in the Creditor List. It is not clear to me how they can advance both claims.

[93] Secondly, in para. 24 of *Waxman*, the Court focused on the prevailing authority at the time prior to the amendments by which declared dividends were considered debt as opposed to equity. At present, the 2009 amendments make clear that this type of claim now clearly falls within the definition of “equity claim” in subpara. (a): *CCAA*, s.2(1).

[94] With respect to the comments of the Court in *Waxman*, para. 25, I agree with CuVeras that the Court was simply observing that a judgment debt will normally satisfy the requirements of the claim being recoverable by legal process, one of the requirements of a “provable claim”, as noted above. These comments do nothing more than note the obvious - that in ordinary circumstances, a judgment is a claim recoverable by legal process. I do not interpret these comments as obviating an analysis of the true nature of a claim, whether represented by a judgment or not.

[95] Accordingly, I do not view *Waxman* as standing for the proposition advanced by the Prestons, namely that a judgment transforms an equity claim into a debt claim

such that no further analysis or characterization by the court is necessary. This would have applied even before the enactment of the 2009 amendments, but certainly is more evident now given the expansive definition now contained in the *CCAA*.

[96] Indeed, the later comments of Justice Pepall in *Nelson Financial Group* suggest that she only decided in *Waxman* that by reason of a judgment, an equity claim *may* become debt:

> [32] The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons.* there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims [footnotes omitted].

[97] The Court in *Dexior Financial* at para. 16 commented on *Waxman* but those comments were clearly *obiter* as no judgment had been obtained in that case. See also *EarthFirst Canada* at para. 4.

[98] At its core, the issue before the court is a narrow one - namely, whether a shareholder, having an equity claim but who obtains a judgment before the filing, has become a debt claimant rather than an equity claimant for the purposes of the insolvency proceeding? In my view, they do not, for the reasons below.

[99] In light of the dearth of authority on the issue, I consider that the court must start from first principles.

[100] I return to the comments in *Century Services* regarding the remedial purposes of the *CCAA* and the broad and flexible authority of this court to facilitate a restructuring that is fair, reasonable and equitable in accordance with either the express will of Parliament, as specifically dictated in the *CCAA*, or as might be reasonably interpreted as falling within those broad purposes.

[101] At its core, the policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in a situation (insolvency) where all obligations or expectations cannot be fulfilled. What is "fair" is a flexible or uncertain concept and needless to say, what is fair will likely be differently interpreted depending on which stakeholder you ask. Nevertheless, Parliament has clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims. This was so before September 2009 and is even more decidedly so now, given the express and expansive statutory treatment of equity claims that now applies.

[102] In my view, the characterization of claims by the court continues to have an important role in fulfilling that purpose. I have already outlined the considerable authority from Canadian courts in respect of such claims, both pre- and post-amendments. Particularly, the court continues to have a role in applying these new equity claims provisions by considering the true nature or substance of those claims. In many cases, the matter is now considerably clearer given the definition of "equity claims". What is most important, however, is that form will still not trump substance in the consideration of this issue.

[103] As was noted by counsel for CuVeras, the obtaining of a judgment does not necessarily mean that it will be recognized as a debt for the purpose of an insolvency proceeding. There are many provisions of the *BIA* and *CCAA* which allow for the challenge of certain pre-filing transactions or events that may be the basis for supposed rights in the proceeding. For example, the payment of a dividend and redemption of shares may be attacked (*BIA*, s. 101). Another example is that either the granting of a judgment against the debtor or payment of monies such as redemption amounts that resulted in a preference being obtained may be challenged (*BIA*, s. 95). Both of these provisions apply in a *CCAA* proceeding: *CCAA*, s 36.1.

[104] These types of provisions reflect the policy choices of Parliament in terms of allowing for the recovery of assets transferred away from the debtor even before the filing so that those assets are brought back into the estate for the benefit of the

entire stakeholder group to be distributed in accordance with the legislation. Similarly, some established rights may be challenged in certain circumstances (such as by way of the preference provisions).

[105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:

> [56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

[106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."

[107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.

[108] Some arguments were advanced by CuVeras and the Prestons as to the timing of the judgment. Indeed, the Preston judgment was obtained well in advance of the filing, by some six months. The Prestons cite *Blue Range* at para. 38 in respect of the importance of timing. However, the timing issue there was the filing of the insolvency proceeding, not the granting of a judgment. I agree that the filing of the proceeding is a significant crystallizing event, however, what is important in this case is the ability of the court to analyze the true nature of the claim. Further, whether a judgment is obtained on the eve of the filing or even years before, I consider that it is a distinction without a difference in terms of the court's role in

ensuring that a proper characterizing of the claim has taken place in accordance with the *CCAA*.

[109] The fact remains that there are thousands of other preferred shareholders holding shares in Bul River and Gallowai whose claims are in essence the same - namely, for a return of their capital and the promised return on that capital (and perhaps other damage claims). The evidence indicates that many of them had also made demand for a return of their preferred share investments and their return on capital well before the filing date. Those claims are clearly equity claims. From the perspective of the policy objective of treating similar claims in a similar fashion (i.e., fairness), it makes little sense to me that a similarly situated preferred shareholder without a judgment should be treated differently than one who does.

[110] Nor does it accord with the policy objectives particularly identified in s. 6(8) of the *CCAA* that by the simple mechanism of obtaining a judgment an equity claimant should be elevated to a debt claimant which would inevitably diminish the recovery of other "true" debt claimants.

[111] The Prestons argue that this will open the floodgates to an endless analysis of claims reduced to judgments resulting in increased cost and inefficiencies in these types of proceedings. I see no merit in this submission given that this decision relates to only equity claims and by no stretch of the imagination has the previous litigation on the point overwhelmed the court system across Canada. In any event, if that is the will of Parliament, then there is little ability in this court to take a different approach.

[112] The courts have not been hesitant in preventing claimants from recharacterizing their claims such that an equity claim is indirectly advanced where no direct claim could be made: *Sino-Forest Corporation*, ONSC at para. 84 (although the Court of Appeal preferred to express the same sentiment in terms of the purpose of the *CCAA*). In *Return on Innovation*, Newbould J. stated, consistent with the "substance over form" approach that the court's decision will not be driven by the form of the legal action:

> [59] The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used [are] not the important thing. It is the fact that they are being used to recover an equity investment that is important.

[113] Similarly, in addition to the "legal tools" not being determinative, neither are the legal *forms* of recovery determinative, such as the obtaining of a judgment.

[114] In summary, the *CCAA* policy objectives in relation to equity claims are clear. In my view, those objectives are best achieved by the continued approach of the court, both pre- and post-*CCAA* amendments, to consider the substance or true nature of the claim. This accords with the ongoing supervisory jurisdiction of the court to exercise its statutory discretion to achieve the purposes of the *CCAA*. In particular, the court's fundamental role is to facilitate a restructuring that is fair and reasonable to all stakeholders in accordance with the now very clearly stated objective of allowing recovery to debt claimants before any recovery of equity claims. Section 6(8) reflects that the court has no ability to proceed otherwise.

[115] Within those broad objectives, in my view, it is of no importance that prior to the court filing, a claimant with an equity claim has obtained a judgment. That judgment still, in substance, reflects a recovery of that equity claim and therefore, the claim comes within the broad and expansive definition in the *CCAA*. Accordingly, for the purposes of the *CCAA*, that claim or judgment must still, of necessity, bear that characterization in terms of any recovery sought within this proceeding. I conclude that any contrary interpretation, such as advanced by the Prestons, would result in the clear policy objectives under the *CCAA* being defeated.

[116] Nor I do not accept that, as argued by the Prestons, applying this characterization amounts to a collateral attack or an "undoing" of the judgment from the Alberta court. As noted by CuVeras, the obtaining of a judgment by a creditor does not mean that insolvency laws do not apply to it. Judgments are affected by insolvency proceedings all the time. Recoveries of judgments are stayed by such

proceedings and as stated above, they can be attacked as fraudulent preferences. All that results from my conclusions is that notwithstanding the granting of the judgment, within these *CCAA* proceedings, the judgment is to be characterized in accordance with the true nature of the underlying claim, which is an equity claim.

[117] For the above reasons, I conclude that the Preston Claim is an equity claim within the meaning of the *CCAA*.

(b) The Stafford Claim

[118] The Stafford Claim is advanced as a debt claim in these proceedings. That position is disputed by CuVeras who contends that, in fact, it is a claim owed by Stanfield personally and not by either Bul River or Gallowai such that it cannot be advanced in this *CCAA* proceeding.

(i) The Proof of Claim

[119] The Creditor List referenced Mr. Stafford as holding Class B common shares (3,340), Class D preferred shares (4,200) and Class E preferred shares (17,548). He therefore received a Claims Package from the petitioners.

[120] Mr. Stafford took no issue with the shareholdings alleged to be held by him in accordance with the Creditor List. However, on October 14, 2011, a Notice of Dispute and Proof of Claim were submitted on behalf of Mr. Stafford. This was done by Carol Morrison, who was exercising a power of attorney for Mr. Stafford by reason of his mental and physical incapacity that occurred at least as early as November 2010.

[121] The Notice of Dispute refers to “claim not listed” as the “reason for dispute”. The Proof of Claim submitted by Mr. Stafford notes the “type of claim” as “other – loan and accrued interest 50% Bul River Mineral Corp. and 50% Gallowai Metal Mining Corp.” The Stafford Claim submitted is for outstanding principal and interest under a loan in the total amount of $2,587,174.

[122] The supporting documentation submitted for Mr. Stafford includes a copy of a loan agreement between Stanfield in his personal capacity, as borrower, and Mr. Stafford, as lender, dated June 12, 1990, 21 years before the CCAA filing (the "Stafford Loan Agreement"). The Stafford Loan Agreement references a loan in the principal amount of $150,000, accruing interest in the amount of 20% per annum "on the Principal", calculated yearly and not in advance.

[123] Pursuant to the terms of the Stafford Loan Agreement, Stanfield borrowed these funds for the purpose of "investing the funds in the costs of the ongoing research and development of a Process" with "Process" being defined as a "new improved method or process for extracting precious metals from ore". Paragraphs 6 and 8 of the Stafford Loan Agreement provided for a bonus payable to Mr. Stafford equal to the amount of the Principal, if the "Process" proved successful (as declared by an independent metallurgical consultant). As CuVeras submits, on its face, this was not a loan directly related to the mine or the petitioners.

(ii) Dealings in Respect of the Stafford Loan Agreement

[124] For obvious reasons, the death of Ross Stanfield and the incapacity of Mr. Stafford result in a situation where no individual is in a position to shed light on the intentions of the parties in relation to this loan. Mr. Hewison is similarly unable to provide any evidence about the loan, save for referring to such documents as have been found in relation to this loan. Those documents do provide some indication as to the how Stanfield, Bul River and Gallowai addressed this loan up to the time of the *CCAA* filing.

[125] There are two resolutions of the directors of Bul River, dated October 1994 and February 1996 respectively, that are essentially the same. Both refer to the "need of major amounts of additional financing" and authorize Stanfield to negotiate, on behalf of Bul River, potential sources of debt or equity financing, to settle the terms of the financing, and to sign, seal and deliver any agreements necessary to secure funding required by the company. I agree that these resolutions on their face clearly do not authorize Stanfield to act as an agent for Bul River. They merely

authorize him to act directly in the name of the company with the company as principal in respect to those transactions. These resolutions also do not reference any loan by Mr. Stafford to Stanfield made years before in June 1990.

[126] Bul River also appears to have prepared a schedule of loan payments as of December 31, 2006. That schedule shows payment of interest to Mr. Stafford by Stanfield personally from June 1995 to September 1998 totalling approximately $183,000. In 1999 and 2000, Gallowai appears to have made interest payments of $40,000 and from that time forward, some person (unidentified) made interest payments of $25,000 for 2001 and 2002. From 2004 to 2006, it appears that Bul River made interest payments of $22,500 and principal payments of $26,000 to Mr. Stafford. Mr. Stafford's own calculations show further payments of interest from 2007 to 2009 totalling $58,000.

[127] Accordingly, in respect of his $150,000 loan, as of 2009, Mr. Stafford had received $328,100 in interest payments and $26,000 in principal payments for a total recovery of $354,100.

[128] Leaving aside the interest and principal payments referred to above, the involvement of Bul River and Gallowai in respect of the Stafford Loan Agreement arose, from a corporate perspective, in 2003. At that time, various resolutions were passed by the directors of Bul River. Mr. Stafford places great reliance on these resolutions and as will become apparent from the discussion below, the issue largely turns on the legal effect of these resolutions. As such, I will describe the resolutions in some detail.

[129] The first resolution is dated May 13, 2003. It provides:

> WHEREAS:
>
> A. Loans, loan repayments and principal and interest payments which were property for the benefit of, or were the responsibility of, the Company have for some years been done, as a matter of convenience, in the name of the Company's President, [Stanfield] - and as a result debit and credit entries have improperly been posted to Stanfield's Shareholder Loan Account.
>
> B. Stanfield has requested that the situation described above be corrected…

> C. The Companies' accountant has examined the financial records and has verified that the said situation has occurred with respect to the Company as well as Gallowai…
>
> D. Management has proposed, based on professional advice, that for convenience and simplicity the various Loan Accounts involving Stanfield, the Company and the Other Companies be consolidated in the books of the Company.
>
> …
>
> NOW THEREFORE, IT IS RESOLVED:
>
> 1. THAT the Loan Accounts and payments referred to above be recognized as solely the responsibility of the Company and it be confirmed that Stanfield was, in being named in the transactions, acting solely on behalf of the Company and that he had no personal, legal or beneficial interest in, or any liabilities as a result of, any of the transactions.
>
> 2. THAT the Agreement dated this May 13, 2003 between the Company, Stanfield and the Other Companies be approved and that Stanfield or any other officer or director of the Company be authorized to sign and deliver it on behalf of the Company.
>
> 3. THAT the Company assume the obligations of the Other Companies to Stanfield pursuant to the shareholder account in their records, to be offset by inter-company accounts whereby each of the Other Companies will be indebted to the Company for the amount of shareholders accounts assumed by the Company.

[130] The second resolution of Bul River is dated October 20, 2003 and relates to the May 2003 resolution. The resolution references that Stanfield is having difficulty providing full documentary verification and back-up for his expenditures for which he was requesting reimbursement. In addition, the preamble to the resolution states in part:

> D. Acceptance of liability to Stanfield at this date poses some special problems due to the fact that some of the disbursements that he has requested to be reimbursed for precede the last date that the financial statements of the company were audited – and such statements did not include the expenditures.

Concern was expressed whether or not the acceptance of these responsibilities would be acceptable to Bul River's auditors. The resolution authorizes the engagement of the auditors for the purpose of conducting a special audit of the expenditures made by Stanfield. There is no evidence as to the result of that special audit or if it even took place.

[131] The third resolution of Bul River is dated November 30, 2003 and is of particular significance. It reads as follows:

> WHEREAS:
>
> A. Ross Stanfield …has submitted various claims for recognition of corporate liabilities to third parties ... as shareholder's loans for transactions undertaken as agent on behalf of the Company, Gallowai … to finance the exploration of the British Columbia properties owned by the Companies ("Properties").
>
> B. Stanfield and the Companies signed an Agreement dated May 13, 2003 recognizing the fact that Stanfield has acted as agent on behalf of the Companies since 1972 and had personally undertaken a variety of transactions as agent for the Companies to finance the exploration of the Properties.
>
> C. Stanfield has submitted the following claims pursuant to the Agreement for the Director's consideration and approval.
>
> 1. Exploration Loans
>
> These loans were negotiated between 1983 and 2002 personally by Stanfield, as the agent of the Company, and all funds were advanced to the Companies as shareholders loans from him. Payments were made on the loans with his own personal funds or shareholdings. The Directors were provided with a summary of individual loans and accrued interest for review. Files have been prepared for corporate record keeping purposes that include the documentation and amortization schedules supporting each loan.
>
> Balances as at December 31, 2002
>
> | | |
> |---|---|
> | Loan principal | $1,886,413 |
> | Accrued interest | $6,281,004 |
>
> …
>
> **NOW THEREFORE**, the undersigned acting as a group excluding … [Stanfield], RESOLVE:
>
> 1. THAT the loans, accrued interest and share subscriptions detailed in paragraph C.1 above, negotiated by Stanfield as agent on behalf of the Companies, be accepted as liabilities of the Companies.
>
> …
>
> 3. THAT the resolution passed by the full Board dated May 13, 2003 that the Company accept all of the above described liabilities on behalf of the other Companies – to be offset by inter-company accounts whereby each of the other Companies will be indebted to the Company for the amounts assumed by the Company – be further approved and ratified.

[132] It should be noted that the agreement between Stanfield and Bul River (and perhaps others) dated May 13, 2003 has not been located. Nor have any similar resolutions from the directors of Gallowai been found.

[133] In addition, no one has been able to locate a copy of the summary of the loans as of December 2002 referred to in paragraph C.1 of the November 2003 resolution. Mr. Hewison refers in his evidence to a spreadsheet in the name of Bul River referencing "Mine Development Loans" for the year ended December 2003 which indicates a loan from Mr. Stafford of $150,000 with accrued interest of $899,236.39. The total interest figure for all loans is slightly different (lower) than the interest amount referenced in the November 2003 resolution which was as of December 31, 2002. In any event, CuVeras does not dispute that Mr. Stafford would likely have been on the list referred to in the November 2003 resolution.

[134] No audited financial statements have been produced pre-2003, as might have been amended arising from the special audit authorized in October 2003.

[135] Also in evidence are various letters from Bul River to Mr. Stafford concerning these loans.

[136] On April 23, 2007, a letter was sent to Mr. Stafford's accountant enclosing various amended 2006 T5 (Statement of Investment Income) forms or slips that were apparently issued to Mr. Stafford by Gallowai and Bul River, each as to 50% of interest paid or payable pursuant to the Stafford Loan Agreement. The letter indicates that as of 2006, the amount of such interest was just over $1.5 million (which included the $150,000 bonus amount supposedly due pursuant to the Stafford Loan Agreement).

[137] On March 6, 2008, Mr. Stafford received correspondence from Bul River's controller concerning the 2006 T5s slips from Bul River and Gallowai. Later letters from the controller dated April 2, 2008, February 12, 2009 and January 19, 2010 refer to T5 slips being issued by Bul River and Gallowai for 2007, 2008 and 2009 relating to accrued interest on the Stafford Loan Agreement. Finally, T5 slips for 2010 appear to have been issued by Bul River and Gallowai for that taxation year.

[138] There is no evidence that Mr. Stafford knew anything about the 2003 resolutions by Bul River. It does appear to be the case that he began receiving

interest payments from Gallowai in 1999 and these would continue together with the payment of some principal by either Gallowai or Bul River to 2009. Bul River would also later send Mr. Stafford, commencing in 2007 and continuing to 2010, certain details or statements relating to the loan and the T5 slips.

(iii) Legal Basis for the Stafford Claim

[139] For the reasons set out below, CuVeras submits that the Stafford Claim is not a debt claim against Bul River and Gallowai and ought to be expunged from the Creditor List. CuVeras argues that Mr. Stafford cannot satisfy the onus placed upon him to prove his claim against those petitioners.

[140] At the outset, it is clear that Mr. Stafford advanced his loan to Stanfield personally, and not to either Bul River or Gallowai. The 2003 resolutions confirm that such was the case and, indeed, the amounts were noted in the books of Bul River and Gallowai as shareholder loans owing to Stanfield personally in that respect.

[141] CuVeras made substantial arguments on the later involvement of Bul River and Gallowai in terms of whether those petitioners became the principal obligants under the Stafford Loan Agreement. These arguments related to whether or not there had been a valid assignment of the Stafford Loan Agreement from Stanfield to Bul River and Gallowai. While Mr. Stafford agreed with these submissions, it is helpful to set out these issues and arguments in order to put in focus the later arguments of Mr. Stafford (which are contested by CuVeras).

[142] I agree that there is no basis upon which Mr. Stafford can contend that Stanfield assigned the Stafford Loan Agreement to Bul River and Gallowai. There is no evidence that Gallowai agreed to anything, since the resolutions were only that of Bul River's directors.

[143] Even assuming that the November 2003 resolution was intended to effect a valid assignment of the obligations under the Stafford Loan Agreement from Stanfield to Bul River and Gallowai, it is of no legal effect in that it purports to assign the burden of Stanfield's obligations to Bul River and Gallowai. It is trite law that

neither the common law nor equity has ever permitted a debtor to unilaterally assign the burdens or obligations (as opposed to the benefits) of a contract to a third party without the consent of the creditor. Rather, in that case a novation is required: *Mills v. Triple Five Corp.* 1992 CanLII 6204 (Alta. Q. B.) at paras. 13-14, [1992] 136 A.R. 67.

[144] Novation involves the substitution of a new contract or obligation for an old one which is thereby extinguished: *Royal Bank of Canada v. Netupsky*, 1999 BCCA 561. In *Netupsky* at paras. 11-13, the court set out the essential elements that must be established to satisfy the test to establish novation:

> 1. the new debtor must assume complete liability for the debt;
>
> 2. the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; and
>
> 3. the creditor must accept the new contract in full satisfaction and substitution for the old contract.

[145] Mr. Stafford bears the burden of proving novation which the Court in *Netupsky* described as a "heavy onus". Further, while the courts may look at the surrounding circumstances, including the conduct of the parties, they will not infer that a novation has occurred in the face of ambiguous evidence as to the parties' intention to effect a new agreement with the substituted party.

[146] As is noted by CuVeras, it is somewhat ironic to suppose that Mr. Stafford might have advanced this issue since he is the creditor and as noted in *Netupsky*, it is usually the "unwilling creditor" who is objecting to any suggestion of a novation. In any event, in this case there is no evidence to suggest that:

a) Mr. Stafford had any knowledge of the 2003 resolutions or was in any other way even advised by Stanfield, Bul River or Gallowai that it was intended that Bul River and Gallowai would assume the obligations under the Stafford Loan Agreement in place of Stanfield; and

b) Stanfield, Bul River, Gallowai and Mr. Stafford reached a consensus with respect to the terms upon which any purported new or substituted agreement would operate.

[147] Accordingly, it is clear, as agreed by CuVeras and Mr. Stafford, that novation did not occur such that Bul River and Gallowai assumed the obligations of Stanfield under the Stafford Loan Agreement with the consensus of Mr. Stafford. In addition, no privity of contract arose simply by reason of later payments to Mr. Stafford or issuance of T5 slips by Bul River and Gallowai. That Mr. Stafford was not directly involved in any such new contractual arrangements and that he only later "assumed" that Bul River and Gallowai were involved is made evident by his own loan summary attached to his Proof of Claim:

> Commencing in 2006, T5 slips were issued by Bul River Mineral Corporation and Gallowai Metal Mining Corporation (50% each). Assumption is therefore that ½ of Grand Total is receivable from each.
>
> [Emphasis added].

[148] Nor is there any suggestion that Bul River or Gallowai provided a guarantee of the Stafford Loan Agreement to Mr. Stafford. Finally, Mr. Stafford does not argue that Bul River and Gallowai are somehow estopped from denying that they are debtors of Mr. Stafford, particularly by reason of the interest and principal payments made by them and the T5 slips prepared by them which were then forwarded to Mr. Stafford.

[149] Having confirmed the agreement of CuVeras and Mr. Stafford on the above issues, I turn to Mr. Stafford's position, which is solely rooted in agency:

> The corporate minutes of Bul River Mineral Corporation confirm that the actions of Ross Hale Stanfield were as agent for the company and associated companies and confirmed by resolution to accept liability of agreements signed by Stanfield as legitimate debts of a company and acted on it accordingly[.]

[150] Essentially, Mr. Stafford's argument is that Stanfield was retroactively appointed as the agent of Bul River and Gallowai by reason of the November 2003 resolution such that he had the express or implied authority to bind Bul River and

Gallowai at the time of the loan. He relies in particular on s. 193(2) and (4) of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> 193 (2) A contract that, if made between individuals, would, by law, be required to be in writing and signed by the parties to be charged, may be made for a company in writing signed by a person acting under the express or implied authority of the company and may, in the same manner, be varied or discharged.
>
> …
>
> (4) A contract made according to this section is effectual in law and binds the company and all other parties to it.

[151] It seems to be common ground that Stanfield was not acting as the agent of Bul River and Gallowai in 1990 when the loan was made. The Stafford Loan Agreement does not reference Stanfield acting as an agent and the Proof of Claim does not allege an agency relationship at the time of the Stafford Loan Agreement. Nor was Stanfield acting as the agent of Bul River and Gallowai during the ensuing 13 years when the loan was being administered. The allegation is that changes only occurred in 2003 when Stanfield decided he wanted to be reimbursed by Bul River and Gallowai for certain loans he had earlier made.

[152] I was referred to only one authority on the agency issue by CuVeras, being *Spidell v. LaHave Equipment Ltd.*, 2014 NSSC 255.

[153] In *Spidell*, LaHave Equipment Ltd. was a dealer for Case Canada Limited. The plaintiff Spidell purchased a Case Canada excavator from LeHave which was financed by Case Credit Limited. Spidell alleged that employees of LaHave made representations to him about the performance of the equipment. Spidell believed LaHave was a representative or agent or dealer for Case Canada. Spidell did not make the required payments to Case Credit and the equipment was repossessed. Spidell sued LaHave claiming damages for alleged misrepresentations. LaHave defended the action but subsequently went into bankruptcy. Only then did Spidell amend his pleading to add Case Credit and Case Canada as defendants, claiming LaHave was their agent. The issue on the summary trial was whether LaHave was in fact the agent of the Case companies.

[154] Mr. Justice Coughlan reviewed the law of agency, as follows:

> [21] In *Halsbury's Laws of Canada First Edition,* "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:
>
> "1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions."
>
> And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:
>
> "1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,
>
> 4. by estoppel, or
>
> 5. by operation of the principles of law."
>
> [Emphasis added].

[155] Mr. Stafford relies in particular on the creation of agency by ratification as referred to above. Justice Coughlan said this about agency by ratification:

> [25] The conditions for an agency by ratification to be established were set out in *Halsbury's Laws of Canada, supra*, at Agency HAY-22 as follows:
>
> "**Three Conditions**. Actions by a principal after the agent has purported to act on the principal's behalf may amount to creation of agency by ratification. For this to occur, three conditions must be satisfied. First, the agent whose act is sought to be ratified must have purported to act for the principal; second, at the time the act was done the agent must have had a competent principal; and third, at the time of the ratification the principal must be legally capable of doing the act himself.["]

[156] The key consideration from the above quote is the first requirement. In this case, there is no evidence that Stanfield "purported to act" for Bul River and Gallowai as principals in 1990 when he entered into the Stafford Loan Agreement. In fact, the evidence is to the contrary in that he acted in his personal capacity and not as agent.

[157] I agree with CuVeras that agency by ratification assumes that there exists a relationship (even though perhaps mistaken) between the principal and agent at the time of the transaction which must later be ratified. One example is as noted in the *Halsbury's* quote above, namely where the agent exceeded his or his authority but later the unauthorized transaction is ratified or adopted by the principal. That is not what occurred in this case. Ratification of an agent's actions in that case cannot occur when no agency relationship existed in the first place. The second example of ratification described in *Halsbury's* (where the person had no authority to act but their actions were later ratified) still requires that the actions be done by the agent "on the principal's behalf" in purported furtherance of an agency relationship.

[158] Accordingly, the concept of ratification by Bul River and Gallowai of Stanfield's actions concerning the Stafford Loan Agreement as their agent has no application in this case.

[159] What occurred in this case is that many years later, in 2003, Stanfield, Bul River and Gallowai agreed that the companies would take over responsibility for payment of the Stafford Loan Agreement in place of Stanfield. But those arrangements were only between Bul River, Gallowai and Stanfield and not Mr. Stafford.

[160] Accordingly, we start from the proposition that there was no agency relationship between Stanfield and Bul River and Gallowai in 1990. The only parties to the Stafford Loan Agreement are Stanfield and Mr. Stafford.

[161] The only evidence suggesting any link between Mr. Stafford and Bul River and Gallowai arise from the fact that, commencing in April 2007, Mr. Stafford began to receive T5 slips from them. Payments were also made by Bul River and Gallowai commencing in 1999. Mr. Stafford argues that by reason of such actions, Bul River and Gallowai treated the Stafford Loan Agreement as their debt since they could not have issued T5 slips for someone else's debt. The 2003 resolutions are, of course, an internal document of Bul River but do indicate that Bul River at least intended to accept the Stafford Loan Agreement as its obligation. The basis upon which Bul

River was able to accept this obligation on behalf of Gallowai is unclear and not substantiated.

[162] Mr. Stafford argues that these events confirm that Bul River and Gallowai had assumed the obligations of Stanfield. But this argument brings us back to the legal bases for any liability on the part of Bul River and Gallowai that CuVeras raised and I discussed above (assignment, novation, guarantee and estoppel) and which arguments Mr. Stafford agreed did not apply.

[163] I agree with the submissions of CuVeras that these later actions of Bul River and Gallowai evidence an intention on the part of Bul River (and perhaps Gallowai) to take over or assume payment of the obligations of Stanfield under the Stafford Loan Agreement. In that sense, and without a novation, in substance these arrangements amount to Bul River and Gallowai agreeing to indemnify Stanfield in respect of his obligations to pay the Stafford Loan Agreement amounts and nothing more.

[164] I conclude that Mr. Stafford has not met the onus of proving that the amounts under the Stafford Loan Agreement are obligations or "provable debts" of Bul River and Gallowai.

[165] Both CuVeras and Mr. Stafford made submissions concerning the issue as to whether the Stafford Loan Agreement provided for compound interest or not. In light of my conclusions above, it is not necessary to address that issue.

Conclusion

[166] In accordance with the above reasons, the Court declares that:

a) the Preston Claim is an equity claim for the purposes of this *CCAA* proceeding; and

b) the Stafford Claim is not a debt claim as against Bul River and Gallowai. It follows that the Creditor List should be amended accordingly and that

> Mr. Stafford is not entitled to vote on or receive any distribution under any plan of arrangement as may subsequently be filed by those petitioners.

[167] If any party is seeking costs, then written submissions should be delivered to the court and the party against whom costs are sought within 30 days of delivery of these reasons. Any response shall be delivered within 15 days and any reply to that response shall be delivered with seven days of that date.

"Fitzpatrick J."

TAB 9

Re Olympia & York Developments Ltd. and 23 other Companies set out in Schedule "A"

[Indexed as: Olympia & York Developments Ltd. (Re)]

12 O.R. (3d) 500
[1993] O.J. No. 545
Action No. B125/92

Ontario Court (General Division),
R.A. Blair J.
February 5, 1993

Debtor and creditor -- Companies' Creditors Arrangement Act -- Company applying for order sanctioning plan of compromise or arrangement -- Criteria for exercise of court's jurisdiction to sanction plan -- Criteria for determining whether plan fair and reasonable -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

Debtor and creditor -- Companies' Creditors Arrangement Act -- Company applying for order sanctioning plan of compromise or arrangement -- Lack of unanimity amongst the classes of creditors -- Court may sanction plan where the classes of creditors that had not approved the plan are not bound or prejudiced by the plan -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

O & Y Ltd. and 23 affiliated corporations applied under s. 6 of the Companies' Creditors Arrangement Act (CCAA) for a court order sanctioning a final plan of compromise or arrangement. The five-year plan for which sanctioning was sought was the culmination of several months of intense negotiation by sophisticated, experienced, and well-advised parties. The plan was detailed, technical, enormously complex, and comprehensive; it involved corporate reorganizations, amalgamations,

privatizations, management agreements, share exchanges, asset transfers, options, conversion rights, and the accrual of interest and principal payments on loans. Important features were that secured creditors had the right to "drop out" from the plan and enforce their securities subject to certain strictures about timing and notice and, under the plan, the applicants could apply for an order that sanctioned the plan only insofar as it affected classes that had agreed to the plan.

There were 35 classes of creditors; 27 classes voted in favour of the plan while eight classes (which, in each case, comprised secured creditors holding security against a single project asset or single group of shares) either voted against the plan or did not approve it with the voting majorities required by the CCAA. The plan was approved by 83 creditors representing 93.26 per cent of the creditors represented and voting at the meeting and 93.37 per cent of the claims represented and voting at the meeting.

Held, the plan should be sanctioned.

The exercise of the court's statutory authority to sanction a compromise or arrangement under the CCAA is a matter of discretion. The general criteria are: (1) there must be strict compliance with all statutory requirements; (2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done that is not authorized by the CCAA; and (3) the plan must be fair and reasonable. What is fair and reasonable must be assessed in the context of the impact of the plan on the creditors and the various classes of creditors in the context of their response to the plan and with a view to the purpose of the Act. When considering whether to sanction a plan, the court is called upon to weigh the equities or balance the relative degrees of prejudice that would flow from granting or refusing the relief sought under the Act, although it was not the court's function to second guess the business aspects of the plan. One important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which approval has been given. Where a plan had been approved by the requisite majority

of creditors, there was a very heavy burden on parties seeking to show that the plan was not fair and reasonable. Another measure of what is fair and reasonable is the extent to which the proposed plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and non-prejudicial a manner as possible.

In this case, there had been strict compliance and no unauthorized conduct. The plan was also fair and reasonable. The great degree of creditor support deserved deference. With the "drop out" clause entitling secured creditors to realize upon their security, all parties were entitled to receive what they would have received had there not been a reorganization; potentially they might receive more.

In this case, because of the design of the plan the applicants also got over the legal question that arose because there had not been unanimity amongst the classes of creditors, a question for which the language of the CCAA did not provide a clear answer. It was relatively clear that a court would not sanction a plan if doing so would impose it upon a class or classes of creditors who rejected the plan; here, however, the plan treated the claims of creditors who rejected the plan as unaffected claims and the plan allowed secured creditors to drop out at any time. There was no prejudice and no unfairness to the eight classes of creditors that have not approved the plan because nothing was being imposed on them and none of their rights was being confiscated. In these circumstances, the plan could be sanctioned without unanimity of approval of classes of creditors.

Cases referred to

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, [1891] 1 Ch. 213, [1886-90] All E.R. Rep. Ext. 1143, 60 L.J. Ch. 221, 64 L.T. 127, 7 T.L.R. 171, 2 Meg. 337 (C.A.); Campeau, Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); Canadian Vinyl Industries Inc., Re (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.); Dairy Corp. of Canada, Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.); cole internationale de haute

esthtique Edith Serei Inc. (Receiver of) v. Edith Serei internationale Inc. (1989), 78 C.B.R. (N.S.) 36 (Que. S.C.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 sub nom. Nova Metal Products Inc. v. Comiskey (Trustee of), 41 O.A.C. 282 (C.A.); Keddy Motor Inns Ltd., Re (1992), 13 C.B.R. (3d) 245, 6 B.C.R. (2d) 116, 90 D.L.R. (4th) 175, 110 N.S.R. (2d) 246, 299 A.P.R. 246 (C.A.); Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.); Multidev Immobilia Inc. v. S.A. Just Invest (1988), 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.); Northland Properties Ltd. Re (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), affd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); NsC Diesel Power Inc., Re (1990), 70 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.); Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) [leave to appeal to S.C.C. refused (1991), 55 B.C.L.R. (2d) xxxiii]; Wellington Building Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (S.C.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Companies Act, R.S.O. 1927, C-218
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 4, 5, 6
Joint Stock Companies Arrangement Act, 1870 (U.K.), c. 104

Authorities referred to

Houlden, L.W., and Morawetz, C.H., Bankruptcy Law of Canada, vol. 1 (Toronto: Carswell, 1984), pp. E-6, E-7

APPLICATION for a court order sanctioning a final plan of compromise or arrangement under s. 6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

See list of counsel in Schedule "A", pp. 521-22, post.

R.A. BLAIR J. (orally):--On May 14, 1992, Olympia & York

Developments Limited and 23 affiliated corporations (the "applicants") sought, and obtained, an order granting them the protection of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a period of time while they attempted to negotiate a plan of arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.

A Final Plan of compromise or arrangements has now been negotiated and voted on by the numerous classes of creditors. Twenty-seven of the 35 classes have voted in favour of the Final Plan; eight have voted against it. The applicants now bring the Final Plan before the court for sanctioning, pursuant to s. 6 of the Companies' Creditors Arrangement Act.

THE PLAN

The Plan is described in the motion materials as "The Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as the "Plan" or the "Final Plan". Its final purpose, as stated in art. 1.2,

> . . . is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals -- with some common themes -- for the treatment of the claims of the various classes of creditors which have been established

in the course of the proceedings.

The contemplated O & Y restructuring has three principal components, namely:

1. The organization of O & Y Properties, a company to be owned as to 90 per cent by OYDL and as to 10 per cent by the Reichmann family, and which is to become OYDL's Canadian real estate management arm;

2. Subject to certain approvals and conditions, and provided the secured creditors do not exercise their remedies against their security , the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y Properties, in exchange for shares; and,

3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely, by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".

Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class-by-class basis, for dealing with the outstanding debt in question during the five-year Plan period.

In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage

the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.

It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.

The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self-financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.

The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides:

> a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically lifted; and,
>
> b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders'

Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan .

Finally, I note that art. 1.3 of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants".

THE PRINCIPLES TO BE APPLIED ON SANCTIONING

In Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 sub nom. Nova Metal Products Inc. v. Comiskey (Trustee of) (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the Companies' Creditors Arrangement Act, with this overview, at pp. 308-09 O.R., pp. 122-23 C.B.R.:

> Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (No. 1) (1989), 102 A.R. 161 (Q.B.), at p. 165.

Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a plan.

Section 6 of the CCAA reads as follows:

> 6. Where a majority in number representing three-fourths in

value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy Act or is in the course of being wound up under the Winding-up Act , on the trustee in bankruptcy or liquidator and contributories of the company.

(Emphasis added)

Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.

The general principles to be applied in the exercise of the court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) There must be strict compliance with all statutory requirements . . .

(2) All materials filed and procedures carried out must be examined to determine if anything has been done [or purported to have been done] which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

In an earlier Ontario decision, Re Dairy Corp. of Canada, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario Companies Act, R.S.O. 1927, c. 218. The Nova Scotia Court of Appeal recently followed Re Northland Properties Ltd. in Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116 (N.S.C.A.). Farley J. did as well in Re Campeau (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.).

Strict compliance with statutory requirements

Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: see Re Campeau.

At the outset, on May 14, 1992, I found that the applicants met the criteria for access to the protection of the Act -- they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings creditors' committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.

With the consent, and at the request of, the applicants and the creditors' committees, the Honourable David H.W. Henry, a former justice of this court, was appointed "claims officer" by order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or the Honourable M. Craig or the Honourable W. Gibson Gray -- both also former justices of this court -- as his designees, presided over the meetings of the classes of creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the court orders pertaining to them and the CCAA.

I am quite satisfied that there has been strict compliance with the statutory requirements of the Companies' Creditors Arrangement Act.

Unauthorized conduct

I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.

Since May 14, the court has been called upon to make approximately 60 orders of different sorts, in the course of exercising its supervisory function in the proceedings. These orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring costs throughout the "stay" period; they involved the confirmation of the sale of certain of the applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of creditors' committees, the classification of creditors for purposes of voting, the creation and defining of the role of "information officer" and,

similarly, of the role of "claims officer". They involved the endorsement of the information circular respecting the Final Plan and the mail and notice that was to be given regarding it. The court's orders encompassed, as I say, the general supervision of the negotiation and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the applicants and the creditors along the way.

While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of compromise, I have, with one exception, been the judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA .

In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.

This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

The Plan must be "fair and reasonable". That the ultimate expression of the court's responsibility in sanctioning a plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. "Fairness" is the quintessential expression of the court's equitable jurisdiction -- although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process.

From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs, whose decision in Quintette Coal Ltd. v. Nippon Steel Corp.

(1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 314 C.B.R., p. 116 B.C.L.R., that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced -- or "reasonable" -- manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it -- technical and procedural compliance with the Act aside -- the plan should be sanctioned if it is "fair and reasonable".

When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be assessed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.

On the appeal in Re Northland Properties Ltd., supra, at p. 201, Chief Justice McEachern made the following comment in this regard:

> . . . there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to

bind the minority to the terms of the plan, but the plan must be fair and reasonable.

In Re Alabama, New Orleans, Texas & Pacific Junction Railway Co., [1891] 1 Ch. 213 (C.A.), a case involving a scheme and arrangement under the Joint Stock Companies Arrangement Act, 1870 (U.K.), c. 104, Lord Justice Bowen put it this way, at p. 243:

> Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation . . . Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

Again at p. 245:

> It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

Is the Final Plan presented here by the O & Y applicants "fair and reasonable"?

I have reviewed the Plan, including the provisions relating to each of the classes of creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian -- if not worldwide -- corporate history. It would be folly for me to suggest that

I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.

One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

This point has been made in numerous authorities, of which I note the following: Re Northland Properties Ltd., supra, at p. 205; Re Langley's Ltd. , [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.), at p. 129 O.R., pp. 233-34 D.L.R.; Re Keddy Motor Inns Ltd, supra; cole internationale de haute esth etique Edith Serei Inc. (Receiver of) v. Edith Serei internationale (1987) Inc. (1989), 78 C.B.R. (N.S.) 36 (Que. S.C.).

In Re Keddy Motor Inns Ltd., the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a plan is not fair and reasonable, involving "matters of substance", when the plan has been approved by the requisite majority of creditors: see pp. 257-58 C.B.R., pp. 128-29 B.L.R. Freeman J.A. stated at p. 258 C.B.R., p. 129 B.L.R.:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that

creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

In Re cole internationale, at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.

In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the Final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take a compromise on the part of the participants in the negotiating and bargaining process". The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of May 14, 1992". Each creditors' committee had the benefit of independent and experienced legal counsel.

With the exception of the eight classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the applicants. This level of approval is something the court must acknowledge with some deference.

Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of five years.

The claims of creditors -- in this case, secured creditors -- who did not approve the Plan are specifically treated under

the Plan as "unaffected claims", i.e., claims not compromised or bound by the provisions of the Plan. Section 6.2(c) of the Final Plan states than the applicants may apply to the court for a sanction order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.

The claims of unsecured creditors under the Plan are postponed for five years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least annually, an amount out of OYDL's cash on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.

Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the applicants are able to become the "self-sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan".

Speaking as co-chair of the unsecured creditors' committee at the meeting of that class of creditors, Mr. Ed Lundy made the following remarks:

> Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.
>
> The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S.

Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.

In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.

The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.

After such consideration, the members have indicated their intentions as follows . . .

Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26 per cent of the creditors represented and voting at the meeting and 93.37 per cent in value of the claims represented and voting at the meeting.

As for the O & Y applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the

properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.

In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible.

I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e., as much as they would have received had there not been a reorganization: see Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.

The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contemplated arrangement under the Business Corporations Act, R.S.O. 1990, c. B.16. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.

For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".

Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is

empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In eight of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50/75 per cent test of s. 6.

The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:

Class 2 -- First Canadian Place Lenders
Class 8 -- Fifth Avenue Place Bondholders
Class 10 -- Amoco Centre Lenders
Class 13 -- L'Esplanade Laurier Bondholders
Class 20 -- Star Top Road Lenders
Class 21 -- Yonge-Sheppard Centre Lenders
Class 29 -- Carena Lenders
Class 33a -- Bank of Nova Scotia Other Secured creditors

While s. 6 of the CCAA makes the mathematics of the approval process clear -- the Plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class -- it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors . . . agree to any compromise or arrangement . . . the compromise or

arrangement may be sanctioned by the court.

(Emphasis added)

What does "a majority . . . of the . . . class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?

This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.

At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See Re Keddy Motor Inns Ltd., supra. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this . . . purpose": Elan Corp. v. Comiskey , supra, per Doherty J.A., at p. 307 O.R., p. 120 C.B.R. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297 O.R., pp. 110-11 C.B.R.:

> It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the

> debtor companies . . . are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

Approaching the interpretation of the unclear language of s. 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.

Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of s. 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:

> 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 . . . order a meeting of the creditors or class of creditors.

(Emphasis added)

It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or any class -- as opposed to all classes -- of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.

Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in all classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.

In Re Wellington Building Corp., [1934] O.R. 653 (S.C.), Mr.

Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

> I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value of each class should be obtained in support of the scheme before the Court could or should approve of it.

(Emphasis added)

This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 660):

> Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the Act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

Thus, the plan in Re Wellington Building Corp. went unsanctioned, both because the bondholders had unfairly been deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in Multidev Immobilia Inc. v. S.A. Just Invest (1988), 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.). There, the arrangement had been accepted by all creditors except one secured creditor, S.A. Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal, was unconcerned because it had struck a separate agreement; and three classes of which Just Invest was a member, opposed.

The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved as regards the other creditors who voted in favour of the Plan. The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

While it might be said that Multidev, supra, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to sanction.

I think it relatively clear that a court would not sanction a

plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.

By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the Plan, secured creditors have the right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different effect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not accepted and none of their rights is being "confiscated".

From this perspective it could be said that the parties are merely being held to -- or allowed to follow -- their contractual arrangement. There is, indeed, authority to suggest that a plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a plan that could be lawfully incorporated into any contract: see Re Canadian Vinyl Industries Inc. (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; Houlden & Morawetz, Bankruptcy Law of Canada, vol. 1 (Toronto: Carswell, 1984), pp. E-6 and E-7.

In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which

have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is nothing unfair in sanctioning the Final Plan without unanimity, in my view.

I am prepared to do so.

A draft order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semicolon, and capital letter has been vigilantly examined by the creditors and a battalion of advisers. I have been told by virtually every counsel who rose to make submissions, that the draft as it exists represents a very "fragile consensus", and I have no doubt that such is the case. Its wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan -- the First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.

Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning order should state this clearly and in a positive way. Paragraph 9 of his factum states the argument succinctly. It says:

> 9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.

The basis for the concern of these "no" creditors is set out in the next paragraph of the factum, which states:

10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.

The provision in the proposed draft order which is the most contentious is para. 4 thereof, which states:

4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

Mr. Barrack seeks to have a single, but much debated word -- "only" -- inserted in the second line of that paragraph after the word "will", so that it would read "and will only be binding on . . . the Applicants and the Creditors holding Claims in Classes [which have approved the Plan]". On this simple, single word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.

In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:

35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:

> 4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.

36. It is also submitted that any additional paragraph

should be added if any provisions of the proposed Sanction Order are granted beyond paragraph 4 thereof as follows:

> This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

These suggestions are vigorously opposed by the applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed order is necessary in order to provide those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise if arise they do.

The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate restructuring. It may be, or it may not be, that the objecting project lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a reorganization and corporate restructuring of this dimension it may simply not be realistic to expect that the world of the secured creditor, which became not-so-perfect with the onslaught of the applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.

I do, however, agree with the thrust of Mr. Barrack's submissions that the sanction order and the Plan can be binding only upon the applicants and the creditors of the applicants in respect of claims in classes which have approved the Plan, and

trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in s. 6.2 (c), it stipulates that, where classes of creditors do not agree to the Plan,

(i) the applicants shall treat such class of claims to be an unaffected class of claims; and,

(ii) the applicants shall apply to the court "for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan".

The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.

In terms of the court's jurisdiction, s. 6 directs me to sanction the order, if the circumstances are appropriate, and enacts that, once I have done so, the order "is binding . . . on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors . . . and on the company". As I see it, that is exactly what the draft order presented to me does.

Accordingly, an order will go in terms of the draft order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.

These reasons were delivered orally at the conclusion of the sanctioning hearing which took place on February 1 and February 5, 1993. They are released in written form today.

COUNSEL FOR SANCTIONING HEARING ORDER
SCHEDULE "A"

David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland, for Olympia & York.

Ronald N. Robertson, Q.C., for Hong Kong & Shanghai Banking Corp.

David E. Baird, Q.C., and Patricia Jackson, for Bank of Nova Scotia.

Michael Barrack and S. Richard Orzy, for First Canadian Place Bondholders, Fifth Avenue Place Bondholders and L'Esplanade Laurier Bondholders.

William G. Horton, for Royal Bank of Canada.

Peter Howard and J. Superina, for Citibank Canada.

Frank J.C. Nebould, Q.C., for Unsecured/Under Secured Creditors Committee.

John W. Brown, Q.C., and J.J. Lucki, for Canadian Imperial Bank of Commerce.

Harry Fogul and Harold S. Springer, for The Exchange Tower Bondholders

Allan Sternberg and Lawrence Geringer, for O & Y Eurocreditco Debenture Holders.

Arthur O. Jacques and Paul M. Kennedy, for Bank of Nova Scotia, Agent for Scotia Plaza Lenders.

Lyndon Barnes and J.E. Fordyce, for Crdit Lyonnais, Cr edit Lyonnais Canada.

J. Carfagnini, for National Bank of Canada.

J.L. McDougall, Q.C., for Bank of Montreal.

Carol V. E. Hitchman, for Bank of Montreal (Phase I First Canadian Place).

James A. Grout, for Credit Suisse.

Robert I. Thornton, for I.B.J. Market Security Lenders.

C. Carron, for European Investment Bank.

W.J. Burden, for some debtholders of O & Y Commercial Paper II Inc.

G.D. Capern, for Robert Campeau.

Robert S. Harrison and A.T. Little, for Royal Trust Co. as trustee.

Order accordingly.

TAB 10

Ontario Supreme Court
Menegon v. Phillip Services Corp.
Date: 1999-08-27

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

In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as Amended

In the Matter of a Plan of Compromise or Arrangement of Philip Services Corp. and the Applicants Listed on Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Joseph Menegon, Plaintiff and Philip Services Corp., Salomon Brothers Canada Inc., Merill Lynch Canada Inc., CIBC Wood Gundy Securities Inc., Midland Walwyn Capital Inc., First Marathon Securities Limited, Gordon Capital Corporation, RBC Dominion Securities Inc., TD Securities Inc., and Deloitte & Touche, Defendants

Ontario Superior Court of Justice [Commercial List] Blair J.

Judgment: August 27, 1999

Docket: 99-CL-3442, 4166CP/98

David R. Byers, Sean Dunphy and Colleen Stanley, for Philip Services Corp. et al.

John McDonald, for the Class Proceedings Plaintiffs.

J.L. McDougall, Q.C. and B.R. Leonard, for Deloitte & Touche.

B. Zarnett, for Merrill Lynch Canada Inc., Midland Walwyn Capital Inc.,

First Marathon Securities Limited, Gordon Capital Corporation and Salomon Brothers Canada Inc. ("The Underwriters").

Hilary Clarke, for Royal Bank of Canada.

Pamela Huff and Susan Grundy, for Lenders under the Credit Agreement.

Joseph Groia and Subrata Bhattacharjee, for certain Directors.

E.A. Sellers, for CIBC as Account Intermediary.

Steven Graff, for PHH Vehicle Leasing.

Blair J. **:**

I—Facts

Background

[1] The issues raised on these Motions touch upon difficult areas in the burgeoning field of cross-border insolvencies.

[2] Philip Services Corp. is the ultimate parent company of a network of approximately 200 directly and indirectly owned subsidiaries in Canada, the United States and elsewhere. The operations of this international conglomerate of companies are service oriented, with a primary focus on what are referred to as “Metals Services” and “Industrial Services”. The former involves the collection, processing and recycling of scrap metal for steel mills and for the foundry and automotive industries. The latter entails providing such things as cleaning and maintenance services, waste collection and transportation, emergency response services and tank cleaning for major industries (“outsourcing services”), and providing “by-products recovery services”, with heavy emphasis on chemicals and fuel and polyurethane recycling, for the same industries.

[3] The Philips conglomerate—with consolidated revenues in 1998 of U.S. $2 billion, but a consolidated, net loss of U.S. $1,587 billion for the period ending December 31, 1998—has fallen into insolvent circumstances. On June 25, 1999, Philip Services Corp. and its Canadian subsidiaries sought and obtained the protection of this Court under the provisions of the CCAA to enable them to attempt to restructure their affairs. On the same date, Philip Service Corp. and its primary subsidiary for its U.S. operations, Philip Services (Delaware) Inc., together with other U.S. subsidiaries, filed for Chapter 11 protection under the *U.S. Bankruptcy Code* in United States Bankruptcy Court (District of Delaware). On July 12, 1999, a “Disclosure Statement and a Plan of Reorganization” was filed in the U.S. Bankruptcy Proceedings (“the U.S. Plan”). On July 15th, a Plan of Compromise and Arrangement was filed in the CCAA Proceedings (“the Canadian Plan”).

[4] As the parties and counsel have done, I shall refer to Philip Services Corp. as “Philip” and to Philip Services (Delaware) Inc. as “PSI”. I shall refer to the conglomerate as a whole as “Consolidated Philip”.

[5] Philip is an Ontario corporation with head offices in Hamilton, Ontario. It is a public company with stock trading on the Toronto Stock Exchange, the Montreal Exchange, and the

New York Stock Exchange. Although trading is suspended at the present time, the bulk of trading occurred on the New York Stock Exchange. Eighty-two percent of Philip's issued and outstanding shares are owned by U.S. residents. Moreover, it appears, the majority of Philip's operating assets, and of its operations, are located in the United States. Consolidated Philip carries on business at more than 260 locations, and employs more than 12,000 employees, primarily in North America. Its customer list includes more than 40,000 industrial and commercial customers world-wide. In Canada, there are 94 locations, about 2,000 employees, and annual revenues in the neighbourhood of U.S. $333 million.

[6] Philip expanded very rapidly in the past few years—perhaps too rapidly, as it turns out. Consolidated Philip grew by more than 40 new businesses acquisitions in 1996 and 1997. Associated with this expansion was the negotiation of a U.S. $1.5 billion Credit Agreement between Philip and PSI as borrowers and a syndicate of more than 40 lenders (the "Lenders"). Under the Credit Agreement Philip guaranteed the borrowings of PSI, and PSI guaranteed the borrowings of Philip. In addition, certain subsidiaries of Philip and PSI guaranteed all of the liabilities of Philip and PSI to the lenders, and the guarantees from the subsidiaries were secured by general agreements and specific assignments of assets. In short, the Lenders have security over virtually all of the assets of Consolidated Philip. Moreover, subject to certain specific exceptions, it is first security.

[7] During this same period of expansion, Philip raised about U.S. $362 million through a public offering in the U.S. and Canada. Seventy-five percent of these shares were sold in the U.S. As events transpired, these public offerings have led to a series of class actions against Philip both in the U.S. and in Canada. They arose out of certain discrepancies between copper inventory as shown on the books and records of Philip and actual inventory on hand, which were revealed in audits in early 1998. Publicity surrounding the discrepancies led to a drop in the price of Philip shares, which led to various class actions. Eventually, it was determined that Philip's liabilities had been understated by approximately U.S. 35 million. As a result, it was required to file an Amended Form 10-K with the U.S. Securities and Exchange Commission restating its financial results for 1997 to show an additional loss of $35 million. It was also required to revise the amount of pre-tax special and non-recurring charges for that same year.

[8] It is said that the unsettling effects of the financial irregularities and the class action proceedings, in conjunction with a general uncertainty in the markets serviced by Consolidated Philip, caused Philip's earnings to drop dramatically. It could not refinance its long-term debt under the Credit Agreement. Its trade credit was curtailed. It lost contracts and, because its bonding capacity was impaired, it was further hampered in its ability to win new contracts. In spite of concerted efforts over a period of nearly a year, Philip was not able to re-finance its debt or to restructure its affairs outside of the court restructuring context. Cash conservation measures in late 1998 led to defaults under the Credit Agreement. Debt restructuring negotiations with *the Lenders* since that time led ultimately to the parallel insolvency proceedings in Canada and the U.S. to which I have referred above.

The Class Proceedings

[9] Developments in the class action proceedings are what have led specifically to the Motions which are presently before this Court.

[10] In February and March of 1998 various class actions were filed in the United States against Philip, certain of its past and present directors and officers, the underwriters of the Company's November 1997 public offering, and the Company's auditors (Deloitte & Touche)[1]. The actions, now consolidated, alleged that Philip's financial disclosure for various time periods between 1995 and 1997 contained material misstatements or omissions in violation of U.S. federal securities laws.

[11] In May, 1998, a class proceeding was also commenced in Ontario, under the *Class Proceedings Act,* 1992 ("the CPA Proceeding"). The plaintiff is Joseph Menegon, a retired school teacher living in Hamilton, who had purchased 300 common shares of Philip on the TSE in November, 1998. The CPA Proceedings is an action for misrepresentation, negligent misrepresentation and recission relating to the purchase of shares of Philip by people in Canada between February 28 and May 7, 1998. The defendants are Philip, the various Underwriters, and Deloitte & Touche.

[12] At the instance of Philip and Deloitte & Touche, however, a motion was brought for an order dismissing the U.S. Class Action on the grounds that the United States Court was not the proper Court for the disposition of the claims, but that the Ontario Court was. This motion

was successful and on May 4, 1999 the U.S. Class Action was dismissed. A motion to reconsider was also dismissed. Although the U.S. Class Action plaintiffs have appealed, the present status of those proceedings is that they have been dismissed.

[13] Nonetheless, the U.S. claims persist, and there have been negotiations between counsel for the U.S. and Canadian Class Action plaintiffs and Philip since early 1999 with a view to arriving at a settlement of the class action claims against Philip. Because of the nature of these claims, and the potential quantum of any judgments that might be obtained, a resolution of the Class Action proceedings, according to Philip, is an essential element of any successful restructuring. On June 23, 1999, the parties to the negotiations entered into a Memorandum of Understanding which outlined a proposed settlement between Philip and the U.S. Class Action and CPA Proceedings plaintiffs.

[14] Philip and the CPA Proceeding plaintiff now seek certification of the CPA Proceeding and approval of the Settlement by the Court. Philip, separately, seeks approval of this Court under the CCAA to enter into the proposed Settlement. These motions have triggered the series of matters that are now to be disposed of. Deloitte & Touche not only opposes the Motions, but seeks separate declaratory relief on its own part touching upon the Settlement itself and as well the overall "fairness" and "reasonableness" of the proposed Canadian Plan. I shall return to the specifics of the competing Motions and the relief sought shortly. First, however, some brief reference to the controversial aspects of the Canadian and U.S. Plans, and to the terms of the Settlement, is required.

The Controversial Aspects of the Plans, and the Settlement

[15] The principle terms and conditions of the U.S. and Canadian Plans, as they presently stand, were hammered out in a "Lock-Up Agreement" entered into in April, 1999 and later amended on June 21st, between Philip (as Canadian borrower), PSI (as U.S. borrower), and a Steering Committee representing the Lenders. There were also negotiations with certain of Philip's major unsecured creditors and with counsel for the U.S. and Canadian class action plaintiffs. The Lock-Up Agreement is variously described as the result of "heavy" negotiations and "very hard bargaining". No doubt that is indeed the case.

[1] These various actions were eventually consolidated and transferred to the United States District Court, Southern District of New York, by order dated June 2, 1998.

[16] The amended Lock-Up Agreement provides in substance that the Lenders will become the holders of 91% of the equity in the newly restructured Philip, and that they will as well receive U.S. $300 million of senior secured debt (now reduced to $250 million through asset sales) and $100 million of secured “payment in kind” notes. Under the U.S. Plan the remaining 9% of the equity in the restructured Philip is to be made available to other stakeholders, on the following basis: 5% (plus U.S. $60 million in junior notes) is to be for the compromised unsecured creditors; 2% for the existing shareholders; 1.5% for the Canadian and U.S. class action plaintiffs; and, 0.5% for the holders of other securities claims. The formula is conditional upon cross-approvals of the U.S. and Canadian Plans.

[17] From Philip’s perspective the Plans filed in both the U.S. and in Canada are interdependent and form a single Plan from a “business point of view”. The general concept of the overall plan is that each class of stakeholders in the Consolidated Philip with similar characteristics are to be treated similarly whether they are located in the U.S. or in Canada. With this in mind, and having regard to the need for a coordinated restructuring of claims and interests against Philip, PSI, and the Canadian and U.S. subsidiaries, the Plans provide that,

a) creditors with claims against *Philip’s Canadian subsidiaries but not against Philip itself* are to file their claims in the CCAA proceedings in Canada, and are to be dealt with in the Canadian Plan; and,

b) creditors with claims *against Philip* or its U.S. subsidiaries are to have their claims processed in the U.S. proceedings and are to be dealt with in the U.S. Plan.

[18] The result of this is that the claims of *Philip’s* creditors, whether Canadian or U.S., are to be dealt with under the U.S. Plan and governed by Chapter 11 of the *U.S. Bankruptcy Code.* This includes the claims of Deloitte & Touche and of the Underwriters, and of certain former officers and directors, for contribution and indemnity in relation to the U.S. and Canadian class proceedings. It also includes the claims of certain creditors, such as Royal Bank of Canada, in relation to personal property leases.

[19] Not surprisingly, those so affected take umbrage at this treatment. They submit that it contravenes the provisions of the CCAA and their substantive rights under Canadian law, and should not be countenanced. It renders the Canadian Plan unfair and unreasonable, in their submission, and should not be sanctioned. Philip argues, on the other hand, that matters

relating to whether or not the Plan is fair and reasonable are matters to be dealt with at the sanctioning hearing, when the Plan is brought before the Court for approval after it has received the earlier approval of the Company's creditors. Counsel for Philip—supported by counsel for the Lenders and counsel for the Canadian class action plaintiff—submits that it is premature at this stage to consider such contentions. Counsel for Deloitte & Touche and for the Underwriters and for Royal Bank counter this argument, however, by asserting that the certification and approval of the Settlement as sought raises the very same issues and that they are so "inextricably linked" that they must be dealt with together. In an earlier endorsement, I agreed with this latter submission. It fails now to consider the two matters together.

The Proposed Settlement

[20] Under the proposed Settlement the Canadian and U.S. class action plaintiffs are to receive 1.5% of the common shares of a restructured Philip, as noted above. The shares are to be distributed *pro rata* amongst the Canadian and U.S. plaintiffs. There is to be, in addition, an amount of up to U.S. $575,000 for costs of counsel for the U.S. and Canadian class action plaintiffs. The Settlement is embodied in the U.S. Plan as "Allowed Class 8B Claims". It includes the right of persons caught by the class proceedings to opt out; however, any member of the class who elects to opt out of the proposed settlement is also to be dealt with in the U.S. Plan as a Class 8B claimant.

[21] The proposed Settlement is conditional upon its being approved by the Courts in Canada and in the U.S. and, according to Philip, upon the successful implementation of both the Canadian and the U.S. Plan. Philip has made it clear that it and its professional advisors do not believe that a restructuring of Philip can be accomplished without resolution of the class action claims in Canada and the U.S. Philip, counsel in the Canadian class action, and the Lenders all argue that in the event of liquidation, the plaintiffs will get nothing because—even if they are successful on liability—they will have no chance of recovering a damage award against the insolvent Philip. The Settlement is also recommended by Ernst & Young, the court appointed Monitor for Philip in the CCAA proceedings.

[22] What, then, are the specific issues that the Court is asked to determine on the pending Motions?

II—The Issues Raised

[23] The following Motions, as summarized, are before the Court:

1) A Motion by Philip pursuant to the CCAA for authorization and direction to enter into the proposed Settlement of the proceeding pending against it under the *Class Proceeding Act*;

2) A joint Motion by Philip and Mr. Menegon, the representative plaintiff in the CPA Proceedings, for certification of the class proceeding as against the defendant Philip only, and for approval of the Settlement Agreement together with directions regarding notification of members of the proposed class;

3) A cross-Motion by Deloitte *&* Touche—one of Philip's co-defendants in the CPA Proceedings, supported by the other co-defendant Underwriters—for declaratory relief in the nature of an order:

a) declaring, pursuant to s. 5.1(3) of the CCAA and s. 97 of the *Courts of Justice Act* that the Canadian Plan is not fair and reasonable in the circumstances, having regard to those provisions in the Canadian Plan which compromise the ability of Deloitte & Touche to claim contribution and indemnity against Philip and certain of its directors, officers and employees;

b) precluding the compromise of the Deloitte & Touche claims and amending both the Canadian Plan and the U.S. Plan so that Deloitte & Touche's rights are to be determined under the Canadian Plan alone, and in accordance with Canadian law and without unfairly prejudicing its rights.

4) A Motion by Royal Bank of Canada for an order,

a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;

b) declaring that the Canadian Plan is not fair and reasonable because it seeks to compromise the Bank's claims in the U.S. Plan, thus adversely affecting the Bank's rights and circumventing Philip's obligations under Canadian law;

c) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,

d) amending sub-paragraph 14(d) of the initial Order granted in the CCAA proceeding on June 25, 1999—which presently permits Philip to terminate any and all arrangements entered into by them—by providing that the sub-paragraph does not apply to leases of personal property; and, finally,

5) A Motion on behalf of certain former officers and directors of Philip seeking to have the Canadian Plan and the U.S. Plan declared not fair and reasonable in the circumstances, having regard to those provisions,

a) which attempt to compromise or otherwise limit the ability of the Moving Parties to claim contribution and indemnity from Philip without compensation whatsoever;

b) which call for releases to be provided to current directors and officers of Philip, but not to former directors and officers;

c) which deprive the Moving Parties of their rights as creditors to vote on the Canadian Plan.

III—Law and Analysis

The Class Proceedings

[24] There is little difference in substance between the joint Motion of Philip and the Canadian class action plaintiff under the *Class Proceedings Act,* and that of Philip alone, under the CCAA. Both ultimately seek approval and implementation of the proposed Settlement. However, the CCAA proceeding provides the context in which this approval is sought and, indeed—as I have already mentioned—Philip and others are of the view that a successful restructuring of Consolidated Philip is not possible without the implementation of the proposed Settlement, and that the converse is also true. Thus, there *is* a close link between the two, and in my opinion the issue of settlement approval cannot be viewed in isolation from the CCAA/restructuring environment in the context of which it was developed.

Certification

[25] I have little hesitation in certifying—and do certify—the CPA Proceeding as a class proceeding pursuant to subsection 5(1) of the *Class Proceedings Act,* as requested. That is, the proceeding is certified as a class proceeding as against the defendant Philip only and for settlement purposes only. It is without prejudice to any arguments the other defendants to the

CPA Proceedings may wish to make in opposition to any element of the plaintiff's claim, including, but not limited to, certification of a class as against them.

[26] For those purposes, however, I am satisfied that the tests set out in subsection 5(1) have been met. The statement of claim discloses a cause of action based upon faulty disclosure. There is an identifiable class, as articulated in the materials, and a common issue, as therein very broadly defined[2]. A class proceeding makes sense, and is the preferable procedure for the resolution of the common issue in the circumstances, and Mr. Menegon constitutes a representative plaintiff as called for in the subsection. An Ontario Court has jurisdiction pursuant to the *Class Proceedings Act* to certify a Canada-wide opt out class where the action has a "real and substantial" connection to Ontario, as is the case here: see, *Carom v. Bre-X Minerals Ltd.,* February 11, 1999, unreported, Court file No. 99-02614 (Ont. Gen. Div.) [reported at 43 O.R. (3d) 441]; *Nantais v. Telectronics Proprietary (Canada) Ltd.,* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal refused (1995), 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.).

Approval and Notice

[27] I have concluded, however, that Notice should be given at this time to the members of the class as certified, in accordance with the provisions of section 17 of the *Class Proceedings Act,* but that the proposed Settlement ought not to be approved at this time and at this stage of the restructuring proceedings.

[28] This conclusion is based not so much on the issue of whether notification under the *Act* may be given jointly for certification *and* approval, and not so much of the question of the merits of the proposed Settlement as between the class action plaintiffs and Philip. The former issue has not yet been settled, but need not be determined in this case. The latter is supported by the recommendations of the Monitor and seasoned U.S. representative counsel, and by the "reality check" that if there is no settlement it is unlikely that the class action plaintiffs will ever recover anything from Philip.

[29] Rather, my conclusion is based upon my sense that it is *premature* to approve a settlement of the U.S. and Canadian class action proceedings at this stage of the restructuring process. Philip and the Lenders have made it clear that the settlement of those

claims forms a central underpinning to the ability of Consolidated Philip to reorganize successfully. But the reverberations of the class actions extend to more than merely the relations between Philip and the class action plaintiffs. They affect the relations between Philip and the co-defendants in the proceedings, and between the class action plaintiffs and the co-defendants as well. The class action plaintiffs and the co-defendants are all unsecured claimants of Philip in the restructuring process—the claims of the co-defendants for contribution and indemnity against Philip and its former officers and directors arise out of the same "nucleus of operative facts"[3] as the claims of the class action plaintiffs against Philip; and one follows from the other. It has frequently been noted that the full name of the CCAA is "An Act to facilitate compromises and arrangements between companies and their creditors". In the bare-knuckled ring of commercial restructuring negotiations, this cannot be accomplished if one group of unsecured claimants is given an unwarranted advantage over another.

[30] To grant approval to the proposed Settlement of the class action plaintiffs with Philip at this stage would in effect immunize both those plaintiffs and Philip from the need to have regard to the co-defendants in resolving their dispute. It may well be that a plaintiff in an action with multi-party defendants can settle unilaterally with one of those defendants without creating other repercussions in the lawsuit. It may also be, however, that such a settlement cannot be effected without taking into account some aspects of the "other party" issues—things such as the impact of the settlement on the co-defendants' claims for contribution and indemnity, including the quantum of or a cap on recovery and questions of releases, to take only some examples.

[31] For instance, Philip is contractually bound under the terms of its Underwriting Agreement with the Underwriters to indemnify and hold the Underwriters harmless against all claims based on allegations of untrue statements or alleged untrue statements in a prospectus. More to the point, Philip *is not entitled without the consent of the Underwriters,* under the terms of the same Agreement, *to settle* any action in which such claims are made against it and unless the settlement includes an unconditional release in favour of the Underwriters. Approval of the proposed Settlement at this stage of the restructuring proceedings would deprive the Underwriters of that contractual right. What is significant at this point is not the attempt to

[2] The common issue is very broadly and vaguely defined, and while such a definition has received approval in other cases, I do not mean to be taken as having approved such a definition for any purposes other than those of this particular case.

compromise the claim, including the contractual right to the release, but rather the loss of the bargaining chip on the part of the Underwriters in the process as a result of the *unilateral* settlement as between Philip and the plaintiffs.

[32] Philip, the Lenders, and counsel for the class action plaintiffs have mounted an adamant chorus that if the proposed Settlement is not approved the U.S. and Canadian class action plaintiffs will get nothing because Philip will be liquidated and, in addition, that there is simply no room for the class action plaintiffs to receive anything more than the 1.5% share distribution in the restructured Philip which is currently on the table. The Lenders point out that they are fully secured and that they need not leave available even that 1.5% interest (not to mention the 9% equity interest which they have agreed to leave available to other stakeholders generally). These pronouncements may well reflect the final reality of the situation. However, I am somewhat less inclined to accept them at face value than the parties are to make them, particularly at this stage of the proceedings. It would not be the first time in restructuring negotiations where an adamant chorus turned into a more harmonious melody before the end of the day. Only the final moments of the process will tell the tale. In the meantime, as many negotiating options as possible should be kept open as amongst claimants of equal status in the restructuring, in my view.

[33] I do not say that this proposed Settlement, in its present or some other form, will not ultimately be approved. It is simply premature at this stage in the restructuring process to give it that imprimatur, in my opinion—if the imprimatur is to be given—for the reasons I have articulated. Accordingly, the question of approval of the proposed Settlement is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing. In the meantime, Notice of certification and of the *pending* motion for approval is to be sent to all members of the class.

The Fairness Issues Regarding the Canadian Plan.

[34] Much of the foregoing reasoning applies to the conclusions I have reached with respect to the issues raised by Deloitte & Touche and others respecting the Canadian Plan and its nexus with the proposed Settlement.

[3] To use the phrase adopted by the parties.

[35] The claim of the plaintiffs in the CPA Proceedings as against Deloitte & Touche and the Underwriters includes a claim for the difference between the value received by the plaintiffs as a result of the settlement and their actual loss. If the Settlement and the Canadian and U.S. Plans are approved, however, these co-defendants will lose their rights to claim contribution and indemnity from Philip in the class action. This, in itself, is not a reason for impugning the fairness and reasonableness of the Plans, because the ability to compromise claims against it is essential to the ability of a debtor corporation to restructure its affairs. Nonetheless, where the proposed structure of the reorganization affects the substantive rights of claimants in a fashion which treats them differently than they would otherwise be treated under Canadian law, and where the effect of that treatment is to place the claimants in a position where their ability to engage in full and complete negotiations with the debtor company are impaired, there is cause for concern on the part of the Court. That, in my view, is the case here.

[36] The effect of the Canadian Plan, as presently structured, is to deprive Deloitte & Touche, the Underwriters and others such as the former directors and officers of Philip who may have claims of contribution and indemnity as against Philip arising out of the same “nucleus of operative facts” pertaining to the class action claims, from pursuing those contribution claims in the Canadian CCAA proceeding. The same is true, but for different reasons, of the claim of Royal Bank with respect to its equipment leases. This is accomplished by carving out the claims in question from the CCAA proceedings and providing that they are to be dealt with under the U.S. Plan in U.S. Bankruptcy Court in accordance with the provisions of the *U.S. Bankruptcy Code. All claims against Philip* are to be dealt with in that fashion, notwithstanding that it was Philip which set in motion the CCAA proceedings in the first place and which sought and obtained the stay of proceedings preventing these very same claimants from pursuing their claims in Canada against it. At the same time, the Canadian Plan, but its very terms, is to be binding upon all holders of claims against Philip—including those which are subject to the Canadian Plan: see section 9.15 of the Canadian Plan. This is to be accomplished without even according the right to those claimants to vote on the Plan.

[37] The binding nature of the Canadian Plan has the effect of requiring the responding claimants to provide releases in favour of Philip while they are at the same time not released by Philip from claims that might be subsequently asserted against them. Furthermore, as the Plan presently stands, Deloitte & Touche and the Underwriters will be deemed to have

released former directors and officers from claims for contribution and indemnity. The Class Action plaintiffs have chosen not to pursue the directors and officers, at the present time, and there is apparently upwards of $100 million in insurance that might be available to satisfy such claims. This is a matter of considerable concern for Deloitte & Touche and for the Underwriters. Philip has advised, during the course of these motions and before, that it does not intend the proposed Settlement or the Plan to preclude the ability of Deloitte & Touche and of the Underwriters to pursue the former officers and directors. For the present, however, the Plan is worded in such a way that they will be so precluded. The real point is that all of this is being visited upon the responding claimants without there being entitled to any say in the Canadian proceedings as to their willingness or lack of willingness to be so treated.

[38] In my opinion it is the loss of the right to vote in the Canadian Plan which lies at the heart of the present dilemma. The mere fact that a Canadian creditor's rights are to be dealt with and affected by single or parallel insolvency proceedings in the U.S. Bankruptcy Court—or that the reverse may be the case (U.S. creditor/Canadian Court)—is not necessarily sufficient, in itself, to undermine the fairness and reasonableness of a proposed Plan: see, for example *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Alta. Q.B.); *Re Starcom Services Corp.,* Bankr. W.D. Wash., case no. M-98-60005, Nov. 20, 1998. In Canadian insolvency proceedings under the CCAA, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the CCAA proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky—and potentially large—contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal.

[39] While the fact that their treatment under U.S. Bankruptcy law will apparently be considerably less favourable than their treatment under Canadian law is not determinative, it is certainly a factor for consideration when taken in conjunction with the loss of voting rights in the Canadian Plan. As counsel have presented it, contribution claimants such as Deloitte & Touche, the Underwriters and the directors and officers will have the status equivalent to *equity* holders under the U.S. Plan. Their claims will not be considered as unsecured *debt*

claims in terms of priority ranking. Pursuant to the “cram down” provisions of the *U.S. Bankruptcy Code,* the Bankruptcy Court can approve a plan of reorganization even if a class of creditors votes not to accept the plan provided no junior-ranking class receives a distribution and the plan is otherwise fair and reasonable. Moreover, the U.S. Bankruptcy Court may on motion deem such a class of stakeholders to have voted to reject the plan in order to dispense with the necessity of having such a vote amongst its members. While Philip’s deponents and its counsel have not said so expressly, it is the clear inference from the materials filed that that is precisely the route which Philip proposes to follow *vis à vis* the contribution claimants whose claims have been left to be dealt with under the *U.S. Bankruptcy Code.*

[40] For purposes of the CCAA the claim of an unsecured creditor includes a claim in respect of any indebtedness, obligation or liability which would be a claim provable in bankruptcy, and therefore includes a contingent claim for unliquidated damages. Thus, Deloitte & Touche, the Underwriters, the officers and directors, and Royal Bank are all entitled to assert claims in the CCAA proceedings. They are Canadian claimants, asserting claims against a Canadian company in a Canadian proceeding. In respect of the claims for contribution and indemnity those claims arise out of a “nucleus of operating facts” which the U.S. Courts—at the urging of Philip, amongst others—have already determined are more conveniently litigated in Canadian class action proceedings.

[41] In respect of the Royal Bank, the claim relates to some 57 equipment leases entered into between the Bank and Philip under lease agreements governed by the laws of Ontario and with respect to equipment located (with one exception) in Ontario. However, under U.S. Bankruptcy laws, Philip would be entitled to “reject” leases, which it is not entitled to do under Ontario law, although it may of course “break” the leases if it is prepared to suffer the legal consequences. Again the attempt by Philip is to treat the claims under a regime which is more favourable to it and less so to the claimant. That attempt may not in itself be objectionable, but to the extent that it is accomplished by depriving the creditor of its right to vote and to participate in the Canadian proceedings which were initiated for the purposes of shielding Philip against the claim, it is troubling.

[42] The rights of creditors under the CCAA cannot be compromised unless,

a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;

b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;

c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,

d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).

43 See CCAA, section 4,6 and 12; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.

[44] Here, for the reasons I have outlined, what Philip proposes is inconsistent with the foregoing.

[45] Philip and the Lenders argue that the issues raised in this regard by the Respondents go entirely to the fairness find reasonableness of the U.S. and Canadian Plans, and that such considerations should be reserved for determination at the sanctioning hearings. I agree that generally speaking matters relating to fairness and reasonableness are better considered in the overall context of the final sanctioning hearing. Where, as here, however, the debtor company has acted earlier to obtain approval of a step in the restructuring process—in this case, the Class Action Settlement—which gives rise to issues that are inextricably linked to the overall fairness of the proposed Plan, and its compliance with statutory requirements, the consideration of those issues may be called for. This is one of those cases, in my opinion, because the reverberations of approving the proposed Settlement—in conjunction with the manner in which the debtor intends to treat other claimants directly affected by the settlement, have the effect of requiring those claimants to participate in the subsequent restructuring negotiations without a full deck of cards.

[46] Philip and the Lenders also argue that "comity" demands that this Court defer to the U.S. Bankruptcy Court in allowing the claims of Deloitte & Touche, the Underwriters, the former directors and officers, and the Royal

Bank to be dealt with in the U.S. Plan. They point out that in its Initial Order in the CCAA proceedings this Court approved an international Protocol which provides for co-operation between the U.S. and Canadian Courts, to the extent possible. I do not think that either comity or the question of whether the claims will be dealt with ultimately under the U.S. Plan, are the issues here. In addition, the effect of the Protocol as I read it—given the circumstances outlined above—is to provide some protection to claimants on either side of the border from being swept into the rigours of the other countries regimes where to do so might prevent them from asserting their substantive rights under the applicable laws of their own jurisdiction.

[47] In this regard, the following provisions of the Protocol are worthy of note:

> **(C) Comity and Independence of the Courts**
>
> 7. The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing the Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.
>
> 8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.
>
> 9. In accordance with the principles of comity and independence established in paragraphs 7 and 8 above, nothing contained herein shall be construed to:
>
> • increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada…;
>
> • *preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada* or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.
>
> (emphasis added)
>
> **(J) Preservation of Rights**
>
> 27. *Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the* powers, rights, *claims* and defenses *of* the Debtors and their estates, the Committee, the Estate Representatives, the U.S. Trustee *or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA.*
>
> (emphasis added)

[48] The extension of comity as between Courts in cross-border insolvency situations, and co-operation generally in such matters, are matters of great importance, to be sure, in order to facilitate the successful and orderly implementation of insolvency arrangements in such circumstances. Nothing I have said in these Reasons is intended to counter that ethic. However, comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction, whenever any kind of differences between the two jurisdictions may arise. Both the Protocol and the provisions of subsection 18.6(2) of the CCAA—which gives this Court authority "to make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under [the CCAA] with any foreign proceeding"—confirm this. Subsection 18.6(5) of the CCAA provides that "nothing in this section requires the Court to make any order that is *not in compliance with the laws of Canada* or to enforce any order made by a foreign court" (emphasis added).

[49] Here, there is yet no order of the U.S. Court, or treatment of the Claimants or Debtor to which comity may be extended, but there is—as I have outlined above—a failure to comply with the requirements of insolvency laws and procedure of Canada, as stipulated in the CCAA. I conclude, therefore, that the Canadian Plan as it presently stands is flawed because it seeks to exclude Canadian claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote.

[50] There was much debate in argument over whether the issue of treatment of the claims in the Canadian or U.S. proceedings was a function of the "real and substantial connection" of Philip with the U.S. jurisdiction, or a function of the "real and substantial connection" of the responding claimants and their claims to the Canadian proceedings. There is no doubt that Philip has a substantial connection with the United States in terms of the residence of the majority of shareholders and the location of the majority of operating assets. This connection certainly justifies the U.S. Chapter 11 proceedings. However, Philip also has a substantial connection to Canada, with its headquarters in Ontario, its Canadian subsidiaries, and its 94 locations and 2,000 employees throughout the country. This connection, together with its array of Canadian creditors, sustains the resort to the CCAA proceedings.

[51] I do not think that the analysis falls to be made, in these particular circumstances, on purely *foreign conveniens* grounds. There is more to the situation than that. Philip initiated the CCAA proceedings and sought and accepted the benefits flowing from that step. The responding claimants seek to assert claims in the Canadian proceeding against the Canadian company which instituted those proceedings, in relation to matters arising out of a Canadian class proceeding or (in the case of Royal Bank) out of Canadian contracts and equipment largely located in Canada. The substantive law of Canada under the CCAA, and the procedures therein laid down, entitle them to assert those claims in the Canadian proceedings and to have a vote on the "Plan" which is set forth by the debtor company to compromise them. They should not be deprived of those substantive and procedural rights without having any say in the matter. Putting it another way, I am satisfied that the unquestioned "juridical advantage" which Philip seeks to achieve through its proposed treatment of the responding claimants is outweighed by the unquestioned "juridical disadvantage" on the part of the latter, given that the juridical scales would otherwise be tipped towards Philip through the resort to a stratagem which in my view is not sanctioned under the CCAA.

[52] Philip and the Lenders argue that there is great urgency to effect the restructuring process, and that requiring Philip to adhere to the procedures relating to classification, the valuation of claims, and voting—with the numerous issues that may have to be determined in that context—may well doom the process from the beginning. The Lenders are truculent, as their secured position leads them to be; they say that if the reorganization is not completed quickly they may simply abandon the process and exercise their rights to realize on their security, and the entire restructuring process will fail, with dire consequences for all concerned. Mr. McDougall, on behalf of Deloitte & Touche, characterized this as "the cry of doom".

[53] I am very aware of the need for timeliness in situations such as these—particularly given the sensitive nature of Consolidated Philip's service oriented business. However, I do not think that the need for a timely resolution alone is justification for depriving claimants of their substantive rights under Canadian law, and for abrogating their right to vote which lies at the very heart of the Canadian restructuring process from the creditor's perspective. It is the tool which gives them ultimate leverage in the bargaining process, and without it their practical rights—as well as their substantive and procedural ones—are greatly diminished.

III—Conclusion

[54] An order will therefore go in terms of the foregoing.

The Class Proceedings

[55] As indicated, an Order is granted certifying the CPA Proceeding as a class proceeding, pursuant to subsection 5(1) of the *Class Proceedings Act,* as against Philip only and for settlement purposes only. The certification is without prejudice to any arguments the other defendants in the CPA Proceeding may wish to make in opposition to any element of the plaintiffs' claim including, but not limited to, certification of a class as against them. In addition, notice of the certification and of the pending motion for approval of the proposed Settlement is to given to members of the class as certified, in accordance with the provisions of section 17 of the *Act.* The question of approval of the Settlement, in its present form or some other form as may be advised, is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing.

The Fairness/Substantive Law Issues

[56] Notwithstanding the observations in these Reasons about the Canadian Plan and the treatment of claims in the U.S. proceedings, I am reluctant to grant the sweeping declaratory relief sought by the Respondents. Whether the Plan is ultimately found to be fair and reasonable and in accordance with all necessary requirements remains still a matter for determination in the sanctioning hearing, after all the negotiations have been concluded and the votes counted. As much as is reasonably possible should be left to that process.

[57] I am prepared to make an Order, however—and do—declaring that the Canadian Plan as it is presently constituted fails to comply with the procedural and statutory requirement of the CCAA regime in that it seeks to exclude the responding claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote. Anything further in this respect, it seems to me, should be left to the negotiation arena.

[58] The position of the Royal Bank is slightly different. It is entitled, in addition, to an order,

a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;

b) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,

c) amending sub-paragraph 14(d) of the Initial Order granted in the CCAA proceeding on June 25, 1999—which presently permits Philip to terminate any and all arrangements entered into by them—by providing that the sub-paragraph does not apply to the Royal Bank leases of personal property.

[59] There will be no order as to costs.

[60] Order accordingly.

Orders accordingly.

TAB 11

Citation: In the Matter of Doman Industries et al
2003 BCSC 376

Date: 20030307

Docket: L023489
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Tysoe
Pronounced in Chambers
March 7, 2003

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

AND

IN THE MATTER OF THE *COMPANY ACT*
R.S.B.C. 1996, c. 62

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*
R.S.C. 1985, c. C-44

AND

IN THE MATTER OF THE *PARTNERSHIP ACT*
R.S.B.C. 1996, c. 348

AND

IN THE MATTER OF DOMAN INDUSTRIES LIMITED,
ALPINE PROJECTS LIMITED
DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED
DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN – WESTERN LUMBER LTD., EACOM TIMBER SALES LTD.,
WESTERN FOREST PRODUCTS LIMITED
WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED

PETITIONERS

Counsel for the Petitioners:	M.A. Fitch, Q.C., S. Martin and R. Millar
Counsel for the Ad Hoc Committee of Senior Secured Noteholders:	G. Morawetz, R. Chadwick and J.J.L. Hunter, Q.C.
Counsel for Wells Fargo, National Association:	J.F. Dixon
Counsel for Herb Doman:	G.K. Macintosh, Q.C. and R.P. Sloman
Counsel for Her Majesty the Queen in Right of British Columbia:	D.J. Hatter and R. Butler
Counsel for Attorney General of Canada:	R.D. Leong
Counsel for CIT Business Credit Canada Inc.:	W.C. Kaplan, Q.C. and P.L. Rubin
Counsel for the Monitor, KMPG Inc.:	J.I. McLean
Counsel for Brascan Financial, Merrill Lynch and Oppenheimer Funds:	D.I. Knowles, Q.C., M. Buttery and I. Nordholm
Counsel for Toronto Dominion Asset Management Inc., TD Securities Inc. and Tordom Company:	P. Macdonald and G. Gehlen
Counsel for Petro-Canada:	K. Zimmer
Counsel for Pulp, Paper & Woodworkers of Canada, Locals 3 and 8:	W. Skelly

[1] There are two competing motions before the Court in these proceedings under the ***Companies Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended (the "***CCAA***"). The first is a motion of the Petitioners (the "Doman Group") for an order authorizing the calling of creditor meetings to consider a plan of compromise or arrangement prepared by the Doman Group (the "Reorganization Plan" or the "Plan"). The second motion is an application by a group of secured creditors called the Ad Hoc Committee of Senior Secured Noteholders (the "Senior Secured Noteholders Committee") for numerous orders, including orders relating to the invalidity of the Reorganization Plan, allowing the Senior Secured Noteholders to vote on the Plan and authorizing the Senior Secured Noteholders Committee to file its own secured creditor Plan.

[2] One of the arguments which the Senior Secured Noteholders Committee wished to advance related to the constitutionality of the Court varying the terms of a contract in the absence of enabling provincial legislation. The Senior Secured Noteholders Committee applied to adjourn all of the applications so that the necessary notice for constitutional questions to the Attorneys General of British Columbia and Canada could expire. I refused the adjournment on the basis that the constitutional question can be argued upon the expiry

of the notice periods if it is still necessary to do so. Accordingly, my rulings at this stage are subject to the constitutional challenge by the Senior Secured Noteholders Committee and nothing I say in these Reasons for Judgment should be construed as a determination of the constitutional validity of such rulings.

[3] The Doman Group has the following four principal types of creditors:

(a) the Senior Secured Noteholders which are owed US$160 million and who hold security over most, but not all, of the fixed assets of the Doman Group;
(b) the Unsecured Noteholders which are owed US$513 million;
(c) the lender which provides the Doman Group with an operating line of credit and which holds security against its current assets; and
(d) unsecured trade creditors which are owed in the range of $20 to $25 million.

[4] The Reorganization Plan seeks to compromise only the indebtedness of the Unsecured Noteholders and the unsecured trade creditors. It is proposed that the unsecured trade

creditors will be paid in full up to an aggregate ceiling or cap amount of $23.5 million. The Reorganization Plan provides that the Unsecured Noteholders are to receive US$112,860,000 Junior Secured Notes plus 85% of the shares in the Doman Group (with the existing shareholders retaining the remaining 15% of the shares). The Junior Secured Notes are to be secured in second position against the assets subject to the security of the Senior Secured Noteholders.

[5] The Senior Secured Notes were issued pursuant to a Trust Indenture dated as of June 18, 1999 (the "Trust Indenture"). The principal amount of the Senior Secured Notes is due on July 1, 2004. The Doman Group is in default of the payment of the interest due on the Senior Secured Notes but it is intended that the overdue interest be paid upon implementation of the Reorganization Plan. The Trust Indenture has the usual types of events of default, including the commencement of proceedings under the ***CCAA***, non-payment of principal or interest on indebtedness owed by the Doman Group to the Senior Secured Noteholders or to other parties and the failure to remedy a breach of any of the provisions of the Trust Indenture within 30 days after notice of the breach has been given to the Doman Group. It also has the usual provision enabling the Trustee under the Trust Indenture or a

specified percentage of the holders of the Senior Secured Notes to accelerate payment of the indebtedness upon the occurrence of an event of default and to thereby make all monies owing on the notes to be immediately due and payable.

[6] Sections 4.13 and 4.16 of the Trust Indenture are also relevant to the present applications. Section 4.13 reads as follows:

> (a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired, or any income or profits therefrom or assign or convey any right to receive income therefrom, except Permitted Liens (provided that Liens on Note Collateral or any portion thereof shall be governed by clause (b) of this Section 4.13) unless (i) in the case of Liens securing Indebtedness which is subordinated to the Notes and the Guarantees, the Notes and the Guarantees are secured by a Lien on such property, assets, income, profits or rights that is senior in priority to such Liens and (ii) in all other cases, the Notes and the Guarantees are equally and ratably secured.
>
> (b) The Company shall not, and shall not permit of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired that constitutes Note Collateral, any income or profits from any Note Collateral or to assign or convey any right to receive income from any Note Collateral, except for Permitted Note Collateral Liens.

Section 4.16 reads, in part, as follows:

> Upon the occurrence of a Change of Control, each Holder of Notes shall have the right to require the Company to repurchase all or any part (equal to U.S. $1,000 or an integral multiple thereof) of such Holder's Notes pursuant to the offer described below (the "Change of Control offer") at an offer price in cash equal to 101% of the aggregate principal amount thereof plus accrued and unpaid interest, if any, and Liquidated Damages, if any, to the date of purchase (the "Change of Control Payment"). Within 10 days following any Change of Control, the Company shall mail a notice to each Holder stating: (1) that the Change of Control offer is being made pursuant to the covenant entitled "Change of Control" and that all Notes tendered will be accepted for payment; (2) the purchase price and the purchase date, which will be no earlier than 30 days nor later than 40 days from the date such notice is mailed and which shall be the same date as the Change of Control Payment Date with respect to the 1994 Notes and the 1997 Notes (the "Change of Control Payment Date"); ...
>
> On the Change of Control Payment Date, the Company shall, to the extent lawful, (1) accept for payment Notes or portions thereof tendered pursuant to the Change of Control Offer, (2) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions thereof so tendered and (3) deliver or cause to be delivered to the Trustee the Notes so accepted ...

[7] The Reorganization Plan does not seek to compromise the indebtedness owed to the Senior Secured Noteholders. However, the Senior Secured Noteholders maintain that they are affected or prejudiced by the Reorganization Plan. They point to sections 4.12, 6.2 and 6.3 of the Reorganization Plan, the relevant portions of which read as follows:

> 4.12 **Waiver of Defaults and Permanent Injunction**

From and after the Effective Date:

(a) all Creditors and other Persons (including Unaffected Creditors) shall be deemed to have waived any and all defaults of the Doman Entities then existing or previously committed by the Doman Entities or caused by the Doman Entities, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Doman Entities, including a default under a covenant relating to any other affiliated or subsidiary company of Doman other than the Doman Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded;

(b) a permanent injunction shall be pronounced on the terms of the Final Order against Creditors and all other Persons (including Unaffected Creditors) having contractual relationships with any of the Doman Entities with respect to the exercise of any right or remedy contained in the instruments evidencing such contractual relationships or at law generally, which might otherwise be available to such Creditors or other Persons as a result of the filing of the CCAA Proceedings, the content of the Plan, implementation of the Plan, any action taken by the Doman Entities or any third party pursuant to the Plan or the Final Order either before or after the Plan Implementation Date, or any other matter whatsoever relating to the CCAA Proceedings, the Plan, or the transactions contemplated by the Plan; and

(c) the Doman Entities may in all respects carry on as if the defaults, non-compliance, rights and remedies referred to in this section 4.12 had not occurred.

6.2 **Effect of Final Order:**

In addition to sanctioning the Plan, the Final Order shall, among other things:

...

(f) confirm that all executory contracts, security agreements and other contractual relationships to which the Doman Entities are parties are in full force and effect notwithstanding the CCAA Proceeding or this Plan and its attendant compromises, and that no Person party to such an executory contract, security agreement or other contractual relationship shall be entitled to terminate or repudiate its obligation under such contract or agreement, or to the benefit of any right or remedy, by reason of the commencement of the CCAA Proceeding or the content of the Plan, the Change of control of Doman resulting from the Plan, the compromises extended under the Plan, the issuance of the Junior Secured Notes, or any other matter contemplated under the Plan or the Final Order; and

(g) confirm and give effect to the waivers, permanent injunctions and other provisions contemplated by section 4.12 of the Plan.

6.3 **Conditions Precedent to Implementation of Plan:**

The implementation of this Plan shall be conditional upon the fulfilment of the following conditions:

(a) ***Court Approval***

Pronouncement of the Final Order by the Court on the terms contemplated by Section 6.2 and otherwise acceptable to the Doman Entities.

The term “Unaffected Creditors" used in Section 4.12 includes the Senior Secured Noteholders.

[8] The application of the Doman Group is relatively limited in scope because it simply seeks authorization to hold creditor meetings to consider the Reorganization Plan. However, it is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.

[9] Counsel for the Doman Group submitted that the sole issue is whether the Court has the jurisdiction to grant a stay under s. 11(4) of the ***CCAA*** in the form of the permanent injunction specified under clause (b) of the Section 4.12 of the Reorganization Plan. I do not agree. In particular, clause (a) of Section 4.12 purports to bind Unaffected Creditors, which include the Senior Secured Noteholders, by deeming them to have waived all defaults under instruments between them and the Doman Group. I agree with the counsel for the Senior Secured Noteholders Committee that creditors of debtor company under the ***CCAA*** cannot be bound by the

provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: see ***Menegon v. Philip Services Corp.,*** [1999] O.J. No. 4080 (Q. L.) (Ct. Jus.) at para. 38. It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it.

[10] However, my conclusion in this regard does not mean that I should accede to the request of the Senior Secured Noteholders Committee for the right to vote on the Reorganization Plan. In view of the submission made by the counsel for the Doman Group that the Plan was not intended to affect the rights of the Senior Secured Noteholders, I believe that the Doman Group should first be given the opportunity to propose a revised Reorganization Plan which does not include reference to Unaffected Creditors in clause (a) of Section 4.12 or any other provision which purports to bind parties who are not given the opportunity to vote on the Plan.

[11] I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the

implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

[12] The Court is given the power to grant stays of proceedings by s. 11(4) of the ***CCAA***, which reads as follows:

> (4) A court may, on an application in respect of a company other than an initial application, make an order on such term 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.

[13] Since the re-emergence of the ***CCAA*** in the 1980s, the Courts have utilized the stay provisions of the ***CCAA*** in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,*** (1988) 72 C.B.R. (N.S.) 1 (Alta Q.B.), where the Court stayed the ability of a joint venture partner of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement.

[14] Two other prominent examples are ***Re T. Eaton Co.*** (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and ***Re Playdium Enterprises Corp.*** (2001), 31 C.B.R. (4th) 302, as supplemented at 31 C.B.R. (4th) 309 (Ont. Sup. Ct. Jus.). In the ***T. Eaton*** case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the ***Playdium*** decision, the Court approved an assignment of an agreement in conjunction with a sale in a

failed ***CCAA*** proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the ***Playdium*** case relied on s. 11(4) of the ***CCAA***, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in ***Re Woodward's Ltd.*** (1993), 17 C.B.R. (3d) 236, where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

[15] The law is clear that the court has the jurisdiction under the ***CCAA*** to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in ***Playdium***:

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

[16] Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in ***Luscar Ltd. v. Smoky River Coal Ltd.,*** 1999 ABCA 179 is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

[17] Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the

court would decline to exercise its jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the Notes upon implementation of the Reorganization Plan.

[18] The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term “potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

[19] I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of

Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

[20] The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

[21] The language of s. 11(4) of the ***CCAA***, on a literal interpretation, is very broad and the case authorities have

held that it should receive a liberal interpretation in view of the remedial nature of the ***CCAA***. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

[22] In my view, there are numerous purposes of stays under s. 11 of the ***CCAA***. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the

restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

[23] In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

[24] Section 11(4) utilizes the verbs “staying", “Restraining” and “prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This

wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

[25] Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

[26] There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

[27] Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in ***Woodward's,*** prior to the enactment of s. 11.2 of the ***CCAA,*** to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the ***CCAA*** or to "flesh out the bare bones" of the ***CCAA*** in order to give effect to its objects: see ***Re Westar Mining Ltd.*** (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) at p. 93 and ***Re Dylex Ltd.*** (1995), 31 C.B.R. (3d) 106 (Ont. Ct. Jus.) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the ***CCAA*** during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the ***CCAA***.

[28] In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a

permanent injunction in relation to Section 4.16 will not necessarily frustrate the restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

[29] Although I have agreed with the reasoning of Spence J. at para. 32 of the ***Playdium*** decision, I should not be interpreted as agreeing with the correctness of the conclusion in ***Playdium***. I have some reservations with respect to its

conclusion but, as ***Playdium*** is clearly distinguishable from the present case, it is not necessary for me to decide whether or not it should be followed.

[30] For these reasons, I conclude that the court does not have the jurisdiction to grant the permanent injunction contemplated by Section 4.12 (b) of the Reorganization Plan, at least as it relates to Section 4.16 of the Trust Indenture. Hence, it would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan in its present form because the condition precedent contained in section 6.3(a) of the Plan cannot be satisfied. I dismiss the application of the Doman Group, with liberty to re-apply in respect of a revised Reorganization Plan.

[31] In addition to seeking an order allowing them to vote on the Reorganization Plan, the Senior Secured Noteholder Committee applied for an order authorizing it to file a secured creditor plan of arrangement or compromise and an order directing the Doman Group to pay all of its costs.

[32] The form of the proposed secured creditor plan was attached to one of the affidavits. In essence, it includes the terms upon which the Senior Secured Noteholders represented by the Committee are prepared to waive breaches of the Trust Indenture occasioned by the restructuring of the

Doman Group and to amend the Trust Indenture to allow the restructuring. One of these terms is the payment of a fee equal to 3% of the face value of the Senior Secured Notes (approximately US$5 million).

[33] I am not prepared to allow the Senior Secured Noteholders Committee to file its own plan. If such a plan were filed and approved by the Senior Secured Noteholders, they would accomplish the same thing which they are complaining that the Doman Group was endeavouring to achieve through the permanent injunction; namely, a unilateral variation of the terms of the Trust Indenture without the agreement of the other party to the Trust Indenture. Such a plan may also have the effect of giving the Senior Secured Noteholders a veto power in respect of the Doman Group's restructuring.

[34] The Senior Secured Noteholders Committee has not demonstrated a basis for the requested order that the Doman Group should pay all of its costs. The committee was presumably formed so that the Noteholders could act to protect or advance their own interests. It is not a committee requested by the Doman Group or constituted by the Court. The Noteholders may be entitled to some or all of such costs pursuant to the provisions of the Trust Indenture but that

issue is not before me. As to the costs of these applications in the context of the ***Rules of Court***, there has been divided success and I direct that each party bear own costs.

[35] I dismiss the applications of the Committee for an order in relation to a secured creditor plan and an order in relation to its costs.

[36] If the Senior Secured Noteholders Committee still wishes to pursue the constitutional question, arrangements for a hearing may be made through Trial Division. However, as I am not granting the application of the Doman Group for an order authorizing the calling of creditor meetings to consider the Reorganization Plan in its present form, it would seem to me that any such hearing should await the issuance of a revised form of the Plan.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe

TAB 12

Citation: In the Matter of SNV Group Ltd. 2001 BCSC 1644

Date: 20011128
Docket: L012888
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

and

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*
as amended, R.S.C. 1985, C-44

and

IN THE MATTER OF SNV GROUP LTD. and SNV INTERNATIONAL LTD.

PETITIONERS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PITFIELD

Counsel for the Petitioner:	Mary I.A. Buttery
Counsel for the Respondent: Park Hotel (Edmonton) Ltd.	Craig D. Johnston
Date and Place of Hearing:	November 13, 2001 Vancouver, B.C.

[1] SNV Group Limited and its wholly owned subsidiary SNV International Ltd. (collectively "SNV") are operating under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 pursuant to the terms of an initial *ex parte* order obtained October 18, 2001 and amended on October 29, 2001. On November 16, 2001 the initial stay of proceedings was extended to 6:00 p.m. on December 14, 2001 unless extended by further order of the Court before that time.

[2] SNV applies for an order finding Park Hotel (Edmonton) Ltd., carrying on business as Dominion Hotel in Victoria, British Columbia, in contempt of the order for having taken steps to collect room charges from guests rather than limiting its pursuit of payment to SNV to whom the guests had pre-paid the room charges.

[3] The relevant facts are the following. SNV is engaged in the business of marketing vacation packages that include hotel accommodation. SNV sells the packages at both the wholesale and retail levels of trade. SNV entered into an agreement with Dominion Hotel whereby the hotel was obliged to provide rooms at specified rates to persons on whose behalf SNV made reservations. The agreement describes the manner in which Dominion Hotel would be paid as follows:

> The Dominion Hotel will invoice your organization for all contracted services. Payment terms are 30 days net. Accounts more than 30 days overdue are subject to a surcharge equivalent to 1.5% per month calculated from the billing date.

[4] The agreement describes the voucher system that would be used by guests in the following terms:

> [SNV] clients travel with pre-paid travel vouchers which will be presented upon check-in. These vouchers normally cover room and taxes only. However, if there are any variances to that, it will have been noted at the time of reservation. As well, the voucher will make note of this variance. Our wholesaler partners might also issue vouchers on our behalf and in such cases it will be clearly indicated that billing is to be forwarded to SNV International. Should your records differ from that of the voucher, please call us immediately.

[5] Upon arrival at the Dominion Hotel with room voucher in hand, each guest was obliged to provide a credit card imprint and to sign a guest registration form, the text of which included the following:

> The management is not responsible for valuables not secured in safety deposit boxes provided at the front desk. *I agree that my liability for this bill is not waived and agree to be held personally liable in the event that any of the above indicated person(s), company(s), or association(s) fails to pay any or the full amount of all charges associated with this account including the 'DB' rate.* I further agree that I am responsible for any damages to or missing items from my guest room and will be charged accordingly by hotel management. I also agree that all charges contained in this account are current and any disputes or requests for copies of

> charges must be made within five days after my departure. [emphasis added]

[6] By mid-September 2001, SNV owed Dominion Hotel approximately $40,000 in respect of guest room charges and the account was in arrears. Dominion Hotel concluded that the collection of the amount owing by SNV was in jeopardy. It began to process room charges to the credit cards of the guests in reliance upon the guest registration forms it had in hand. Charges made to guests in this manner during the week of September 26, 2001 approximated $30,000. The remaining portion of the unpaid room charges approximating $10,000 was billed to guests on October 27, 2001. SNV owed no amount to Dominion Hotel after October 27, 2001 in respect of pre-October 18th room charges as a result.

[7] Paragraph 3(h) of the initial order obtained October 18, 2001 provided as follows:

> 3(h) no creditor of [SNV] who has received pre-payment in respect of post-filing claims may seek payment directly from a traveller in respect of the same services, or in an effort to satisfy any pre-filing claims.

[8] The initial order was amended on October 29, 2001 upon further application by SNV on notice only to SNV's banker. Paragraph 3(k) was added as follows:

> 3(k) no creditor of [SNV] may seek payment directly from a traveller for travel that has already occurred in an effort to satisfy any pre-filing claims, and a creditor who has charged a traveller directly in satisfaction of such claim shall immediately process a refund to that traveller.

[9] SNV agrees that paragraph 3(h) of the initial order did not apply to the actions of Dominion Hotel in respect of guest charges for the period preceding October 29, 2001. It says, however, that paragraph 3(k) applies to Dominion Hotel and the hotel acted in contravention of the order by seeking payment directly from travellers and omitting to process refunds in the manner directed by the paragraph.

[10] Dominion Hotel says it was not a creditor of SNV at October 29, 2001 when paragraph 3(k) became effective. It says it elected to recover payment from the guests rather than SNV and, by processing the credit card charges, it ceased to be a creditor of SNV. Dominion Hotel also says that the Court does not have jurisdiction, whether under the *CCAA* or by virtue of its inherent jurisdiction, to order the refund of the amounts the hotel charged to guests before October 29, 2001.

[11] In the circumstances, the applicable legal principles are these.

[12] The *CCAA* confers a statutory power upon the Court to grant a stay of proceedings in respect of a debtor company or its assets. Section 11(3) of the *CCAA* provides as follows:

> 11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, 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.

[13] The statutory power conferred by s. 11(3) of the *CCAA* is not restricted to a stay of proceedings involving persons who are creditors of SNV but extends to any person who is in position to take action in respect of SNV or its assets: *Norcen Energy Ltd. v. Oakwood Petroleums Ltd.* (1989), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) at pp. 12-17; *Quintette Coal Limited v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 193 (B.C.S.C.) at p. 200; and *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 (O.C.J. Gen. Div.) at p. 5.

[14] The statutory power to grant a stay is augmented by the Court's inherent jurisdiction to grant a stay in appropriate circumstances: *Re Woodward's Ltd.*, [1993] B.C.J. No. 42 (B.C.S.C.) at para. 32; *Re Lehndorff General Partner Ltd., supra,* at p.7*;* and *T. Eaton Co. Ltd.* (1997), 46 C.B.R. (3d) 293 (O.C.J. Gen. Div.) at para. 6. The power to augment the stay permitted by s. 11(3) of the *CCAA* allows the Court to stay, prohibit or restrain proceedings that may be taken by any person against another person who is not the debtor where that proceeding may have the effect of placing the possibility of concluding a compromise or arrangement at risk: see *Re Woodward's Ltd., supra,* at para. 32*; T. Eaton Co. Ltd., supra,* at para. 6*.* In *CCAA* proceedings, the inherent power to augment the stay should be exercised with caution: *Re Woodward's Ltd., supra,* at paras. 33, 34.

[15] I have concluded that the actions of Dominion Hotel cannot and should not be controlled by a stay of proceedings or order to repay.

[16] Dominion Hotel was not a creditor of SNV at October 29, 2001. The actions of Dominion Hotel in respect of the outstanding guest accounts were taken prior to the grant of any order of the Court that might apply to the hotel. Three-quarters of the amounts owing were billed to guests in the

latter part of September, considerably in advance of the October 18th initial order. The remaining actions in respect of outstanding guest accounts were taken by Dominion Hotel on October 27, 2001, two days before the initial order was amended by the addition of paragraph 3(k).

[17] On October 18th, SNV applied for the protection it thought necessary to facilitate the compromise or arrangement it wished to complete with its creditors. It made no application to stay any proceeding by any person claiming indemnity from a third party in relation to a SNV trade obligation. When it applied for and obtained an amendment on October 29, 2001, SNV did not attempt to extend paragraph 3(k) of the order to anyone other than creditors, nor did it apply to make the order retroactive.

[18] The capacity to stay, whether pursuant to s. 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the *CCAA* or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that

would amount to adjudication of a claim. The *CCAA* is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

[19] It follows that in this proceeding, I need not be concerned whether there was a binding agreement between any guest and Dominion Hotel obliging the guest to pay the amount of the room charge notwithstanding the presentation of a pre-paid room voucher to the hotel or, if so, whether the contract is in the nature of a guarantee so that the Court might be prohibited from making an order in the nature of a stay by virtue of s. 11.2 of the *CCAA*. The question whether there was an enforceable agreement between Dominion Hotel and any guest permitting the hotel to recover room charges from the guest is a matter that must be resolved in proceedings taken by the guests against Dominion Hotel and perhaps SNV independent of the *CCAA* proceedings.

[20] Because Dominion Hotel was not a creditor of SNV at October 29, 2001 and because the Court cannot order a stay of proceedings in relation to actions completed before the effective date of an order, Dominion Hotel cannot be in contempt of the order of October 29, 2001 due to the fact that it processed charges to guests.

[21] Dominion Hotel is not in contempt of the requirement in paragraph 3(k) of the order requiring repayment of amounts to persons from whom payment has been obtained. Paragraph 3(k) should not be construed to require repayment of amounts received before the effective date of the order. The purpose of paragraph 3(k) is to require repayment where, by virtue of lack of notice of the order that was in place, payment might have been obtained in innocent rather than contemptuous contravention of the stay imposed by paragraph 3(k).

[22] Were the Court empowered to make an order requiring Dominion Hotel to undo that which it has done to the guests, I would decline to exercise my discretion to do so.

[23] There is insufficient evidence from which I could conclude that repayment would improve the prospects of concluding a compromise or arrangement. I could not conclude that the fact room charges have been collected from the guests will adversely affect, in any substantial respect, the prospect of a compromise or arrangement being concluded.

[24] SNV claims that the fact Dominion Hotel has unilaterally collected amounts from guests may affect the willingness of travellers to do business with SNV. There is no circumstantial evidence to indicate that the concern is real, particularly in light of the fact that suppliers to SNV in the

post-filing period are insisting upon pre-payment of guest room charges in any event.

[25] SNV is concerned that a company called Canadian Affair with which it deals has refused to pay an account of approximately $400,000 because approximately $8,000 of that sum that was ear-marked for payment by SNV to Dominion Hotel has already been collected by the Dominion Hotel through credit card charges to guests. The question whether the agreements among Dominion Hotel, SNV, Canadian Affair and the guests justify the refusal of Canadian Affair to pay any part of its outstanding debt to SNV will have to be determined in independent enforcement proceedings initiated by SNV. The Court's power to stay proceedings cannot assist in the resolution of that dispute.

[26] I do not agree with the SNV claim that other creditors who are hotels might attempt to do to guests as Dominion Hotel has done. Other SNV creditors who might claim to be in a position similar to that of Dominion Hotel in respect of guests are precluded from taking any steps to recover amounts directly from guests by credit card charges because of the prospective application of paragraph 3(k) from and after October 29, 2001.

[27] In the circumstances the SNV application to find Park Hotel (Edmonton) Ltd. in contempt is dismissed. Because it is unclear whether, having regard for the contractual relationship between SNV and Dominion Hotel, the hotel had an enforceable agreement with guests permitting it to charge them directly, this is an appropriate case for the parties to this application to bear their own costs.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield

TAB 13

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 October 2, 2024

Last amended on April 27, 2023

À jour au 2 octobre 2024

Dernière modification le 27 avril 2023

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Compromise with secured creditors

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

R.S., c. C-25, s. 5.

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any

présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme,

required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that would have been required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

(A.1) la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds visé aux articles 81.5 et 81.6 de la *Loi sur la faillite et l'insolvabilité* pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité si le régime était régi par une loi fédérale,

(A.2) toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds établi à la date à laquelle des procédures sont intentées sous le régime de la présente loi,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82; 2023, c. 6, s. 5.

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27; 2012, ch. 16, art. 82; 2023, ch. 6, art. 5.

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

(d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

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.

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

Créancier lié

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

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

Monitors

Duties and functions

23 (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

Contrôleurs

Attributions

23 (1) Le contrôleur est tenu :

a) à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

(i) de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

b) de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

TAB 14

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 October 2, 2024

Last amended on June 28, 2024

À jour au 2 octobre 2024

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eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

executing officer includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; (*huissier- exécutant*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account; (*garantie financière*)

General Rules means the General Rules referred to in section 209; (*Règles générales*)

failli Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation juridique d'une telle personne. (*bankrupt*)

faillite L'état de faillite ou le fait de devenir en faillite. (*bankruptcy*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par les Règles générales à la date de l'ouverture de la faillite, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

huissier-exécutant Shérif, huissier ou autre personne chargée de l'exécution d'un bref ou autre procédure sous l'autorité de la présente loi ou de toute autre loi, ou de toute autre procédure relative aux biens du débiteur. (*sheriff*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

localité En parlant d'un débiteur, le lieu principal où, selon le cas :

a) il a exercé ses activités au cours de l'année précédant l'ouverture de sa faillite;

TAB 15

COURT FILE NUMBER	2401-
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**FIRST AFFIDAVIT OF JOHN ARBUTHNOT IV**

Clerk's stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 0136555.00034

FIRST AFFIDAVIT OF JOHN ARBUTHNOT IV
Sworn July 12, 2024

I, John Arbuthnot IV, of the City of Winnipeg, in the Province of Manitoba, SWEAR AND SAY THAT:

1. I am the Chief Executive Officer ("**CEO**") and director of Delta 9 Cannabis Inc. ("**D9 Parent**") and a director and president of Delta 9 Logistics Inc. ("**Logistics**"), Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Lifestyle**") and Delta 9 Cannabis Store Inc. ("**Store**"; collectively, the "**Applicants**" or "**Delta 9**"). As such, I have personal knowledge of the matters deposed to in this Affidavit, except where stated to be based on information and belief, in which case, I verily believe the same to be true.

2. D9 Parent is a publicly traded company and the parent company of Bio-Tech, Logistics and Store. Bio-Tech in turn owns 68.8% of Lifestyle and a third-party unrelated company, 2759054 Ontario Inc., o/a Fika Herbal Goods ("**Fika**") owns the other 31.2% of Lifestyle's shares. D9 Parent centrally manages the finances and business operations of Delta 9.

3. I founded Delta 9 with my father in 2012. Since then, my focus has been devoted to corporate strategy, financial planning, business development and implementing Delta 9's modular growth strategy.

4. As a director and officer, I am responsible for managing the Applicants' overall operations and resources and making strategic business decisions. I have been in my current role as a director and officer for over six years, since shortly after D9 Parent went public in November 2017.

5. The Applicants are bringing this urgent application for protection under the *Companies' Creditors Arrangement Act* RSC 1985, c C-36, as amended (the "**CCAA**") as a result of recent changes to the makeup of its key stakeholders (which will be described in more detail below), demand for payment sent on July 10, 2024 by the Applicants' primary secured creditor, and in order to preserve the significant value associated with the Applicants' operations on a going-concern basis.

6. Leading up to these CCAA proceedings, the Applicants have worked extensively with the Plan Sponsor (as defined below) to develop a detailed restructuring plan for the Applicants' businesses. Most significantly, the Applicants have entered into a Restructuring Term Sheet (as defined and described below) that sets out the key terms of the restructuring plan, including substantial interim financing to be provided by the Plan Sponsor, which financing is required to fund the ongoing operations of the Applicants and which will provide for repayment of all secured obligations owing to the Applicants' current senior secured lender.

7. In preparing and negotiating the Restructuring Term Sheet, and after consultation with the Proposed Monitor (as defined herein), the Applicants are of the view that with the protections afforded by the CCAA, the restructuring plan proposed herein and in the Restructuring Term Sheet will permit the Applicants to emerge from these CCAA proceedings as a going-concern business for the benefit of all stakeholders.

8. Unless otherwise indicated, monetary references in this Affidavit are references to Canadian dollars.

I. RELIEF SOUGHT

9. This affidavit is sworn in support of an application scheduled for July 15, 2024 (the "**Initial Order Application**") for an Order (the "**Initial Order**") in respect of the Applicants pursuant to the CCAA.

10. The Applicants are seeking approval of the Initial Order substantially in the form attached to the Initial Order Application as Schedule "A" providing for the following grounds of relief:

    (a) declaring service of the Initial Order Application and supporting materials good and sufficient, and if necessary, abridging time for notice of the Initial Order Application to the time actually given;

    (b) declaring that the Applicants are companies to which the CCAA applies;

    (c) granting some or all of the Applicants authority to file with the Court a plan of compromise or arrangement, subject to further order of the Court;

    (d) authorizing the Applicants to remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**") and continue to carry on business in a matter consistent with the preservation of their business (the "**Business**") and Property;

    (e) authorizing the Applicants to continue utilizing their cash management system described in further detail at paragraphs 107-114 herein (the "**Cash Management System**");

    (f) authorizing the Applicants to pay their reasonable expenses incurred in carrying out their business in the ordinary course, including certain expenses incurred prior to the date of the Initial Order;

    (g) staying, for an initial period of not more than ten (10) days (the "**Stay Period**") all proceedings, rights and remedies against or in respect of the Applicants or their Business or Property, the Applicants' directors, to the extent the directors have secured the obligations of the Applicants, or the Proposed Monitor (defined below), except as otherwise set forth in the Initial Order or otherwise permitted by law;

(h) restraining any Person (as defined in the Initial Order) from accelerating performance of any rights in respect of the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Honourable Court;

(i) restraining any Person from interfering with the supply of goods or services to the Applicants;

(j) appointing Alvarez & Marsal Canada Inc. ("**A&M**") as the monitor (the "**Proposed Monitor**", and if appointed the "**Monitor**") of the Applicants in these CCAA proceedings;

(k) authorizing the Applicants to pay the reasonable fees and disbursements of the Monitor and its counsel and the Applicants' professional advisors and legal advisors incurred both before and after the date of the Initial Order;

(l) directing the Applicants to incur no further expenses in relation to the Securities Filings (as defined below) and declaring that none of the directors, officers, employees and other representatives of the Applicants, the Monitor and its directors, officers, employees and representatives shall have any personal liability for any failure by the Applicants to make Securities Filings;

(m) granting an administration charge (the "**Administration Charge**") in an initial amount not exceeding the amount of $350,000 as security for the professional fees and disbursements of the Monitor, counsel for the Monitor and counsel for the Applicants, incurred both before and after the approval of the Initial Order;

(n) approving a directors and officers charge (the "**D&O Charge**") up to the aggregate amount of $300,000 as security for the liabilities to which the Applicants' directors and officers may be exposed after the commencement of these CCAA proceedings, except to the extent any obligation was incurred as a result of any director or officer's gross negligence or wilful misconduct;

(o) directing that the status quo in respect of Bio-Tech's cannabis excise licence (as defined below, the "**Excise Licence**") shall be preserved and maintained during the pendency of the Stay Period, and to the extent the Excise Licence may expire during the Stay Period, directing that the term of the Excise Licence is deemed to be extended by a period equal to the Stay Period (or further extension thereof); and

(p) providing for the Comeback Application on July 24, 2024 in respect of the relief granted under the Initial Order and certain other additional relief.

11. For the reasons set out herein, I verily believe that the Applicants are insolvent on a cash flow and balance sheet basis and are companies to which the CCAA applies.

II. URGENT NEED FOR RELIEF

12. Delta 9 is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales and business to business sales.

13. The Applicants are insolvent. They face an unsustainable liquidity crisis and increased pressure from their secured creditors and are in urgent need of relief under the CCAA.

14. The cannabis industry is nascent, highly regulated and has experienced a number of rapid changes since legalization in 2017. The uncertainty caused by these changes has created an array of challenges for companies in the industry, including difficulties in obtaining adequate investment and financing to adequately scale operations and capital expenditures.

15. In recent years, the Applicants have suffered losses due to, among other things, the following:

(a) intense competition and an over-supply of cannabis products leading to significant price compression and the sale of inventory at a loss;

(b) the impact of the illicit supply of cannabis, including illegal dispensaries and black market suppliers;

(c) the burdensome costs associated with the regulatory regime in the industry;

(d) the significant amount of capital required to successfully develop and generate revenue from new products;

(e) the changing capital market investor sentiment driving public investment away from the cannabis sector, forcing the Applicants to seek more expensive forms of financing; and

(f) higher interest rates leading to investors demanding increased rates of return in excess of returns that the Applicants are able to provide.

16. While a large portion of the Applicants' business is cash-flow positive, there is insufficient capital to continue to meet Delta 9's debt obligations while also funding the operations of Bio-Tech that continue to operate at a significant loss. The strain of Delta 9's debt burden has also made it difficult to raise additional capital and attract the necessary investment into the business to adequately scale its operations to a level where it is cash-flow positive across all segments.

17. Since approximately December 2023, the Canada Revenue Agency (the "**CRA**") has only renewed Bio-Tech's cannabis excise licence under the *Excise Act, 2001* on a 30-day recurring basis, subject to Bio-Tech's strict compliance with a payment plan due to Bio-Tech's significant excise tax arrears that total approximately $7,600,000. If at any point Bio-Tech fails to meet the conditions of the licence renewal, it could lose its licence to produce and sell cannabis and be required to immediately pay the entire amount of the outstanding excise tax arrears, further jeopardizing the Applicants' overall business operations.

18. As of March 31, 2024, D9 Parent was in breach of its Debt Service Coverage Ratio and Current Ratio covenants for its credit facilities with its former primary secured creditor, Connect First Credit Union Ltd. ("**CFCU**").

19. On May 21, 2024, D9 Parent received a demand and notice of intention to enforce security (the "**First SNDL Demand**") from SNDL Inc. (formerly Sundial Growers Inc., "**SNDL**"). At the time the First SNDL Demand was issued, SNDL was a subordinate secured creditor owed an estimated $12,512,876.71. D9 Parent believes that the amount claimed by SNDL in the First SNDL Demand will need to be reviewed by the Monitor and the amount outstanding thereunder confirmed with appropriate supporting documentation being provided by SNDL. The First SNDL Demand expired on June 22, 2024. Attached as **Exhibit "1"** is a copy of the SNDL Demand.

20. As set out in further detail below, on July 5, 2024, without notice to Delta 9 and after extensive engagement by both Fika, the proposed plan sponsor (in such capacity, the "**Plan Sponsor**") and Delta 9 with CFCU, CFCU sold to SNDL all of the CFCU Outstanding Indebtedness (as defined below). SNDL assumed all of CFCU's right, title and interest under the CFCU Loan, the CFCU Security and the Priority Agreement (the "**SNDL**

Assignment"). Attached as **Exhibit "2"** is a copy of the Bill of Sale evidencing this assignment and assumption between CFCU and SNDL of the CFCU Outstanding Indebtedness.

21. The SNDL Assignment came as a significant surprise to Delta 9 and was contrary to the representations that were made by CFCU to Delta 9 when Delta 9 made enquiries as to whether such discussions had been occurring with SNDL. Delta 9 made substantial good faith efforts to engage with CFCU early on as its primary secured stakeholder. Fika also made significant efforts, expending its time and incurring expenses, in order to engage with CFCU to set out a proposed restructuring of the Applicants, including the payout of the CFCU secured debt. Due to CFCU's delay and non-responsiveness to the presentations and substantial financial information provided by both Delta 9 and Fika to CFCU, significant time was lost, and the financial position of Delta 9 continued to deteriorate during this period.

22. SNDL is now Delta 9's primary senior secured creditor. SNDL is now owed the estimated collective amount of $38,701,617.27 (the "**Estimated Outstanding Indebtedness**").

23. SNDL has since issued a second set of demands and notices of intention to enforce security dated July 10, 2024 to D9 Parent, Bio-Tech, Lifestyle and Store, demanding payment of the amount of the CFCU Outstanding Indebtedness that SNDL assumed under the SNDL Assignment, which as of July 5, 2024, amounted to $27,868,283.94 (the "**Second SNDL Demand**", and together with the First SNDL Demand, the "**SNDL Demands**"). The Second SNDL Demand expires within 22 business days of the date of issue, being August 12, 2024. Attached collectively as **Exhibit "3"** are copies of the Second SNDL Demand.

24. D9 parent does not have enough cash available to meet the terms of the First SNDL Demand or the Second SNDL Demand. The Applicants face potential imminent enforcement action from SNDL under the First SNDL Demand that could be commenced at any time.

25. The SNDL Assignment has created significant urgency to obtain the protection of an Initial Order and commence these CCAA proceedings as soon as possible. Delta 9 believes that SNDL ultimately wants to acquire Delta 9's retail business as a competitor in that segment of the cannabis industry (as discussed in greater detail below). SNDL is not simply a secured creditor in the same position and with the same interests as CFCU.

26. Despite this change in the nature of Delta 9's primary secured creditor, and all of the good faith efforts of Delta 9 and Fika to engage with CFCU, Delta 9 continues to be of the view that SNDL is not the fulcrum creditor in this proceeding. Delta 9 believes that there remains significant value to the other stakeholders of Delta 9 if it is able to implement a restructuring in the stable and controlled environment provided for under the CCAA, all with the oversight and input from the Monitor.

27. Delta 9 requires the time and stability provided by the CCAA to implement a restructuring that will ultimately see SNDL repaid in full for the amounts owed to it under the Estimated Outstanding Indebtedness.

28. Due to their financial difficulty and on-going liquidity constraints, the Applicants require urgent creditor protection to stabilize their financial situation and implement a restructuring plan that maximizes value for all of their creditors and stakeholders. The ultimate goal is to emerge from creditor protection with the support of the Plan Sponsor as a streamlined going-concern business.

29. Due to the Applicants' financial difficulty, and in consultation with their advisors and stakeholders, the Applicants have determined that the best path forward for all stakeholders, including creditors, customers, employees and shareholders, is a restructuring plan that involves the following, as further detailed in the Restructuring Term Sheet:

    (a) implementation of a Court-approved sales and investment solicitation process (the "**SISP**") in respect of the assets and/or shares of Bio-Tech; and

    (b) the filing of one or more plans of arrangement in respect of D9 Parent, Store, Lifestyle and Logistics (collectively, the "**Plan Entities**").

30. As indicated, the Applicants have entered into a binding plan sponsor term sheet (the "**Restructuring Term Sheet**") dated July 12, 2024 with the Plan Sponsor. The Restructuring Term Sheet provides support for the Applicants' restructuring plan and ensures that there is sufficient financing available through interim financing to complete the restructuring plan. The restructuring plan is detailed in the Restructuring Term Sheet and is attached as **Exhibit "4"**.

31. The Applicants have engaged in significant ongoing negotiations with the Plan Sponsor in respect of their restructuring plan and, as set out below in paragraphs 180 to 185 and 189

to 192, the Applicants are of the view that the Restructuring Term Sheet represents the best strategic option that was sourced following a six-month process of canvassing the market.

III. OVERVIEW OF THE APPLICANTS

A. Background

32. The Applicants are in the business of cultivation, processing, extraction, wholesale distribution and retail sale of cannabis.

33. D9 Parent maintains a registered head office at Suite 2600-1066 West Hastings Street, Vancouver, British Columbia.

34. Bio-Tech is a licensed producer and holds a licence from Health Canada to cultivate, process and sell cannabis. Bio-Tech owns and operates a 95,000 square-foot cannabis cultivation and processing facility located at 760 Pandora Avenue East in Winnipeg, Manitoba (the "**Cultivation Facility**") while Logistics operates a distribution and cross-docking facility located at 770 Pandora Avenue East in Winnipeg, Manitoba (the "**Distribution Facility**").

35. Lifestyle and Store collectively operate 41 cannabis retail stores (collectively, the "**Cannabis Retail Stores**") across Alberta, Saskatchewan and Manitoba.

36. Attached hereto as **Exhibit "5"** is a table summarizing the Cannabis Retail Stores portfolio of the Applicants as of March 31, 2024.

B. Corporate Structure

37. Attached hereto as **Exhibit "6"** is a copy of the Applicants' current organizational chart.

(i) Delta 9 Cannabis Inc.

38. D9 Parent is a publicly traded corporation incorporated in the province of British Columbia.

39. D9 Parent is an entity regulated by the Manitoba Securities Commission and is a reporting issuer in all of the provinces and territories in Canada.

40. D9 Parent holds 100% of the issued and outstanding shares of Logistics, Bio-Tech and Stores.

41. Attached as **Exhibit "7"** is a copy of a British Columbia company summary in respect of D9 Parent.

(ii) Delta 9 Logistics Inc.

42. Logistics is a privately held corporation incorporated and continued into the province of Alberta, with its registered office located at 2100, 222-3rd Avenue S.W., Calgary, Alberta. Logistics is the 100% wholly owned subsidiary of D9 Parent.

43. Logistics facilitates the distribution of recreational cannabis products and holds a distribution licence issued by the Manitoba Liquor, Gaming and Cannabis Authority ("**LGCA**").

44. Logistics operates the Distribution Facility, which provides cross-docking and distribution services under a distribution licence to various licensed cannabis retailers within the province of Manitoba, in addition to Store and Lifestyle.

45. Attached as **Exhibit "8"** is a copy of an Alberta corporate registries search in respect of Logistics.

(iii) Delta 9 Bio-Tech Inc.

46. Bio-Tech is a privately held corporation incorporated and continued into the province of Alberta, with its registered office located at 2100, 222-3rd Avenue S.W., Calgary, Alberta. Bio-Tech is a 100% wholly owned subsidiary of D9 Parent and itself owns 68.8% of the issued and outstanding shares of Lifestyle.

47. Bio-Tech is the licensed producer in the Applicants' corporate structure. It holds a licence pursuant to the *Cannabis Act*, SC 2018, c 16 from Health Canada permitting Bio-Tech to produce and sell cannabis and cannabis oils, extracts and derivative products. Bio-Tech operates the Cultivation Facility.

48. Attached as **Exhibit "9"** is a copy of an Alberta corporate registry search in respect of Bio-Tech.

(iv) Delta 9 Lifestyle Cannabis Clinic Inc.

49. Lifestyle is a privately held corporation incorporated in the Province of Manitoba Manitoba that to the best of my knowledge will be continued into the Province of Alberta following the Initial Order Application, with its registered office to be located at 2100, 222-3rd Avenue

S.W., Calgary, Alberta. 68.8% of Lifestyle's issued and outstanding shares are owned by Bio-Tech and the remaining portion are owned by Fika.

50. Lifestyle owns and operates a chain of 19 cannabis retail stores across Manitoba operating under the trade name "Delta 9 Cannabis Store" and "Garden Variety" and holds a variety of store licences from the LGCA.

51. Attached as **Exhibit "10"** is a copy of a Manitoba corporate registry search in respect of Lifestyle.

(v) Delta 9 Cannabis Store Inc.

52. Store is a privately held federal corporation incorporated under the *Canada Business Corporations Act* and extra-provincially registered in Alberta. Store is a 100% wholly owned subsidiary of D9 Parent.

53. Store owns and operates 21 cannabis retail stores across Alberta and one retail cannabis retail store in Saskatchewan under the trade names "Delta 9 Cannabis Store", "Discounted Cannabis" and "Uncle Sam's Cannabis".

54. Store holds retail cannabis licences from Alberta Gaming, Liquor and Cannabis ("**AGLC**") in Alberta and the Saskatchewan Liquor and Gaming Authority ("**SLGA**") in Saskatchewan authorizing the retail sale of recreational cannabis in those provinces.

55. Attached collectively as **Exhibit "11"** is a copy of a federal corporate profile report and Alberta corporate registries search result for Store.

C. Summary of Operations and Locations

(i) Corporate Office Lease

56. Head office functions are largely conducted out of office space located at the Logistics premises at 770 Pandora Avenue East in Winnipeg, MB (the "**Corporate Office**"). The Corporate Office functions primarily as a workspace for Delta 9's accounting and legal professionals and executives, including myself, the Chief Financial Officer and other members of the finance and management team.

(ii) Cultivation Facility

57. Bio-Tech operates the Cultivation Facility. The Cultivation Facility contains 297 modular "grow pods", which are 320 square-foot shipping containers that have been retrofitted to

support specific, micro-cultivation processes for the cultivation of certain types of cannabis plants (the "**Grow Pods**"). The Grow Pods are customized for flowering, trimming, cloning, research, testing, support and storage. Within the Cultivation Facility, the Grow Pods are stacked and connected to a centralized HVAC system. The Cultivation Facility has been retrofitted with HVAC and cooling infrastructure to support the Grow Pods.

58. In addition to its cultivation capabilities, the Cultivation Facility further includes automated bottling and rolling equipment to process the cannabis plant products into products available for consumer use.

59. Bio-Tech owns all of the inventory and intellectual property associated with the Grow Pods in its own name. Attached as **Exhibit "12"** are copies of Canadian trademark and patent registrations in favour of Bio-Tech.

60. Bio-Tech further owns the lands and facility associated with the Cultivation Facility, along with all of the HVAC improvements and automated bottling and rolling equipment. Attached as **Exhibit "13"** is a copy of the Land Title Certificate respecting the Cultivation Facility lands legally described as:

> PARCELS A, B, C, D, E AND F PLAN 51110 WLTO
> EXC FIRSTLY: OUT OF SAID PARCELS A AND C
> ALL MINES AND MINERALS MINERAL OILS PETROLEUM GAS COAL GRAVEL AND VALUABLE STONE OF EVERY DESCRIPTION THAT MAY BE FOUND IN UPON OR UNDER SAID PARCELS A AND C
> TOGETHER WITH THE RIGHT TO ENTER AND REMOVE THE SAME
> SECONDLY: OUT OF SAID PARCELS B AND E, ALL MINES AND MINERALS AS RESERVED IN DEED 2374744 WLTO AND
> THIRDLY: OUT OF SAID PARCEL F, ALL MINES AND MINERALS AS SET FORTH IN TRANSFER 2374748 WLTO
> IN SW 1/4 3 AND SE 1/4 4-11-4 EPM AND
> IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS
>
> (the "**Bio-Tech Lands**").

61. As of the date of filing, Bio-Tech employs 141 full-time employees, six of whom also provide services to Logistics.

(iii) Grow Pods

62. Over the course of the last approximately six years, Delta 9, through Bio-Tech, has generated approximately $25 million from the sale of its Grow Pods and cannabis genetics and from the provision of consulting and licensing services to other cannabis companies.

63. Bio-Tech essentially offers packages to new cannabis producers that include customized Grow Pods, assistance with completing Health Canada licence applications and after-sale support to provide training and industry-leading operations procedures. Bio-Tech also offers a Micro-Cultivation Partner Program and select supply agreements to its customers.

64. Since approximately 2020, revenues realized from the sale of Grow Pods and associated services have declined, largely due to saturation in the market of new cannabis producers.

(iv) Distribution Facility

65. In leased premises directly adjoining the Cultivation Facility, Logistics operates an approximately 15,000 square foot distribution and cross-docking facility out of the Distribution Facility. Bio-Tech leases the Distribution Facility directly from 6599362 Canada Ltd. ("**659 Canada**") pursuant to a head lease (the "**Distribution Facility Lease**") and subleases the premises to Logistics pursuant to a verbal sublease agreement, pursuant to which Logistics pays rent to 659 Canada on the same terms as Bio-Tech would under the Distribution Facility Lease. A copy of the Distribution Facility Lease, as amended, is attached as **Exhibit "14"**.

66. The Distribution Facility provides operational support for the Cultivation Facility and houses the centralized head office where a team of managers oversees both the Cultivation Facility and the Distribution Facility. The Distribution Facility also provides warehouse storage for a number of cannabis retail products before they are distributed into the retail network.

67. On April 14, 2022, Logistics and the LGCA entered into a limited cannabis distribution agreement (the "**Distribution Agreement**") pursuant to which, Logistics was granted the authority to distribute cannabis in Manitoba. Under the Distribution Agreement, Logistics works with authorized cannabis suppliers in Manitoba to provide cross-docking and distribution services in order to fulfil delivery of orders to licensed cannabis retailers. This allows out-of-province suppliers to improve their efficiencies and reduce shipping costs into the Manitoba market.

68. On October 24, 2022, the LGCA issued Logistics a distribution licence (the "**Distribution Licence**"), at which point, Logistics began providing distribution and cross-docking services under the Distribution Agreement.

69. As the company responsible for the Distribution Facility, Logistics holds relatively few assets beyond some operational equipment and storage racking. However, Logistics holds a number of valuable supply contracts within the Delta 9 network of Cannabis Retail Stores, as well as with other licensed cannabis producers and retailers across Manitoba, Saskatchewan, and Alberta. The operations of Logistics are closely intertwined with Bio-Tech, Lifestyles and Stores, and Logistics provides a crucial distribution function within Delta 9's operations.

70. Logistics has six employees, although their payroll is managed and paid through Bio-Tech.

(v) Retail Stores

71. In Alberta, Store operates 21 cannabis retail stores out of the following locations (collectively, the "**Alberta Stores**"):

	Delta 9 Cannabis Store	Uncle Sam's Cannabis	Discounted Cannabis
Grande Prairie	1		
Edmonton	2	9	4
Stony Plain			1
Morinville			1
St. Albert			1
Beaumont			1
Calgary	1		

72. In Saskatchewan, Store operates one Delta 9 Cannabis Store in Lloydminster, SK (the "**Saskatchewan Store**").

73. Store has 104 employees.

74. In Manitoba, Lifestyle operates 19 cannabis retail stores out of the following locations (collectively, the "**Manitoba Stores**"):

	Delta 9 Cannabis Store	Garden Variety
Winnipeg	12	2
Dauphin	1	
Brandon	1	1
Selkirk	1	

Thompson	1	

75. Lifestyle has 166 employees. A full summary of the Cannabis Retail Stores' portfolio is set out in the chart attached earlier as **Exhibit "5"**.

76. All of the Cannabis Retail Stores operate on leased premises pursuant to a number of commercial lease agreements. A summary of the commercial lease agreements for the Cannabis Retail Stores and the Distribution Facility is attached as **Exhibit "15"** (collectively, the "**Commercial Leases**").

77. Almost all payments on the Commercial Leases are current, except for a Delta 9 Cannabis Store in the Beverly neighbourhood of Edmonton, AB (the "**Beverly Store**").

78. In respect of the Beverly Store, the landlord advised it would be increasing the common area maintenance ("**CAM**") fees but has not responded to requests for clarification on how these costs would be divided *pro-rata* amongst the other tenants. We have provided a cheque for rental payments up to March 31, 2024 that to the best of our knowledge has not yet been cashed. We are continuing our efforts to contact the landlord to resolve the issue of increased CAM fees.

79. The Alberta Stores are the largest group of stores within the Delta 9 retail group.

D. Cannabis Licences

80. The activities of the Applicants are subject to regulation by various government authorities including Health Canada and provincial boards in each of the provinces where the Applicants operate. The Applicants' ability to produce, store and sell cannabis depends on their Health Canada licence and provincial retail licences. The Applicants have incurred significant costs to maintain compliance with these licences.

81. Bio-Tech holds a cannabis licence from Health Canada issued under the *Cannabis Act* (Canada) (the "**Health Canada Licence**") and an excise licence (the "**Excise Licence**", and together with the Health Canada Licence, the "**LP Licences**") to sell cannabis products under the *Excise Act, 2001* (Canada) (the "**Excise Act**"). Attached hereto as **Exhibit "16"** is a copy of the Health Canada Licence and attached as **Exhibit "17"** is a copy of the Excise Licence.

82. The Excise Licence is currently set to expire on July 16, 2024. Bio-Tech has been in regular discussions with CRA with respect to licensing conditions. To date, Bio-Tech has

complied with all conditions imposed by CRA and CRA has renewed its Excise Licence; however, as detailed below, Bio-Tech has significant arrears owing to CRA under its Excise Licence in the amount of about $7,606,515.50 (the "**Excise Tax Arrears**"). Since approximately December 2023, the CRA has only agreed to renew the Excise Licence on a 30-day recurring basis.

83. In order to qualify for each 30-day renewal of the Excise Licence, Bio-Tech must continue making the monthly excise duty payment, plus the pre-arranged payment to reduce the Excise Tax Arrears. Making both payments has continued to place additional strain on Bio-Tech's liquidity.

84. The LP Licences are critical to the Applicants' overall operations as they cannot legally, operate without them. The LP Licences are either non-transferrable or else only transferrable by, in effect, making a new application for a licence.

E. Retail Licences

85. As noted above, each of Lifestyle and Store hold provincial licences for the retail sale of cannabis and cannabis-related products for each of their Cannabis Retail Stores (collectively, the "**Retail Licences**").

86. A chart summarizing the details of the Retail Licences is attached as **Exhibit "18"**.

87. The Manitoba Retail Licences were issued to Lifestyle by the LGCA pursuant to *The Liquor, Gaming and Cannabis Control Act* (Manitoba).

88. The Alberta Retail Licences were issued to Store by the AGLC pursuant to the *Gaming, Liquor and Cannabis Act* (Alberta).

89. The Saskatchewan Retail Licence was issued to Store by the SLGA, pursuant to *The Cannabis Control (Saskatchewan) Act* (Saskatchewan).

F. Operations in Other Provinces and Territories

90. Pursuant to various supply agreements with provincial and territorial cannabis boards (collectively, the "**Supply Agreements**"), Bio-Tech, as a designated authorized distributor, supplies retail cannabis products into British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Newfoundland and Labrador and Yukon.

91. Copies of the Supply Agreements, where necessary to ship to provinces, are collectively attached as **Exhibit "19"**.

G. Employees

92. The Applicants currently employ a total of 388 employees, broken down as follows:

Company	Employees
Bio-Tech	112 Production
	29 Management
Lifestyle	164 Retail
	2 Administrative
Store	8 Retail
	94 Retail
	2 Administrative
TOTAL:	**388**

93. Employees are paid biweekly. The Applicants are current on all payments to employees.

94. None of the employees are unionized or otherwise subject to a collective bargaining agreement in connection with their employment with any Applicant.

95. The Applicants do not sponsor, administer or otherwise have any registered or unregistered pension plans for any Canadian employees. The Applicants provide a standard group benefit plan to their employees that covers extended heath care, dental care, life insurance, and accidental death and dismemberment insurance.

H. Key Suppliers and Customers

96. The Applicants rely on a number of vendors and third-party suppliers to operate their business, most critically to Bio-Tech and Logistics. These suppliers or third parties provide cannabis growth inputs, lab services, and shipping services, among other things. Any interruption of service from these suppliers, including because of any pre-filing unpaid amounts, would prevent the Applicants from operating in the ordinary course in general and reduce Bio-Tech's ability to meet its production capacity targets.

97. Bio-Tech needs to ensure the continued availability of these materials in order to maintain its operations and in order to maximize value for its assets under the proposed SISP. This

may require that certain pre-filing amounts owed to these suppliers will have to be paid, with approval of the Monitor, to ensure uninterrupted supply of materials.

98. Bio-Tech is not current on all of its supplier contracts and has been actively negotiating for more favourable payment terms to secure continued service.

(i) Input Supplies

99. As the entity responsible for the Cultivation Facility, Bio-Tech relies heavily on a continued supply of growth inputs to support the continued cultivation of various cannabis plants. These inputs include C02, agricultural chemicals, biological controls, pollinators commercial fertilizers, compost, manure, mulch, sanitizers and non-chemical food agents, among others (collectively, "**Inputs**").

100. Bio-Tech is largely current on its Input payments and contracts but is working to negotiate more favourable payment terms, such as payment after 30 days, rather than on delivery, with certain suppliers.

(ii) Shipping Contracts

101. With respect to the Distribution Facility, Logistics relies heavily on its contracts with transportation and shipping providers to facilitate the distribution of cannabis products within Manitoba and into other provinces and territories.

102. Similar to Bio-Tech, Logistics is largely current on its shipping contracts and has been working to negotiate more favourable payment terms.

(iii) Cultivation and Processing

103. On November 20, 2023, Bio-Tech entered into a supply agreement with another large cannabis producer (the "**LP**") for the bulk sale of cannabis flowers (the "**LP Supply Agreement**"). Pursuant to the LP Supply Agreement, Bio-Tech will cultivate select cultivars for the LP based on a rolling 12-month forecast.

104. Bio-Tech will supply the LP with approximately 40% of the LP's total production and anticipates revenue of approximately $4,620,000 over the first 12 months of the LP Supply Agreement. Bio-Tech is on schedule to deliver its first shipment in the second quarter of 2024.

105. The LP is current on the LP Supply Agreement so far, but Bio-Tech relies heavily on its own supply chain in order to supply the bulk cannabis necessary to meet its delivery obligations under the LP Supply Agreement. Any interruptions to the LP Supply Agreement could have a significant financial impact to Bio-Tech and could have a detrimental impact on the outcome of the SISP.

(iv) Provincial Board Supply Agreements

106. As noted above, key suppliers of cannabis retail stores in other provinces are provincial cannabis boards, the Supply Agreements for which are attached as **Exhibit "19"**. Pursuant to the Supply Agreements, the Applicants provide cannabis products to the relevant provincial or territorial authorities for wholesale distribution and for sale in retail markets.

I. Cash Management System

107. All Applicants hold operating accounts (the "**Operating Accounts**") with Canadian Western Bank ("**CWB**"). Individual payments may be made or received out of any of the Operating Accounts.

108. The Operating Accounts are used to, among other things, collect funds and pay expenses associated with their operations. The Applicants' funds and Cash Management System are managed by the Applicants' finance team and Chief Financial Officer.

109. Bio-Tech also holds a Visa card through CWB with a limit of $50,000 used to fund ordinary course business expenses (the "**Visa Card**"). As of May 31, 2024, the Visa Card has an outstanding balance of approximately $30,216.61.

110. Collectively, the Applicants' described use of Operating Accounts and Visa Card are defined herein as "**Cash Management System**".

111. The Cash Management System has several functions, comprised of: (a) collecting accounts receivable from third parties; (b) disbursements to fund payroll and benefits, capital expenditures, maintenance costs, payments to inventory vendors and other service providers for each of the Applicants; and (c) intercompany cash transfers amongst various Applicant entities (the "**Intercompany Transfers**").

112. Intercompany Transfers are payments made between the Applicants. Intercompany Transfers are made on an "as needed" basis to ensure that each Applicant has sufficient working capital and liquidity to meet its on-going needs.

113. Typically, capital funds are raised through D9 Parent and distributed amongst the other Applicants as needed. As between Bio-Tech and Logistics, their businesses are closely intertwined, such that Logistics will often receive payment for the cannabis products that Bio-Tech produces. Bio-Tech also has staff on its payroll that provide services for other Applicant entities, including Logistics.

114. Historically, the Cannabis Retail Stores and the Distribution Facility operations are cash-flow positive, while Bio-Tech continues to require more funds to operate than it can generate. Intercompany Transfers from D9 Parent and other entities are therefore necessary to fund Bio-Tech's ongoing operations.

IV. FINANCIAL CIRCUMSTANCES AND CASH FLOW FORECAST

115. The Applicants' fiscal year end is December 31, 2024. Attached hereto as **Exhibit "20"** are the Applicants' consolidated audited financial statements for the years ended 2022 and 2023. The Applicants have operated at a net loss since at least 2021.

116. Attached as **Exhibit "21"** is a copy of an unaudited consolidated balance sheet of the Applicants' calculated up to May 31, 2024 (the "**Balance Sheet**").

A. Assets

117. As set out in further detail in the Balance Sheet, the Applicants' total consolidated assets are valued at $65,230,722.38 and consist of the following:

Asset Type	**Book Value (Consolidated)**
Current Assets (Total)	**$12,489,068.48**
Cash and Cash Equivalents	$1,219,915.80
Accounts Receivable	$2,477,941.98
Due from Related Parties	–
Due from Government Agencies	– $1,101,698.41
Due from Employees/Share Holders	$14,534.10
Finished Grow Pods for Resale	$89,264.59
Biological Assets + Inventory	$8,102,209.19
Other Inventory	$2,241,835.48
Purchase Prepayments	$1,562,622.20

Raw Materials (Cultivation, Production, Packaging)	$1,080,301.33
Investment in Oceanic	$500,000.00
Non-Current Assets (Total)	**$52,741,653.90**
Property, Plant and Equipment	$38,286,580.08
Intangibles Assets	–
Goodwill	$14,198,668.59
Investments	$33,333.33
Notes Receivable	$223,071.90
TOTAL ASSETS:	**$65,230,722.38**

B. Liabilities

118. As set out in further detail in the Balance Sheet, the Applicants' total consolidated liabilities are valued at $80,974,426.69 and consist mainly of the following:

Liability Type	**Book Value (Consolidated)**
Current Liabilities (Total)	**$14,471,798.04**
Accounts Payable and Accrued Liabilities	$4,356,789.55
CWB-VISA Card	$30,216.61
Current Portion of Right of Use Lease Liability	$1,967,836.62
Provincial Sales Tax Payable	$24,624.88
Excise Tax Payable	$7,607,561.39
Employee Benefits (incl. source deductions and accrued vacation pay)	$74,283.52
Income Tax Payable	$358.08
Customer Loyalty	$206,545.12
Deferred Revenue	$199,882.27
Gift card liability	$3,700.00
Long Term Liabilities (Total)	**$66,502,628.65**
CFCU Loan and Line of Credit	$28,176,267.12
SNDL Debenture	$10,833,333.33
Uncle Sam's Cannabis Debt	$4,291,192.87
7217804 Manitoba Ltd. Shareholder Loan	$2,887,917.57
CRA Manufacturing Rebate Deferral	$926,375.93
Right of Use Lease Liability	$12,701,219.15
Lease Liability	$5,430,596.35
Customer Deposit	$585,775.33
Derivative Liability	$646,000.00
Payable Notes	$23,951.00
TOTAL LIABILITIES:	**$80,974,426.69**

C. Interim Cash Flow Forecast

119. With the assistance of the Proposed Monitor, Delta 9 has prepared a 13-week cash flow forecast ending the week of September 27, 2024 (the "**Cash Flow Forecast**") to determine the amount of funding required to finance their operations through the anticipated length of the CCAA proceedings. To the best of my knowledge, the Cash Flow Forecast will be attached to a Pre-Filing Report of the Proposed Monitor.

120. If the Initial Order is granted, the Cash Flow Forecast indicates that the Applicants will require interim financing during the pendency of the CCAA proceedings and as early as the week of July 26, 2024.

V. THE APPLICANTS' CREDITORS

A. Secured Creditors

(i) Prior Senior Secured Creditor - Connect First Credit Union

121. On March 11, 2022, D9 Parent, as borrower, CFCU, as lender, and Bio-Tech, Lifestyle and Store, as guarantors (in such capacity, the "**Guarantors**"), entered into a commitment letter dated February 1, 2022 (the "**CFCU Commitment Letter**"). Pursuant to the CFCU Commitment Letter, CFCU, D9 Parent and the Guarantors entered into separate loan agreements providing for the total advancement of $32,000,000 from CFCU to D9 Parent (the "**CFCU Loan Agreements**", and together with the CFCU Commitment Letter, the "**CFCU Loan**").

122. Attached as **Exhibit "22"** is a copy of the CFCU Commitment Letter. Attached as **Exhibit "23"** are copies of the CFCU Loan Agreements.

123. The CFCU Commitment Letter provides for the following facilities:

(a) Facility #1 - $23,000,000 commercial mortgage term loan provided for the purpose of paying out D9 Parent's debt to Canadian Western Bank and certain debentures;

(b) Facility #2 - $5,000,000 commercial mortgage term loan advanced to finance the acquisition of "Uncle Sam's Cannabis" retail stores; and

(c) Facility #3 - $4,000,000 authorized overdraft facility intended to finance the borrower's day-to-day operating requirements.

124. As security for the CFCU Loan, D9 Parent and the Guarantors granted the following security in favour of CFCU (collectively, the "**CFCU Security**"):

(a) first-ranking collateral mortgage dated March 11, 2022, granted by Bio-Tech in favour of CFCU over the Bio-Tech Lands in the principal amount of $28,000,000, a copy of which is attached as **Exhibit "24"**;

(b) general assignment of leases and rents dated March 11, 2022, granted by Bio-Tech in favour of CFCU over the Bio-Tech Lands, a copy of which is attached as **Exhibit "25"**;

(c) mortgages of lease by way of sublease dated March 14, 2022, granted by Bio-Tech in favour of CFCU, respecting Bio-Tech's commercial lease for "Building C" and "Building D" of the Distribution Facility, copies of which are collectively attached as **Exhibit "26"**;

(d) general security agreements (collectively, the "**CFCU GSAs**") dated March 11, 2022 granted in favour of CFCU by each of the following:

(i) D9 Parent, as borrower;

(ii) Bio-Tech, as guarantor;

(iii) Lifestyle, as guarantor; and

(iv) Store, as guarantor,

copies of which are collectively attached as **Exhibit "27"**;

(e) unlimited guarantees (collectively, the "**CFCU Guarantees**") dated March 11, 2022 granted in favour of CFCU from each of the following:

(i) Bio-Tech;

(ii) Lifestyle; and

(iii) Store,

copies of which are collectively attached as **Exhibit "28"**.

125. Each of the CFCU Loan, CFCU GSAs and CFCU Guarantees are governed by the law of the Province of Alberta.

126. Prior to the SNDL Assignment, CFCU did not issue any formal demands or Notices of Intention to enforce its security. However, on September 30, 2022, CFCU issued Delta 9 a Notice of Breach of Financial Covenant (the "**September 2022 Notice of Breach**"), advising Delta 9 it was in breach of the CFCU Loan by failing to maintain a Debt Service Coverage Ratio of a minimum of 1.40:1. Attached as **Exhibit "29"** is a copy of the September 2022 Notice of Breach.

127. On June 13, 2024, CFCU issued Delta 9 a further Notice of Breach of Financial Covenant (the "**June 2024 Notice of Breach**") advising Delta 9 it was in further breach of the CFCU Loan by failing to maintain a Current Ratio of 1.25:1. Attached as **Exhibit "30"** is a copy of the June 2024 Notice of Breach.

128. As of July 5, 2024, the outstanding indebtedness owing from D9 Parent and the Guarantors to CFCU amounted to $27,868,283.94, inclusive of interest but excluding all other costs, expenses and legal costs on a solicitor and own-client (full indemnity) basis (the "**CFCU Outstanding Indebtedness**").

129. As outlined above, the Second SNDL Demand has now been issued to D9 Parent, Bio-Tech, Logistics, and Store, which demand expires on August 12, 2024.

(ii) SNDL Inc.

130. SNDL, as amalgamated under "SNDL Inc." on January 1, 2023, is a corporation incorporated pursuant to the laws of the Province of Alberta. Attached as **Exhibit "31"** is a copy of an Alberta corporate registry search for SNDL, as amalgamated.

131. On March 30, 2022, D9 Parent, as issuer, SNDL, as holder, entered into a second-lien convertible debenture agreement (the "**SNDL Convertible Debenture**").

132. The SNDL Convertible Debenture provides for a $10,000,000 second-lien convertible debenture to be used for general corporate purposes and for growth capital to fund D9 Parent's operations and future acquisitions. A copy of the SNDL Convertible Debenture is attached as **Exhibit "32"**.

133. As security for the SNDL Convertible Debenture, D9 Parent and the Guarantors granted the following security in favour of SNDL (collectively, the "**SNDL Security**"):

(a) second-ranking collateral mortgage dated March 22, 2022, granted by Bio-Tech in favour of SNDL over the Bio-Tech Lands in the principal amount of $14,000,000, a copy of which is attached as **Exhibit "33"**;

(b) general assignment of leases and rents dated March 22, 2022, granted by Bio-Tech in favour of SNDL over the Bio-Tech Lands, a copy of which is attached as **Exhibit "34"**;

(c) general security agreements (collectively, the "**SNDL GSAs**") dated March 22, 2022 granted in favour of SNDL by each of the following:

(i) D9 Parent, as borrower;

(ii) Bio-Tech, as guarantor;

(iii) Lifestyle, as guarantor; and

(iv) Store, as guarantor,

copies of which are collectively attached as **Exhibit "35"**;

(d) unlimited guarantees (collectively, the "**SNDL Guarantees**") dated March 22, 2022 granted in favour of SNDL from each of the following:

(i) Bio-Tech;

(ii) Lifestyle; and

(iii) Store,

copies of which are collectively attached as **Exhibit "36"**.

134. To the best of my knowledge, Store granted a guarantee in favour of SNDL respecting the SNDL Convertible Debenture; however, an executed copy could not be located to enclose in the Exhibits.

135. Each of the SNDL Convertible Debenture, SNDL GSAs and SNDL Guarantees are governed by the law of the Province of Alberta.

136. As of July 2, 2024, the estimated outstanding indebtedness owing from D9 Parent and the Guarantors to SNDL in the SNDL Convertible Debenture was approximately

$10,833,333.33, inclusive of interest but excluding all other costs, expenses and legal costs on a solicitor and own client (full indemnity) basis (the "**SNDL Outstanding Indebtedness**").

B. PPSA and Land Title Registrations

137. Including the secured creditors described above, a number of parties have registered security interests against various Applicants under the applicable personal property legislation in each of British Columbia, Alberta, Saskatchewan and Manitoba (collectively, the "**PPR Registrations**"). A chart summarizing the PPR Registrations is attached as **Exhibit "37"**.

138. A copy of each of the British Columbia, Alberta, Saskatchewan and Manitoba personal property registry searches as at July 11, 2024 with respect to each of the Applicants are collectively attached as **Exhibits "38"**, **"39"**, **"40"** and **"41"**, respectively.

139. Including each of CFCU and SNDL, other parties have registered security interests against the Bio-Tech Lands under *The Law of Property Act* (Manitoba) (the "**Land Title Registrations**"). A copy of the Land Title Certificate respecting the Bio-Tech Lands is attached earlier at **Exhibit "13"**.

140. The Land Title Registrations are summarized as follows:

Secured Party	Instrument Number	Registration Date	Secured Interest
CFCU	5411011/1	March 31, 2022	Mortgage – $28,000,000
CFCU	5411012/1	March 31, 2022	Caveat – Assignment of Rents and Leases
CFCU	5411013/1	March 31, 2022	Personal Property Security Notice
SNDL	5411014/1	March 31, 2022	Mortgage – $14,000,000
SNDL	5411015/1	March 31, 2022	Caveat – Assignment of Rents and Leases
SNDL	5411016/1	March 31, 2022	Personal Property Security Notice
His Majesty the King (Canada)	5588205/1	October 27, 2023	Certificate of Judgment – $6,513,716.64

His Majesty the King (Canada)	5610517/1	January 19, 2024	Certificate of Judgment - $771,393.95

C. Crown Obligations and Priority Claimants

141. As of June 21, 2024, Bio-Tech owed approximately $18,000 to the CRA in respect of unremitted source deduction arrears (the "**Source Arrears**"). The Source Arrears are currently being reassessed and Bio-Tech anticipates paying the balance before the Initial Order Application.

142. As set out below, the Applicants owe the following amounts to the CRA for outstanding GST and excise tax:

Company	GST	Excise Tax
D9 Parent	*Owed a credit*	
Bio-Tech	$657,056	$7,831,515
Logistics	*Owed a credit*	
Lifestyle	$413,927	
Store	$93,634	
Total:	$1,164,617	$7,831,515

D. Unsecured Creditors

(i) Uncle Sam's Cannabis – Store Transaction

143. In approximately spring of 2022, Store entered into a transaction with Uncle Sam's Cannabis Ltd. ("**Uncle Sam's**") to purchase 16 of the Cannabis Retail Stores in Alberta (the "**Uncle Sam's Transaction**"). The CFCU Loan and the SNDL Convertible Debenture Agreement largely financed the Uncle Sam's Transaction, but in addition to that financing, Uncle Sam's, as vendor, Store, as purchaser, and D9 Parent, as guarantor, entered into the following agreements (collectively, the "**Uncle Sam's Agreements**"):

(a) Promissory Note dated April 22, 2022 from Store to Uncle Sam's in the amount of $4,990,264.37 (the "**Primary Note**"), a copy of which is attached as **Exhibit "42"**; and

(b) Limited Liability Guarantee dated April 22, 2022 from D9 Parent to Uncle Sam's, guaranteeing all indebtedness, liabilities and obligations of Store to Uncle Sam's, up to the amount of $5,000,000, a copy of which is attached as **Exhibit "43"**.

144. In addition to the Uncle Sam's Agreements, pursuant to the Asset Purchase Agreement, the parties agreed that Store would be responsible for paying Uncle Sam's $600,928.50 for inventory. The parties contemplated reducing this amount into a separate promissory note, but this was never finalized. Store continues to owe Uncle Sam's the amount of $600,928.50 for inventory items purchased under the Uncle Sam's Transaction.

145. Pursuant to the Primary Note, the debt obligation has a maturity date of July 20, 2025.

146. As of June 25, 2024, Store's outstanding unsecured indebtedness to Uncle Sam's totals $4,191,193.

(ii) Lifestyle Shareholder Loans

147. As set out in further detail below, from approximately September 2018 to June 2021, Lifestyle entered into a number of shareholder loans pursuant to various unsecured promissory notes and convertible debenture instruments (collectively, the "**Lifestyle Debentures**") with its shareholders, which at the time were 7217804 Manitoba Ltd. ("**721 Manitoba**") and Bio-Tech.

148. The Lifestyle Debentures are summarized as follows:

721 Manitoba Debentures			
Agreement Date	**Instrument**	**Amount**	**Status**
Dec. 31, 2018	Demand Convertible Promissory Note	$2,500,000	Due on demand
Jan. 20, 2021	Demand Convertible Promissory Note	$171,500	Due on demand
March 31, 2021	Demand Convertible Promissory Note	$171,500	Due on demand
June 30, 2021	Demand Convertible Promissory Note	$171,500	Due on demand

149. The 721 Manitoba Debentures are collectively attached as **Exhibit "44"**. The 721 Manitoba Debenture issued on March 31, 2021 was issued and paid; however, there is no signed copy available to enclose in the Exhibits.

Bio-Tech			
Agreement Date	**Instrument**	**Amount**	**Status**
Sept. 30, 2018	Demand Promissory Note	$3,000,000	Converted
Dec. 31, 2018	Demand Convertible Promissory Note	$3,060,000	Converted
July 24, 2019	Notice of Advance of Shortfall	$440,000	Converted

Jan. 20, 2021	Demand Convertible Promissory Note	$178,500	Converted
March 31, 2021	Demand Convertible Promissory Note	$178,500	Converted
June 30, 2021	Demand Convertible Promissory Note	$178,500	Converted

150. The Bio-Tech Debentures are collectively attached as **Exhibit "45"**.

151. As of June 21, 2024, Lifestyle's outstanding indebtedness to 721 Manitoba totaled $2,887,917.57.

152. On May 5, 2021 and June 30, 2021, Bio-Tech converted all of its debt to equity and is no longer owed amounts under the shareholder loans as debt. Collectively attached as **Exhibit "46"** are the Notices of Conversion issued by Bio-Tech respecting the Bio-Tech Debentures.

(iii) Other Unsecured Creditors

153. The Applicants have unpaid trade and other unsecured debt accrued in the normal course of business.

154. As of June 21, 2024, Bio-Tech has $2,745,326.95 in trade payables that are due or will become due to unsecured trade creditors within the next 60+ days, 65 of which have been identified as critical to Bio-Tech's continued business operations.

155. As of June 21, 2024, Store has $91,096.98 in trade payables that are due or will become due within the next 60+ days, 18 creditors of which have been identified as critical to Store's continued business operations.

156. Certain of the Applicants' critical suppliers have recently imposed more stringent payment terms as a result of the Applicants' inability to promptly meet trade terms. Where suppliers have required payment on delivery, the Applicants have sourced other suppliers with longer payment terms, where possible. It has become increasingly difficult to pay all critical suppliers within 30 days.

(iv) Intercompany Debt

157. As of June 30, 2024, the Applicants owe the following amounts of unsecured intercompany debt to other Applicant entities as follows (collectively, the "**Intercompany Debt**"):

Owed From	Owed to	Amount
Bio-Tech	D9 Parent	$74,580,703.69
	Lifestyle	$9,298,696.96
	Store	$829,246.43
	Total owed by Bio-Tech:	$84,708,647.08
	Net of amounts owing to Bio-Tech:	$84,497,270.69
Lifestyle	D9 Parent	$4,930,663.76
Lifestyle	Logistics	$34,478.50
	Total owed by Lifestyle:	$4,965,142.26
	Net of amounts owing to Lifestyle:	-$4,549,117.04
Store	Lifestyle	$181,083.84
Store	D9 Parent	$16,826,997.89
Store	Logistics	$56.70
	Total owed by Store:	$17,008,138.43
	Net of amounts owing to Store:	$16,178,892
Logistics	Bio-Tech	$211,376.39
Logistics	Lifestyle	$34,478.50
	Total owed by Logistics:	$245,854.89
	Net of amounts owing to Logistics:	$211,319.69

158. The Intercompany Debt is comprised of accounts payable and receivable and notes/loans receivable. Only Lifestyle owes Bio-Tech an intercompany loan in the amount of $50,949.

VI. DIRECTORS AND OFFICERS INSURANCE POLICIES

159. D9 Parent carries an insurance policy for its directors and officers with CannGen Insurance Canada (the "**D&O Policy**"), with a $2,500,000 limit of liability, with a policy period from May 20, 2024 to May 20, 2025. Attached as **Exhibit "47"** is a copy of the D&O Policy.

160. Notwithstanding the existence of the D&O Policy, the Applicants' ordinary course operations may give rise to potential officer or director liability. As set out in further detail below, to address legitimate concerns expressed with respect to their potential exposure if they continue to act, the directors and officers have requested reasonable protection against personal liability that might arise in the post-filing period through the D&O Charge (as defined below).

VII. CHALLENGES FACED BY APPLICANTS PRIOR TO RESTRUCTURING

A. Overview of Challenges

161. The Applicants have continued to work toward becoming cash-flow positive while they operate in each of the various cannabis segments. However, the Applicants no longer have sufficient liquidity to sustain operations, fund Bio-Tech's cash intensive business operations at a loss, and service their debt obligations to their primary secured creditors, necessitating the commencement of these proceedings under the CCAA. Without having to service their debt obligations, the Applicants were approximately $4,000,000 cash flow positive from their collective operations in 2023.

162. Although the Applicants continue their ordinary business operations and are poised for future growth, a combination of internal and external factors have created severe short-term liquidity issues. The most significant challenges the Applicants have faced over the last several months have been due to the steep decline in demand for cannabis at the retail level and increased demands for payment from its secured lenders.

163. As part of management, I have overseen a number of other cost-saving measures including decreasing operating expenses by approximately $290,000 in the first quarter of 2024 due to amortization, reducing insurance costs and reducing personnel expenditures. This was part of Delta 9's larger cost-cutting measures implanted in January 2023, which included reducing Bio-Tech's production capacity at the Cultivation Facility by 40% and temporarily laying off 40 employees within Delta 9. These cost-cutting efforts achieved approximately $3,200,000 in cost savings since their implementation.

164. Over the last few years, investment in the cannabis industry has decreased. There has been a reduced appetite for equity investments or loans to cannabis companies generally, and this has made it difficult for both public and private cannabis companies to secure adequate capital to continue the required growth in their operations. The Applicants require an additional injection of cash in order to sustain operations during this liquidity crisis.

B. ATM Financing

165. On December 6, 2022, D9 Parent established an at-the-market equity program (the "**Prior ATM Program**") that allowed D9 Parent to issue up to $5,000,000 in Common Shares from the treasury to the public from time to time at D9 Parent's discretion.

166. Under the Prior ATM Program, from December 6, 2022 to October 9, 2023, D9 Parent issued 33,566,000 Common Shares for an average price of $0.06 for aggregate net proceeds of $1,936,183 after broker fees. These Common Shares were offered and sold through a broker by way of privately negotiated transactions with the consent of D9 Parent, as block transactions, by the broker on any other marketplace, and by any other method permitted by law that constituted an "at-the-market" distribution.

167. On October 12, 2023, D9 Parent established a new at-the-market equity program (the "**New ATM Program**") that allowed D9 Parent to issue up to $5,000,000 of Common Shares from the treasury to the public from time to time at D9 Parent's discretion.

168. Under the New ATM Program, for the year ending December 31, 2023, D9 Parent issued 8,600,000 Common Shares for an average price of $0.03 per Common Share for aggregate net proceeds of $258,782, after broker fees and other costs.

169. Also under the New ATM Program, for the three-month period ending March 31, 2024, D9 Parent issued 43,685,000 Common Shares for an average price of $0.02 per Common Share for aggregate net proceeds of $1,091,084, after broker fees.

170. Both the Prior ATM Program and New ATM Program were effective in raising capital, but the capital generated was ultimately insufficient to finance all of Delta 9's liquidity requirements. Since December 6, 2022, the share price of D9 Parent dropped from $0.06 per Common Share to $0.02 per Common Share, throwing into question whether Delta 9 will be able to access at-the-market equity going forward, and if so, for how much return.

171. D9 Parent ceased making offerings under the New ATM Program effective as of July 8, 2024.

C. SNDL Demands

172. The Applicants' general liquidity issues accelerated on May 21, 2024, when, among other things, the Applicants received the First SNDL Demand. These liquidity issues were further exacerbated when the Second SNDL Demand was issued by SNDL on July 10, 2024.

173. Pursuant to the SNDL Demands, SNDL alleged that D9 Parent, as borrower, committed several events of default, including certain waivers and the occurrence of a material adverse change in the financial condition of the Guarantors.

174. SNDL demanded payment within 22 business days of the date of each SNDL Demand. The First SNDL Demand expired on June 20, 2024 and the Second SNDL Demand expires on August 12, 2024. The Applicants are unable to pay the amount outstanding under the SNDL Demands.

175. SNDL proposed a form of forbearance agreement to D9 Parent that was ultimately rejected by Delta 9.

D. Eviction Action Against Distribution Facility

176. On June 17, 2024, 659 Canada filed a Notice of Application against Bio-Tech pursuant to *The Landlord and Tenant Act* (Manitoba), scheduling an application for June 21, 2024 to obtain a writ of possession in favour of 659 Canada respecting the Distribution Facility (the "**Eviction Action**"). Attached as **Exhibit "48"** is a copy of the Eviction Action.

177. The Eviction Action was adjourned from June 21, 2024 to June 28, 2024, and adjourned again into later in July 2024 for procedural reasons.

178. The Eviction Action was brought in the context of a dispute between 659 Canada and Bio-Tech, pursuant to which 659 Canada is attempting to enforce a purchase option against Bio-Tech, for which Bio-Tech lacks sufficient funding to exercise.

179. Bio-Tech requires a stay of proceedings to stabilize its tenancy position and stay the Eviction Action until it can be determined if those premises will be required going forward once a definitive plan has been finalized for the restructuring of the Applicants.

VIII. PRIOR RESTRUCTURING EFFORTS

180. Prior to making the decision to enter formal CCAA proceedings, Delta 9 has worked to increase profitability. While Delta 9's Cannabis Retail Stores continue to operate with positive cash flows, these margins are insufficient to service the ongoing debt obligations and the operational losses experienced at Bio-Tech.

181. Delta 9 has also taken steps to reduce its operating costs since January 2023, as detailed above, which resulted in a reduction of approximately $3,200,000 in operating costs.

182. Although D9 Parent is on pace to generate $3,000,000-$5,000,000 in subscription proceeds under the New ATM Program in 2024, this amount of equity financing is still insufficient to fund all obligations and is not a sustainable or reliable ongoing source of

funding. The New ATM Program has now been stopped by the D9 Parent so is not available to generate any additional subscription proceeds.

183. In addition, for the past four to six months, Delta 9's management team has been actively pursuing an informal strategic alternatives process (the "**SAP**"). This SAP resulted in Delta 9 informally engaging with many of the most significant cannabis companies operating within the industry who are known to be capable of financing such a transaction and investment, including, successfully running and growing Delta 9's retail business operations. Delta 9 entered into several non-disclosure agreements, had numerous discussions, meetings, tours of the facilities with some of these prospective counter-parties during the pendency of the SAP.

184. Throughout the SAP, Delta 9 engaged with a number of parties in order to find a solution to its liquidity and growth issues, further details of which are set out below.

185. In December 2023, Delta 9 engaged with Fika on a potential merger transaction that also contemplated a "spin out" of Bio-Tech. Fika's original offer came in the Spring of 2024 and has since been refined and renegotiated into the current offer advanced through these restructuring proceedings and as represented by the Restructuring Term Sheet.

A. SNDL

186. In and around the Spring of 2024, Delta 9 and Fika approached SNDL jointly to propose a potential partnership into Fika's acquisition of Delta 9's retail and logistics assets.

187. On May 15, 2024, SNDL sent Delta 9 an unsigned non-binding term sheet that contemplated SNDL providing certain cash and credit bid amounts to acquire all of Delta 9's retail operations on a free and clear basis.

188. Delta 9 ultimately rejected this proposal on the basis that it was exclusively negotiating with Fika under a non-binding Letter of Intent and SNDL's proposal failed to: (i) provide adequate value for Delta 9's stakeholders, (ii) address a number of issues such as requisite shareholder approval, (iii) provide any value for minority shareholder equity, and (iv) provide adequate shareholder loan considerations, among other things.

B. Summary of SAP

189. In addition to the more advanced negotiations set out above, for approximately the last 18 months, Delta 9 has also engaged with other significant retail and cannabis producing

entities on potential mergers, acquisitions or other strategic alternatives to maximize value for Delta 9's stakeholders.

190. The result of the SAP was that the most feasible proposal (that also generated the most value for all of the Applicants stakeholders) received for the restructuring and investment in Delta 9's business was received from Fika, the Plan Sponsor.

191. However, outside of generating the Restructuring Term Sheet, these efforts to source other opportunities were ultimately unsuccessful and were unable to produce any other viable proposal on the same level of value as the one contained in the Restructuring Term Sheet.

192. Obtaining relief under the CCAA now presents the best outcome for the Applicants' numerous stakeholders, as it provides Delta 9 the breathing room it requires from its creditors to implement its proposed restructuring that will benefit their stakeholders to the greatest extent possible in the circumstances.

IX. GOOD FAITH AND EXTENSIVE EFFORTS TO ENGAGE CFCU

193. On July 5, 2024, SNDL assumed the entirety of the CFCU Outstanding Indebtedness and obtained all of CFCU's right, title, interest and obligations pursuant to the CFCU Loan and CFCU Security.

194. Prior to July 5, 2024, Delta 9 and Fika were working diligently and in good faith to engage with CFCU to ensure CFCU supported the restructuring proposed herein.

195. Delta 9 and Fika first engaged with CFCU on April 25, 2024 in respect of a potential transaction. A mutual confidentiality agreement was signed among Delta 9, CFCU and Fika on April 30, 2024. After the confidentiality agreement was executed Fika began providing financial and other information regarding a potential transaction with Delta 9 to CFCU.

196. On June 5, 2024, Delta 9 and Fika first reached out to CFCU to advise of a potential transaction between Delta 9 and Fika effected through a CCAA process, which would see Fika acquiring all of the outstanding shares of Delta 9, Logistics, Store and Lifestyle.

197. In response, on June 13, 2024, CFCU wrote to Delta 9 and Fika requesting detailed transaction information, due diligence background information on Fika, a proposal for

addressing the Excise Tax Arrears, a non-binding plan sponsor term sheet, an interim financing term sheet and a valuation of Delta 9 and Fika's businesses on an individual or consolidated basis (the "**June 13 Due Diligence Request**"). Attached as **Exhibit "49"** is a copy of this June 13, 2024 correspondence from CFCU to Delta 9 and Fika.

198. On June 19, 2024, Mark Townsend (on behalf of Fika) responded to CFCU's June 13 Due Diligence Request with details of the status of pending documents and information of where all requested documents could be located in a shared data room and in a Transaction Overview presentation (the "**Transaction Overview**"). Mr. Townsend requested a meeting in one to two days to discuss the Transaction Overview further. The Transaction Overview contains commercially sensitive and confidential information of both Fika and Delta 9 and as a result is not attached.

199. On June 21, 2024, I sent a follow-up email to Kunle Popoola at CFCU to provide a copy of the Non-Binding Term Sheet between Delta 9 and Fika. Attached as **Exhibit "50"** is a copy of this June 21, 2024 email correspondence.

200. On June 22, 2024, I received an email from Mr. Popoola confirming his receipt of my June 21, 2024 correspondence and that the same had been provided to the Delta 9 account management team with CFCU. Attached as **Exhibit "51"** is a copy of this June 22, 2024 correspondence.

201. Following the correspondence from Mr. Popoola on June 22, 2024, Delta 9 and Fika did not receive any substantive updates from CFCU on its position on the proposed transaction between Delta 9 and Fika, notwithstanding numerous attempts from all parties, including the Proposed Monitor, to obtain an update on CFCU's position.

202. Due to the complete lack of response from CFCU, the Applicants were required to move the Initial Order Application date from July 12 to July 15 and the Comeback Application date from July 17 to July 24, while they waited for confirmation from CFCU that it would support the proposed plan.

203. It was not until 6:09 p.m. CT on Friday, July 5, 2024, that CFCU advised me that CFCU would be assigning all of the CFCU Outstanding Indebtedness to SNDL. On July 5, 2024, Gianfelice Calabrese sent me an email advising of the SNDL Assignment and enclosing a letter with further details of the same. Collectively attached as **Exhibit "52"** are copies of this July 5, 2024 email correspondence from Mr. Calabrese and the July 5, 2024 letter to Delta 9 with further details of the SNDL Assignment.

204. I was verbally advised by representatives of CFCU, including Jonathan Clement, Domenic Maucieri, and Gianfelice Calabrese, on more than one occasion that CFCU was not engaged in any ongoing discussions with SNDL regarding the assignment of Delta 9's debt. The correspondence on July 5, 2024 was the first anyone at Delta 9 or the Fika team learned of the SNDL Assignment.

205. As a result of the SNDL Assignment, Delta 9's efforts to engage with CFCU are now moot and Delta 9's cash position has deteriorated an additional month as a result of the delay associated with engaging with CFCU in good faith. The proposed CCAA restructuring plan has been revised to address the new secured creditor composition of Delta 9.

206. SNDL may immediately elect to take enforcement proceedings on the SNDL Outstanding Indebtedness at any time and there is no longer any standstill period that is preventing SNDL from taking such steps.

207. As evidenced by the Second SNDL Demand, the result of the SNDL Assignment creates significant risk to the proposed restructuring of Delta 9 and may impact recoveries of Delta 9's other stakeholders. SNDL is also not just a secured creditor of Delta 9, but a prospective acquiror and competitor who has been (and to the best of Delta 9's knowledge) continues to be interested in acquiring the retail operations of Delta 9.

X. CCAA PROCEEDINGS AND RELIEF SOUGHT

A. Urgent Need for CCAA Relief and Eligibility

208. The Applicants urgently require a broad stay of proceedings to prevent enforcement action by its primary secured creditor, certain contractual counterparties and to provide the Applicants with breathing space while they implement the proposed restructuring, all while permitting their business to continue to operate as a going concern.

209. The Applicants are facing serious liquidity issues. Based on their current financial position, they are unable to service their ongoing debt obligations as they become due. Absent the proposed interim financing, the Applicants will not be able to operate in the ordinary course and meet their debt service burden going forward, to the detriment of their stakeholders. Delta 9 has become increasingly reliant on equity injections to even service debt obligations and Bio-Tech has never been able to generate enough cash-flow from operations to cover its expenses.

210. The Applicants, if relief is obtained under an Initial Order, expect to immediately determine where additional cost savings can be realized and rationalize their operations using the provisions of the CCAA to implement steps to realize a further reduction of expenses and greater efficiencies in the operations of the Applicants.

211. It would be detrimental to the Applicants' business if proceedings were commenced or continued or rights and remedies were exercised against the Applicants. Absent the stay of proceedings, the Applicants will not be able to continue to operate their businesses in the normal course and would be forced to initiate an abrupt, disorderly, and detrimental winddown of their operations in Bio-Tech which would have a significant negative and detrimental impact on the ability of the remaining Applicants to continue to function in the normal course due to the intertwined nature of the operations of the Applicants.

212. Absent a restructuring process, the Applicants will not be able to generate the profit required to pay down their secured and unsecured obligations to get to a point of sustainable operations, let alone to generate sufficient capital to appropriately scale such operations up to the point of profitability.

213. The Applicants believe there is no reasonable expectation that their financial condition will improve without pursuing these restructuring proceedings.

214. The Applicants are therefore insolvent and require CCAA protection at this time.

215. The Applicants have thoroughly considered the circumstances and potential alternatives available, and with the assistance of their advisors, have determined that it is in the best interests of the Applicants and their stakeholders to file for protection under the CCAA at this time. With the benefit of protection under the CCAA, the Applicants will continue to operate their business and advance their restructuring efforts to maximize value for their stakeholders.

216. The Applicants have, on a consolidated basis, liabilities far in excess of $5,000,000.

B. Plan Sponsor and Plan of Arrangement

217. Prior to bringing this Application, the Applicants have attempted to engage in good faith with their senior secured lender, CFCU, and have worked diligently with the Plan Sponsor to prepare a plan or plans of arrangement that will maximize the value realized for all stakeholders of the Applicants.

218. The Applicants have been working with the Plan Sponsor for a substantial period of time leading up to the CCAA filing to develop a restructuring plan for Delta 9. The Restructuring Term Sheet sets out the key steps of the proposed restructuring plan for the Applicants in the context of these CCAA proceedings, as supported by the Plan Sponsor.

219. The proposed restructuring is detailed in the Restructuring Term Sheet. The following is a summary of the significant aspects of the Restructuring Term Sheet:

(a) Delta 9 is required to commence the CCAA proceedings in Alberta;

(b) Delta 9 has agreed to negotiate exclusively with the Plan Sponsor for a period of 93 days beginning on the effective date of the Restructuring Term Sheet;

(c) the Applicants will seek approval of an ARIO within 10 days of commencing the CCAA proceedings that provides for the approval of the Restructuring Term Sheet, the DIP Loan, the DIP Loan Charge, increase to the D&O Charge, the DIP Term Sheet, the KERP, the appointment of the CRO and payment of the second tranche of interim financing (each term as defined in the Restructuring Term Sheet);

(d) within 10 days of commencing the CCAA proceedings, the Applicants will seek Court approval of a 40-day SISP for the going concern operations of Bio-Tech concluding no later than 40 days from the date of the Initial Order Application;

(e) within 10 days of commencing the CCAA proceedings, the Applicants will seek Court-approval of a Claims Process that will be completed no later than 45 days following the date of the Initial Order Application;

(f) within 28 days of commencing the CCAA proceedings, the Applicants will seek approval of a Meeting Order that will require the creditors to vote on the proposed plan or plans within 75 days of the date of the Initial Order Application;

(g) the Plan Sponsor will provide interim financing to the Applicants up to the amount of $16,000,000, payable in two tranches:

(i) Tranche 1: up to $3,000,000 available on the issuance of the ARIO, to be advanced on a weekly basis in accordance with the Cash Flow Forecast; and

(ii) Tranche 2: up to $13,000,000 to repay any and all secured obligations owing to SNDL under the SNDL Convertible Debenture Agreement promptly following the issuance of the ARIO and confirmation by the Monitor of the actual amounts owed to SNDL under the terms of the SNDL Convertible Debenture Agreement;

(h) the remaining Estimated Outstanding Indebtedness owing to SNDL will be paid down from the proceeds realized from the SISP, with full payout of any of the remaining Estimated Outstanding Indebtedness to be completed by the Plan Sponsor upon plan implementation;

(i) the Plan Sponsor will fund any increase to the interim financing required to cover the costs of the within CCAA proceedings;

(j) the Plan Sponsor will fund the plan of arrangement, including any distribution to creditors of the Applicants with unsecured claims, provided that the minimum aggregate amount for all creditors holding unsecured claims against the Applicants shall be no less than $750,000;

(k) the Plan Sponsor shall issue voting common shares in the capital of Fika to the shareholders of D9 Parent, with an aggregate value of $2,000,000 on the terms set out in the Restructuring Term Sheet;

(l) the Plan Sponsor shall make available voting common shares in the capital of Fika to a class of unsecured creditors of Lifestyle and Store who elect to convert their unsecured debt into equity, with an aggregate value of $4,000,000 on the terms set out in the Restructuring Term Sheet;

(m) on implementation of the proposed plan of arrangement, D9 Parent would issue new common shares to the Plan Sponsor and cancel all issued and outstanding common shares of D9 Parent (the "**Acquisition Transaction**");

(n) the Plan Sponsor will support the Applicants request for this Court's approval of a Key Employee Retention Plan at the Comeback Application;

(o) the Applicants will seek this Court's approval of the appointment of Mark Townsend as the Chief Restructuring Officer to facilitate the restructuring at the Comeback Application;

(p) if the Plan Sponsor and the Applicants determine that effecting a successful plan of arrangement is not achievable, then at the Plan Sponsor's sole discretion, the Applicants will initiate a sales and investment solicitation process for the sale of Delta 9 and execute a stalking horse agreement with the Plan Sponsor, whereby the Plan Sponsor will act as a stalking horse purchaser and provide substantially similar consideration to the value to be provided under the Restructuring Term Sheet; and

(q) the Applicants will pay a break fee of $1,500,000 to the Plan Sponsor if the Court approves any plan of compromise, arrangement or other transaction that would preclude the Plan Sponsor from completing the Acquisition Transaction, or the Applicants otherwise enter into any agreement that would preclude the Acquisition Transaction.

C. Cash Management

220. The Applicants are seeking to continue to utilize their current Cash Management System as described herein.

D. Stay of Proceedings

221. Given the challenges faced by the Applicants described herein, the Applicants require the stability of a stay of proceedings under the CCAA to maintain the status quo, provide the Applicants the breathing space they require to address the issues described in this Affidavit and to develop a restructuring plan in consultation with their advisors and the Monitor.

222. The proposed Initial Order contemplates a Stay Period of 10 days, which I understand is the maximum that can be authorized by a court at an initial application under the CCAA.

223. The Applicants are further seeking a direction that the stay of proceedings extend to my personal liability as a director in order to facilitate my continued participation in the restructuring process and in order to allow those obligations to be dealt with in the restructuring process prior to any steps being taken against me in my personal capacity.

E. Appointment of A&M as Monitor

224. The Applicants seek the appointment of A&M as Monitor of the Applicants in these CCAA proceedings. A&M has reviewed, and assisted in the preparation of, the Cash Flow

Forecast and has provided guidance and assistance on the commencement of these CCAA proceedings.

225. A&M has developed critical knowledge about the Applicants, their business operations, financial challenges, strategic initiatives and restructuring efforts to date.

226. The Applicants believe that A&M has the necessary expertise and experience with the Applicants to successfully coordinate a restructuring plan, implement the SISP and guide the Applicants towards a more sustainable, restructured future.

227. A&M has consented to act as the Monitor, subject to Court approval. Attached as **Exhibit "53"** hereto is an executed copy of A&M's consent to act as Monitor.

F. Cash Flow Forecast

228. As set out in the consolidated Cash Flow Forecast appended to the Pre-Filing Report of the Proposed Monitor, the Applicants' principal use of cash during these proceedings will consist of paying the operating costs associated with the ongoing operation of the Business, including, among others, expenses related to employee compensation, trade payments, payments to critical suppliers and landlords, general administration expenses and other ordinary course of business obligations. In addition to these expenditures, the Applicants will also pay the administrative expenses incurred both before and after the commencement of these CCAA Proceedings (should the Initial Order be granted).

G. Payments During the Proceedings

229. The Applicants are seeking authorization pursuant to the proposed Initial Order to pay all reasonable expenses incurred by the Applicants in carrying on its business in the ordinary course after the date of the Initial Order, and, with the approval of the Monitor, to pay certain expenses, whether incurred prior to, on or after the date of the Initial Order, in respect of:

(a) outstanding and future wages, salaries, compensation, employee benefits, vacation pay and expenses (including, without limitation, payroll and benefits processing and servicing expenses) payable on or after the date of the Initial Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any consultants, agents, experts, accountants, counsel and financial advisors and such other persons retained or employed by the Applicants, at their standard rates and charges, incurred both before and after the commencement of the proceedings; and

(c) all invoices issued by suppliers essential to the Business.

230. The Applicants require the commitment and support of their key employees during the CCAA process and after it emerges from the CCAA process. The Applicants further require the continued supply of goods and services from key vendors, essential trade suppliers, and service providers during the CCAA proceedings.

231. This relief is necessary to maintain ordinary course operations, particularly given the highly regulated nature of the Applicants' business. The Applicants' ability to operate their business in the normal course is dependant on their ability to obtain an uninterrupted supply of certain goods and services.

232. Because all of the Cannabis Retail Stores operate out of leased premises, it is also critical that the Applicants are able to continue making their monthly lease payments during the CCAA proceedings.

233. The ability for the Applicants to make the foregoing payments is necessary to maintain stability for the continued operation of the Applicants' business during the CCAA proceedings and to allow the Applicants to advance their restructuring efforts for the benefit of all of their stakeholders.

H. Authorization to Incur no Further Costs in Connection with Security Filings

234. The Applicants seek authorization to dispense with certain securities filing requirements. In particular, the Applicants seek authorization for D9 Parent to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "**Securities Filings**") that may be required by any federal, provincial, or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including without limitation, the *Securities Act* (British Columbia) and comparable statutes enacted by other provinces of Canada, and the rules, regulations and policies of the Toronto Stock Exchange.

235. In my view, incurring the time and costs associated with preparing the Securities Filings will detract from the Applicants' limited resources. It is expected that the Applicants will continue as a private company following completion of a the steps set out in the Restructuring Term Sheet, if approved by this Honourable Court and the creditors voting to approve any plan of arrangement that is proposed. Further, there is no prejudice to stakeholders given that detailed financial information and other information regarding the Applicants will continue to be made publicly available through the materials filed in these CCAA proceedings and as may be required under the CCAA.

I. Administration Charge

236. The Applicants seek a first-ranking charge over the Applicants' Property (as defined in the Initial Order) in favour of the Monitor, counsel to the Monitor, and counsel to the Applicants, (the "**Professionals Group**"), to secure payment of their professional fees and disbursements, whether incurred before or after the date of the Initial Order.

237. The proposed Administration Charge being sought is for a maximum amount of $350,000.00 and is meant to secure the Professionals Group's fees through to the Comeback Application.

238. It is contemplated that the Professionals Group will have extensive involvement during the CCAA proceedings; the Applicants require the Professionals Group's knowledge, expertise and continued participation to complete a successful restructuring. The Professionals Group have contributed and will continue to contribute to the Applicants' restructuring efforts, and will ensure that there is no unnecessary duplication of roles among them.

239. In preparation of the Interim Cash Flow Forecast, the Applicants, in consultation with the proposed Monitor, considered the professional fees forecasted to be incurred on a weekly basis during the cash flow period. Until the Comeback Application, it is forecasted that the Applicants will incur significant professional fees in connection with the CCAA proceedings, such as preparing for the Comeback Application, communicating with employees and stakeholders following the initial filing and if granted, the issuance of the requested Initial Order in these proceedings, and complying with statutory notices, mailings and communications.

240. I believe the quantum of the Administration Charge sought is reasonably necessary at this time to secure the professional fees and the services of the Professionals Group for the period through to the Comeback Application.

J. Directors and Officers' Charge

241. To ensure the ongoing stability of the Applicants during this CCAA proceeding they require the continued participation of their officers and directors. The officers and directors have skills, knowledge and expertise, as well as established relationships with various stakeholders that will contribute to a successful path forward. As a result, the Applicants will be seeking approval of a D&O Charge in the amount of $300,000.

242. The Applicants' directors are the beneficiaries of an insurance policy which I understand provides them with coverage for certain claims and liabilities that may arise against them. However the policy contains exclusions and exceptions to such coverage as provided. The Applicants' ordinary course operations give rise to potential director or officer liabilities, including payroll and sales tax remittances. To address legitimate concerns with respect to their potential exposure, the directors and officers have requested reasonable protection against personal liability that might arise against them during the post-filing period.

K. Relief in Respect of the Excise Licence

243. The Applicants require a direction from the Court maintaining the *status quo* with respect to the LP Licences. While there is no immediate concern that the Health Canada Licence will expire or be terminated during the Stay Period, the Excise Licence is scheduled to expire on July 16, 2024 unless Bio-Tech is able to strictly comply with the payment plan in place.

244. The terms of the LP Licences must continue through the duration of the Stay Period. If the Excise Licence is allowed to expire, or is cancelled or revoked before its expiry, Bio-Tech would not be able to continue cultivating and processing cannabis products to continue to supply such products to Logistics for delivery through its supply chain.

L. Comeback Application

245. If the Initial Order is granted, then the Applicants are seeking a direction from the Court that the Applicants may proceed with the Comeback Application on July 24, 2024, where

the Applicants will seek this Court's approval of the ARIO, an Order approving the SISP, a Claims Process Order, and a Sealing Order.

246. Pursuant to the ARIO, the Applicants will be seeking, among other things, approval of the following: an extension of the Stay of Proceedings; an increase to the Administration Charge up to $750,000; an increase to the D&O Charge to $900,000; an interim financing agreement and a charge in favour of the Plan Sponsor up to $16,000,000; a Key Employee Retention Plan and charge up to $655,000; and the appointment of Mark Townsend as the Chief Restructuring Officer ("**CRO**").

247. The proposed CRO, Mark Townsend, is the Managing Partner at Broderick Capital Corp. and has over fourteen years of experience in investment banking, private equity, capital markets, corporate development and strategy. He has been directly involved in over $2,000,000,000 of M&A and financing transactions and has experience working with both public and private companies in Canada and the US across a wide variety of industries. He has been engaged with the Applicants since January, 2024 and has completed significant review of the Applicants' financial performance and valuation of the business.

248. The proposed CRO has substantial experience in the cannabis industry, having evaluated over eight retail cannabis acquisition opportunities in the past year. He has worked extensively with the Applicants in the time leading up to this application including assisting in the preparation of key financial analysis and the cash flow forecast.

249. The Applicants are seeking to keep the CCAA process as cost-effective as possible given the cash constraints they are currently facing.

250. If the Initial Order is granted, the Applicants will provide notice to all of their creditors of the proceedings, including the next significant steps that the Applicants will be taking in the CCAA proceedings.

XI. FORM OF ORDER AND CONCLUSION ON INITIAL ORDER

251. With the assistance of their legal and financial advisors, the Applicants have determined that the proposed CCAA proceedings represent the best available strategy to maximize value for the Applicants' stakeholders in the circumstances.

XII. CONCLUSION

252. I swear this Affidavit in support of an Application for an Initial Order, and if the Initial Order is granted, the ARIO, under the CCAA and for no other or improper purpose.

SWORN BEFORE ME at Winnipeg, Manitoba,
This 12th day of July, 2024

Notary Public in and for the Province of Manitoba

JOHN ARBUTHNOT IV

BILL OF SALE

This bill of sale (this "**Bill of Sale**") is entered into on ____July 5_____, 2024 between **CONNECT FIRST AND SERVUS CREDIT UNION LTD.** (formerly Connect First Credit Union Ltd.) ("**Connect First**") and **SNDL INC.** ("**SNDL**").

WHEREAS, this Bill of Sale is made in connection with the purchase and sale of indebtedness agreement, dated on or about the date hereof, between Connect First and SNDL (the "**Purchase Agreement**");

AND WHEREAS, reference is made to the commitment letter, dated February 1, 2022, among Connect First, as lender, Delta 9 Cannabis Inc. (including its successors and assigns, the "**Borrower**"), as borrower, and Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Lifestyle**"), and Delta 9 Cannabis Store Inc. ("**Store**" and, collectively with Bio-Tech and Lifestyle, including each of their respective successors and assigns, the "**Guarantors**" and, together with the Borrower, the "**Obligors**"), as guarantors (as amended, amended and restated, renewed, extended, supplemented, replaced, or otherwise modified from time to time, the "**Commitment Letter**");

AND WHEREAS, under the Commitment Letter, the Obligors are, as of the date hereof, indebted, liable, or otherwise obligated to Connect First (the "**Debt**");

AND WHEREAS, the Debt is evidenced, guaranteed, and secured, as applicable, by the Commitment Letter and the other Loan Documents;

AND WHEREAS, SNDL is the subordinate lender to the Borrower and holds security over the Obligors subject to the Priority Agreement;

AND WHEREAS, Connect First has agreed to sell, and SNDL has agreed to purchase, the Purchased Indebtedness, including, without limitation, the Debt and the Loan Documents;

NOW, THEREFORE, for good and valuable consideration in the form and amount paid in accordance with Section 4 of the Purchase Agreement, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. Capitalized terms used and not otherwise defined in this Bill of Sale have the meanings given to them in the Purchase Agreement.

2. Effective on the date hereof and in accordance with the Purchase Agreement:

    a. Connect First irrevocably sells, assigns, transfers, and sets over unto SNDL, and SNDL irrevocably purchases from Connect First, the Purchased Indebtedness, including, without limitation, all of Connect First's right, title, and interest in and to the Debt and to the Loan Documents listed on Schedule "A" hereto, on a non-recourse and without liability basis to Connect First; and

    b. SNDL assumes, covenants, and agrees to be responsible for the payment and performance of all obligations of Connect First under the Purchased Indebtedness.

3. This Bill of Sale incorporates by reference all of the terms of the Purchase Agreement as if each term was fully set forth herein. In the event of conflict

between the terms of the Purchase Agreement and the terms of this Bill of Sale, the terms of the Purchase Agreement govern and control.

4. This Bill of Sale and any amendments, waivers, consents, notice, or other forms of communication may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute one and the same agreement. A handwritten or electronically signed counterpart of this Bill of Sale delivered by email ("PDF" or "tif" format) or other electronic or digital transmission (including by transmission over an electronic signature platform acceptable to the parties, such as DocuSign or the equivalent thereof) is deemed to have the same legal effect as delivery of a manually executed original counterpart of this Bill of Sale.

[*Signature page follows.*]

IN WITNESS WHEREOF, the parties have duly executed and delivered this Bill of Sale as of the date first written above.

CONNECT FIRST AND SERVUS CREDIT UNION LTD.

By Ryan Andries

Name: Ryan Andries

Title: VP Corporate & Commercial Banking

By: Dominic Maucieri

Name: Dominic Maucieri

Title: AVP Commercial Markets

SNDL INC.

By_____

Name:

Title:

IN WITNESS WHEREOF, the parties have duly executed and delivered this Bill of Sale as of the date first written above.

CONNECT FIRST AND SERVUS CREDIT UNION LTD.

By_____

Name:

Title:

SNDL INC.

By Signed by: Zachary George 820ED00DEC594A0...

Name: Zachary George

Title: Chief Executive Officer

SCHEDULE A
LOAN DOCUMENTS

1. Commitment Letter
2. Loan Agreement in the amount of $23,000,000, dated March 11, 2022, granted by the Borrower in favour of Connect First
3. Loan Agreement in the amount of $5,000,000, dated March 11, 2022, granted by the Borrower in favour of Connect First
4. Overdraft Protection Agreement in the amount of $4,000,000, dated March 11, 2022, granted by the Borrower in favour of Connect First
5. Unlimited Guarantee and Postponement of Claim, dated March 11, 2022, granted by Bio-Tech in favour of Connect First
6. Unlimited Guarantee and Postponement of Claim, dated March 11, 2022, granted by Lifestyle in favour of Connect First
7. Unlimited Guarantee and Postponement of Claim, dated March 11, 2022, granted by Store in favour of Connect First
8. General Security Agreement, dated March 11, 2022, granted by the Borrower in favour of Connect First
9. General Security Agreement, dated March 11, 2022, granted by Bio-Tech in favour of Connect First
10. General Security Agreement, dated March 11, 2022, granted by Lifestyle in favour of Connect First
11. General Security Agreement, dated March 11, 2022, granted by Store in favour of Connect First
12. First Charge Demand Collateral Mortgage of a freehold interest over the property known municipally as 760 Pandora Ave, Winnipeg, MB ("**760 Pandora**"), dated March 11, 2022, granted by Bio-Tech in favour of Connect First
13. First Assignment of Rents and Leases over property owned and registered in the name of Bio-Tech, dated March 11, 2022, granted by Bio-Tech in favour of Connect First
14. First Charge Demand Collateral Mortgage of a leasehold interest in a portion of the property known municipally as 770 Pandora Ave, Winnipeg, MB ("**770 Pandora**"), described as Building "C", dated March 14, 2022, granted by Bio-Tech in favour of Connect First
15. First Charge Demand Collateral Mortgage of a leasehold interest in a portion of the property known municipally as 770 Pandora, described as Building "D", dated March 14, 2022, granted by Bio-Tech in favour of Connect First
16. Environmental Indemnity Agreement, dated March 11, 2022, granted by the Obligors in favour of Connect First
17. Assignment and Postponement of shareholders' loans/affiliation company loans/debentures, dated March 11, 2022, granted by Lifestyle in favour of Connect First
18. Instruments, documents, and agreements evidencing and/or creating Connect First's interests in the Obligors' policies of insurance
19. Title insurance policies of Connect First with respect to the Lands

20. Officer’s certificates in connection with the Loan Documents executed by the Obligors

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Canada
Tel: 604-643-7100
Fax: 604-643-7900

mccarthy tetrault

Angelica Kovac
Direct Line: 604-643-5889
Email: akovac@mccarthy.ca

Assistant: Junko Breen
Direct Line: 604-643-7114
Email: jbreen@mccarthy.ca

July 10, 2024

Via Registered Mail

Delta 9 Cannabis Inc.
2600 – 1066 West Hastings Street
Vancouver BC V6E 3X1

Delta 9 Cannabis Inc.
210 – 777 – 8th Avenue SW
Calgary AB T2P 3R5

Delta 9 Cannabis Inc.
800 – 885 West Georgia Street
Vancouver BC V6C 3H1

Delta 9 Cannabis Inc.
MLT Aikins LLP
30th Floor, 360 Main Street
Winnipeg MB R3C 4G1

Re: Secured Loan Facilities granted by SNDL Inc. (the "Lender"), as assignee of Connect First and Servus Credit Union Ltd. (formerly Connect First Credit Union Ltd.) ("Connect First"), to Delta 9 Cannabis Inc. (the "Borrower"), Delta 9 Bio-Tech Inc. ("Bio-Tech"), Delta 9 Lifestyle Cannabis Clinic Inc. ("Lifestyle"), and Delta 9 Cannabis Store Inc. ("Store", and collectively with Bio-Tech and Lifestyle, the "Guarantors" and, together with the Borrower, the "Obligors" and, each, an "Obligor")

Please be advised that we are counsel to the Lender.

As you are aware:

(a) the Obligors are indebted to the Lender pursuant to, *inter alia*, a Note Purchase Agreement, dated March 30, 2022, between the Borrower and the Lender and all related documents (collectively, the "**Note Purchase Agreement Documents**"), the Obligors are in default of their obligations thereunder, and the Lender has demanded that the Obligors immediately repay in full of all such indebtedness and issued all required statutory notices in respect of the enforcement of security granted in respect of same; and

(b) the Lender was the subordinate lender to Connect First, but, effective July 5, 2024, the Lender purchased all of Connect First's right, title, and interest in and to the Borrower Indebtedness (defined below) and the Commitment Letter Documents (defined below).

We write further to:

(a) the commitment letter, dated February 1, 2022, among the Lender, as lender, the Borrower, as borrower, and the Guarantors, as guarantors (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Commitment Letter**"), pursuant to which, *inter alia*, the Lender made available to the Borrower a commercial mortgage loan in the maximum principal amount of $23,000,000, a commercial mortgage loan in the maximum principal amount of $5,000,000, and an

authorized overdraft in the maximum principal amount of $4,000,000 (collectively, the "**Credit Facilities**");

(b) the unlimited guarantees and postponements of claim, each dated March 11, 2022, granted by each of the Guarantors, respectively, with respect to all indebtedness, liabilities, and other obligations of the Borrower (collectively, in each case, as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Guarantees**");

(c) the general security agreement, dated March 11, 2022, pursuant to which the Borrower granted a security interest in all of its present and after-acquired property (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Security Agreement**"); and

(d) any and all other guarantees, security documents, agreements, instruments, and documents entered into by any Obligor from time to time in connection with any of the Commitment Letter, the Guarantees, and/or the Security Agreement (collectively, in each case, as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Additional Documents**" and, collectively with the Commitment Letter, the "**Commitment Letter Documents**").

Please be advised that all capitalized terms used and not defined herein have the meanings ascribed thereto in the Commitment Letter and all references herein to "dollars" or "$" are to Canadian dollars.

As you are aware, and without limiting the demand nature of any of the Credit Facilities that are payable on demand, multiple defaults have occurred and are continuing under the Commitment Letter Documents (collectively, the "**Defaults**"). The Defaults include, without limitation:

1. the defaults more particularly described in the notice of breach of financial covenant, dated July 13, 2024, issued by Connect First to the Borrower, including the Borrower failing to maintain a Debt Service Coverage Ratio of at least 1.40:1 and Current Ratio of at least 1.25:1, in each case, in accordance with the Commitment Letter;

2. the defaults by the Obligors under the Note Purchase Agreement Documents and the acceleration by the Lender of all of the indebtedness, liabilities, and other obligations of the Obligors pursuant to the same; and

3. the occurrence of a material adverse change in the financial condition, operations, assets, business, properties, and prospects of the Obligors in light of the foregoing.

Pursuant to the Commitment Letter Documents, and on behalf of the Lender, we hereby demand immediate payment of all of the Borrower's indebtedness, liabilities, and other obligations under the Commitment Letter Documents, which, as at July 5, 2024, totals $27,868,283.94 (the "**Borrower Indebtedness**").

The Borrower Indebtedness is calculated as of July 5, 2024 and does not include any interest which may accrue after such date, legal fees and expenses, and/or any other costs or amounts recoverable pursuant to the Commitment Letter Documents (collectively, "**Additional Indebtedness**").

Payment of the Borrower Indebtedness, together with all Additional Indebtedness incurred to the date of payment (collectively, the "**Total Indebtedness**"), should be made by wire transfer, bank draft or certified cheque within 22 business days of the date of this letter, payable to:

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5
Attention: Sue Danielisz

Prior to making payment, please ensure you contact Ms. Danielisz at 604-643-5904 or sdanielisz@mccarthy.ca to confirm the Total Indebtedness on the date payment is to be made.

If payment of the Total Indebtedness is not made on or within 22 business days of this letter, the Lender will take such steps as it considers necessary to protect its rights and security, including, but not limited, to commencing action against the Obligors, without further notice to you.

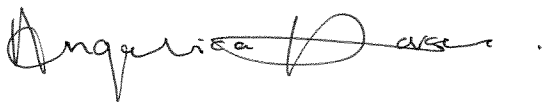
We hereby enclose a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended. To the extent that the *Farm Debt Mediation Act*, SC 1997, c. 21, as amended (the "**FDMA**"), also applies, we also enclose a Notice of Intent by Secured Creditor, in accordance with section 21 of the FDMA.

For the avoidance of doubt, the Lender expressly reserves all rights, powers, and privileges available to it under the Loan, the Commitment Letter Documents, applicable law, and otherwise, including, without limitation, the right to appoint an interim receiver over any of the Obligors, and/or their assets and undertaking, prior to the expiry of any applicable notice period.

Yours truly,

McCarthy Tétrault LLP

Per:



Angelica Kovac
Associate | Sociétaire

AK/jb
LW/kd

NOTICE OF INTENTION TO ENFORCE A SECURITY
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: Delta 9 Cannabis Inc.

TAKE NOTICE THAT:

1. SNDL Inc. intends to enforce its security on Delta 9 Cannabis Inc.'s property described below:

    a. all present and after-acquired personal property.

2. The security that is to be enforced is the following:

    a. general security agreement dated March 11, 2022 (the "**Security**").

3. The total amount of indebtedness secured by the Security as at July 5, 2024 is $27,868,283.94 plus interest, costs, and other amounts recoverable and continuing to accrue to the date of payment.

4. SNDL Inc. will not have the right to enforce the Security until after the expiry of the 10-day period after this notice is sent unless Delta 9 Cannabis Inc. consents to an earlier enforcement, by executing the consent and waiver attached hereto as **Schedule "A"** and providing a copy to the undersigned.

Dated at Vancouver, British Columbia, this 10 day of July, 2024.

SNDL Inc., by its solicitors,
McCarthy Tétrault LLP

Angelica Kovac

SCHEDULE "A"

CONSENT TO AN EARLIER ENFORCEMENT
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: SNDL Inc.

TAKE NOTICE THAT:

The undersigned hereby acknowledges receipt of a Notice of Intention to Enforce Security dated _____, 2024 pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) with respect to the assets of Delta 9 Cannabis Inc., waives its right to the 10-day notice period to redeem the collateral, and consents to the immediate enforcement of the security held by SNDL Inc.

DATED at _____, this _____ day of _____, 2024.

Delta 9 Cannabis Inc.

Per: _____
Signature

_____
Print Name

_____
Title

Agriculture and Agri-Food Canada / Agriculture et Agroalimentaire Canada
Farm Debt Mediation Service / Service de médiation en matière d'endettement agricole

PROTECTED B when completed

NOTICE OF INTENT BY SECURED CREDITOR

As required under Section 21 of the *Farm Debt Mediation Act*, you are hereby notified that it is the intent of:

Name of creditor
SNDL Inc.

To enforce a remedy against the property of; or commence a proceeding, action, execution or other proceeding, judicial or extra-judicial, for the recovery of a debt, the realization of the security or the taking of the property of:

Full name of farmer or business name
Delta 9 Cannabis Inc.

Farmer's address

Unit/Suite/Apt.	Street Number	Number Suffix	Street Name	Street Type
2600	1066		West Hastings	Street

Street direction	PO Box or Route Number	Municipality (City, Town, etc.)	Province	Postal code
		Vancouver	British Columbia	V6E 3X1

The security being (type(s) of security)	on (asset(s))
General Security Agreement dated March 11, 2022	All present and after-acquired personal property

Dated this 10th day of July, 2024 at Vancouver, British Columbia

McCarthy Tétrault LLP
Name of secured creditor or authorized representative (print)

Angelica Kovac
Signature of secured creditor or authorized representative

+1 604-643-5889
Creditor's phone number and ext.

akovac@mccarthy.ca
Email address of secured creditor or authorized representative

+1 604-643-7900
Creditor's fax number

You are hereby notified of your right to make application under Section 5 of the *Farm Debt Mediation Act* for a review of your financial affairs, mediation with your creditors, and to obtain a stay of proceedings against this action. Provided you are:

a) currently engaged in farming for commercial purposes; and

b) insolvent, meaning that you are:
- unable to meet your obligations as they generally become due; or
- have ceased paying your current obligations in the ordinary course of business as they generally become due; or
- the aggregate of your property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all your obligations, due and accruing due.

A secured creditor must wait 15 business days after this notice has been deemed served before beginning action to realize on their security. You may apply for mediation and a stay of proceedings at any time, before, during, or after the 15 business day period, by making an application to the Farm Debt Mediation Service.

The Farm Debt Mediation Service provides qualified farm financial counsellors to conduct a financial review and to prepare a recovery plan for your mediation meeting. Qualified mediators are provided to help you and your creditors reach a mutually satisfactory arrangement.
Application forms and more information about the service can be obtained from:

Farm Debt Mediation Service

https://agriculture.canada.ca/en/agricultural-programs-and-services/farm-debt-mediation-service

The information you provide on this document is collected by Agriculture and Agri-Food Canada under the authority of the *Farm Debt Mediation Act* for the purpose of facilitating financial arrangements between farmers and their creditors. Personal information will be protected under the provisions of the *Privacy Act* and will be stored in Personal Information Bank AAFC-PPU-227. Information may be accessible or protected as required under the provisions of the *Access to Information Act*.

A copy of this form must be sent to the FDMS Administrator

Canada
00070

Eastern Canada Office	Western Canada Office
Tel: 1-866-452-5556	Tel: 1-866-452-5556
Email: aafc.fdmseast-smmeaest.aac@agr.gc.ca	Email: aafc.fdmswest-smmeaouest.aac@agr.gc.ca
Fax: 1-506-452-4975	Fax: 1-306-780-7353

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Canada
Tel: 604-643-7100
Fax: 604-643-7900

mccarthy tetrault

Angelica Kovac
Direct Line: 604-643-5889
Email: akovac@mccarthy.ca

Assistant: Junko Breen
Direct Line: 604-643-7114
Email: jbreen@mccarthy.ca

July 10, 2024

Via Registered Mail

Delta 9 Bio-Tech Inc.
30th Floor, 360 Main Street
Winnipeg MB R3C 4G1

Delta 9 Bio-Tech Inc.
770 Pandora Avenue E
Winnipeg MB R2C 3N1

Delta 9 Bio-Tech Inc.
760 Pandora Avenue East
Winnipeg MB R2C 3N1

Delta 9 Bio-Tech Inc.
PO Box 68096 Osborne Village
Winnipeg, MB R3L 2V9

Re: Secured Loan Facilities granted by SNDL Inc. (the "Lender"), as assignee of Connect First and Servus Credit Union Ltd. (formerly Connect First Credit Union Ltd.) ("Connect First"), to Delta 9 Cannabis Inc. (the "Borrower"), Delta 9 Bio-Tech Inc. ("Bio-Tech"), Delta 9 Lifestyle Cannabis Clinic Inc. ("Lifestyle"), and Delta 9 Cannabis Store Inc. ("Store", and collectively with Bio-Tech and Lifestyle, the "Guarantors" and, together with the Borrower, the "Obligors" and, each, an "Obligor")

Please be advised that we are counsel to the Lender.

As you are aware:

(a) the Obligors are indebted to the Lender pursuant to, *inter alia*, a Note Purchase Agreement, dated March 30, 2022, between the Borrower and the Lender and all related documents (collectively, the "**Note Purchase Agreement Documents**"), the Obligors are in default of their obligations thereunder, and the Lender has demanded that the Obligors immediately repay in full of all such indebtedness and issued all required statutory notices in respect of the enforcement of security granted in respect of same; and

(b) the Lender was the subordinate lender to Connect First, but, effective July 5, 2024, the Lender purchased all of Connect First's right, title, and interest in and to the Borrower Indebtedness (defined below) and the Commitment Letter Documents (defined below)

We write further to:

(a) the commitment letter, dated February 1, 2022, among the Lender, as lender, the Borrower, as borrower, and the Guarantors, as guarantors (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Commitment Letter**"), pursuant to which, *inter alia*, the Lender made available to the Borrower a commercial mortgage loan in the maximum principal amount of $23,000,000, a commercial mortgage loan in the maximum principal amount of $5,000,000, and an authorized overdraft in the maximum principal amount of $4,000,000 (collectively, the "**Credit Facilities**");

(b) the unlimited guarantee and postponement of claim, dated March 11, 2022, granted by Bio-Tech, with respect to all indebtedness, liabilities, and other obligations of the Borrower (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Guarantee**");

(c) the general security agreement, dated March 11, 2022, pursuant to which Bio-Tech granted a security interest in all of its present and after-acquired property (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Security Agreement**");

(d) the mortgage, dated March 11, 2022 (the "**Mortgage**"), pursuant to which Bio-Tech granted the Lender a fixed and specific mortgage and charge over certain real property municipally known as 760 Pandora Avenue, Winnipeg, MB ("**760 Pandora**");

(e) the general assignment of rents and leases, dated March 11, 2022, granted by Bio-Tech in respect of 760 Pandora (the "**Assignment of Rents**");

(f) the mortgage of leasehold interest, dated March 14, 2022, granted by Bio-Tech with respect to the portion of the property municipally known as 770 Pandora Ave, Winnipeg, MB ("**770 Pandora**") described as Building "C" (the "**First Mortgage of Lease**");

(g) the mortgage of leasehold interest, dated March 14, 2022, granted by Bio-Tech with respect to the portion the property municipally known as 770 Pandora described as Building "D" (the "**Second Mortgage of Lease**" and, collectively with the Security Agreement, the Mortgage, the Assignment of Rents, and the First Mortgage of Lease, the "**Security Documents**"); and

(h) any and all other guarantees, security documents, agreements, instruments, and documents entered into by any Obligor from time to time in connection with any of the Commitment Letter, the Guarantee, and/or the Security Documents (collectively, in each case, as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Additional Documents**" and, collectively with the Commitment Letter, the "**Commitment Letter Documents**").

Please be advised that all capitalized terms used and not defined herein have the meanings ascribed thereto in the Commitment Letter and all references herein to "dollars" or "$" are to Canadian dollars.

As you are aware, and without limiting the demand nature of any of the Credit Facilities that are payable on demand, multiple defaults have occurred and are continuing under the Commitment Letter Documents (collectively, the "**Defaults**"). The Defaults include, without limitation:

1. the defaults more particularly described in the notice of breach of financial covenant, dated July 13, 2024, issued by Connect First to the Borrower, including the Borrower failing to maintain a Debt Service Coverage Ratio of at least 1.40:1 and Current Ratio of at least 1.25:1, in each case, in accordance with the Commitment Letter;

2. the defaults by the Obligors under the Note Purchase Agreement Documents and the acceleration by the Lender of all of the indebtedness, liabilities, and other obligations of the Obligors pursuant to the same; and

3. the occurrence of a material adverse change in the financial condition, operations, assets, business, properties, and prospects of the Obligors in light of the foregoing.

Accordingly, the Lender has demanded that the Borrower immediately repay of all of its indebtedness, liabilities, and other obligations under the Commitment Letter Documents, and we enclose a copy of the demand letter sent today to the Borrower in connection therewith (the "**Demand Letter**").

As you know, Bio-Tech guaranteed all of the indebtedness, liabilities, and other obligations of the Borrower pursuant to the Guarantee and granted the Security Documents as general and continuing collateral security for the payment and performance of all of its indebtedness, liabilities, and obligations. Accordingly, further to the Demand Letter, pursuant to the Commitment Letter Documents, and on behalf of the Lender, we hereby demand immediate payment of all of the Borrower's indebtedness, liabilities, and other obligations under the Commitment Letter Documents, which, as at July 5, 2024, total $27,868,283.94 (the "**Borrower Indebtedness**").

The Borrower Indebtedness is calculated as of July 5, 2024, and does not include any interest which may accrue after such date, legal fees and expenses, and/or any other costs or amounts recoverable pursuant to the Commitment Letter Documents (collectively, "**Additional Indebtedness**").

Payment of the Borrower Indebtedness, together with all Additional Indebtedness incurred to the date of payment (collectively, the "**Total Indebtedness**"), should be made by wire transfer, bank draft or certified cheque within 22 business days of the date of this letter, payable to:

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5
Attention: Sue Danielisz

Prior to making payment, please ensure you contact Ms. Danielisz at 604-643-5904 or sdanielisz@mccarthy.ca to confirm the Total Indebtedness on the date payment is to be made.

If payment of the Total Indebtedness is not made on or within 22 business days of this letter, the Lender will take such steps as it considers necessary to protect its rights and security, including, but not limited, to commencing action against the Obligors, without further notice to you.

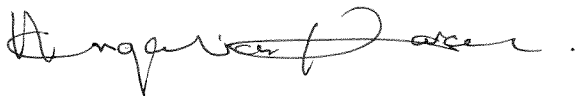
We hereby enclose a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended. To the extent that the *Farm Debt Mediation Act*, SC 1997, c. 21, as amended (the "**FDMA**"), also applies, we also enclose a Notice of Intent by Secured Creditor, in accordance with section 21 of the FDMA.

For the avoidance of doubt, the Lender expressly reserves all rights, powers, and privileges available to it under the Commitment Letter Documents, applicable law, and otherwise, including, without limitation, the right to appoint an interim receiver over any of the Obligors, and/or their assets and undertaking, prior to the expiry of any applicable notice period.

Yours truly,

McCarthy Tétrault LLP

Per:



Angelica Kovac
Associate | Sociétaire

AK/jb
Enclosures

NOTICE OF INTENTION TO ENFORCE A SECURITY
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: Delta 9 Bio-Tech Inc.

TAKE NOTICE THAT:

1. SNDL Inc. intends to enforce its security on Delta 9 Bio-Tech Inc.'s property described below:

    a. real property in the Province of Manitoba legally described as:

    (i) PARCELS A, B, C, D, E AND F PLAN 51110 WLTO EXC FIRSTLY: OUT OF SAID PARCELS A AND C ALL MINES AND MINERALS MINERAL OILS PETROLEUM GAS COAL GRAVEL AND VALUABLE STONE OF EVERY DESCRIPTION THAT MAY BE FOUND IN UPON OR UNDER SAID PARCELS A AND C TOGETHER WITH THE RIGHT TO ENTER AND REMOVE THE SAME SECONDLY: OUT OF SAID PARCELS B AND E, ALL MINES AND MINERALS AS RESERVED IN DEED 2374744 WLTO AND THIRDLY: OUT OF SAID PARCEL F, ALL MINES AND MINERALS AS SET FORTH IN TRANSFER 2374748 WLTO IN SW 1/4 3 AND SE 1/4 4-11-4 EPM AND IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS (the "**Mortgaged Property**");

    b. all leases in respect of the Mortgaged Property and all rents payable in respect of the Mortgaged Property;

    c. all present and after-acquired personal property which is, now or at any time hereafter, located at, related to, used in connection with, arises from the business or affairs carried on at, and/or generated in respect of the Mortgaged Property and the following properties, and all parts, accessories, attachments, equipment additions, accretions and accessions thereto and proceeds thereof:

    (i) PARCEL "G" PLAN 51110 WLTO EXC ALL MINES AND MINERALS AS SET FORTH IN TRANSFER 2374748 WLTO IN SW 1/4 3 AND SE 1/4 4-11-4 EPM AND IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS (the "**G Parcel**");

    (ii) PARCEL "J" PLAN 51110 WLTO EXC ALL MINES AND MINERALS MINERAL OILS PETROLEUM GAS COAL GRAVEL AND VALUABLE STONE WHICH MAY BE FOUND IN UPON OR UNDER THE SAID PARCEL TOGETHER WITH THE RIGHT TO ENTER AND REMOVE THE SAME IN SW 1/4 3 AND SE 1/4 4-11-4 EPM AND IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS (the "**J Parcel**");

    (iii) PARCEL "K" PLAN 51110 WLTO IN SW 1/4 3 AND SE 1/4 4-11-4 EPM AND IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS (the "**K Parcel**");

    (iv) PARCEL "L" PLAN 51110 WLTO EXC ALL MINES AND MINERALS MINERAL OILS PETROLEUM GAS COAL GRAVEL AND VALUABLE STONE OF EVERY DESCRIPTION THAT MAY BE FOUND IN UPON OR UNDER THE SAID PARCEL TOGETHER WITH THE RIGHT TO ENTER AND REMOVE THE

SAME IN SW 1/4 3 AND SE and 1/4 4-11 EPM AND IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS (the "**L Parcel**"); and

(v) PARCEL "H" PLAN 51110 WLTO EXC FIRSTLY: PLAN 65096 WLTO AND SECONDLY: ALL MINES AND MINERALS AS RESERVED IN TRANSFER 2374746 WLTO IN SW 1/4 3 AND SE 1/4 4-11-4 EPM AND IN GOVERNMENT ROAD ALLOWANCE (CLOSED) BETWEEN SAID SECTIONS (the "**H Parcel**" and collectively with, the G Parcel, the J Parcel, the K Parcel and the L Parcel, the "**Leased Properties**");

d. leasehold interest in the portion of the Leased Properties described as Building "C"; and

e. leasehold interest in the portion of the Leased Properties described as Building "D".

2. The security that is to be enforced is the following:

a. mortgage in respect of the Mortgaged Property dated March 11, 2022;

b. general assignment of leases and rents in respect of the Mortgaged Property, dated March 11, 2022;

c. mortgage of lease by way of sublease in a portion of the Leased Properties, described as Building "C", dated March 14, 2022;

d. mortgage of lease by way of sublease in a portion of the Leased Properties, described as Building "D", dated March 14, 2022; and

e. general security agreement, dated March 11, 2022

(collectively, the "**Security**").

3. The total amount of indebtedness secured by the Security as at July 5, 2024 is $27,868,283.94 plus interest, costs, and other amounts recoverable and continuing to accrue to the date of payment.

4. SNDL Inc. will not have the right to enforce the Security until after the expiry of the 10-day period after this notice is sent unless Delta 9 Bio-Tech Inc. consents to an earlier enforcement, by executing the consent and waiver attached hereto as **Schedule "A"** and providing a copy to the undersigned.

Dated at Vancouver, British Columbia, this 10th day of July, 2024.

SNDL Inc., by its solicitors, McCarthy Tétrault LLP

Angelica Kovac

SCHEDULE "A"

CONSENT TO AN EARLIER ENFORCEMENT
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: SNDL Inc.

TAKE NOTICE THAT:

The undersigned hereby acknowledges receipt of a Notice of Intention to Enforce Security dated _____, 2024 pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) with respect to the assets of Delta 9 Bio-Tech Inc., waives its right to the 10-day notice period to redeem the collateral, and consents to the immediate enforcement of the security held by SNDL Inc..

DATED at _____, this _____ day of _____, 2024.

Delta 9 Bio-Tech Inc.

Per: _____
Signature

_____
Print Name

_____
Title

Agriculture and Agri-Food Canada / Agriculture et Agroalimentaire Canada
Farm Debt Mediation Service / Service de médiation en matière d'endettement agricole

PROTECTED B when completed

NOTICE OF INTENT BY SECURED CREDITOR

As required under Section 21 of the *Farm Debt Mediation Act*, you are hereby notified that it is the intent of:

Name of creditor
SNDL Inc.

To enforce a remedy against the property of; or commence a proceeding, action, execution or other proceeding, judicial or extra-judicial, for the recovery of a debt, the realization of the security or the taking of the property of:

Full name of farmer or business name
Delta 9 Bio-Tech Inc.

Farmer's address

Unit/Suite/Apt.	Street Number	Number Suffix	Street Name	Street Type
30th Floor	360		Main	Street

Street direction	PO Box or Route Number	Municipality (City, Town, etc.)	Province	Postal code
		Winnipeg	Manitoba	R3C 4G1

The security being (type(s) of security)	on (asset(s))
See Schedule "A" attached.	See Schedule "A" attached.

Dated this 10 day of July, 2024 at Vancouver, British Columbia

McCarthy Tétrault LLP
Name of secured creditor or authorized representative (print)

Signature of secured creditor or authorized representative

+1 604-643-5889
Creditor's phone number and ext.

akovac@mccarthy.ca
Email address of secured creditor or authorized representative

+1 604-643-7900
Creditor's fax number

You are hereby notified of your right to make application under Section 5 of the *Farm Debt Mediation Act* for a review of your financial affairs, mediation with your creditors, and to obtain a stay of proceedings against this action. Provided you are:

a) currently engaged in farming for commercial purposes; and

b) insolvent, meaning that you are:
- unable to meet your obligations as they generally become due; or
- have ceased paying your current obligations in the ordinary course of business as they generally become due; or
- the aggregate of your property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all your obligations, due and accruing due.

A secured creditor must wait 15 business days after this notice has been deemed served before beginning action to realize on their security. You may apply for mediation and a stay of proceedings at any time, before, during, or after the 15 business day period, by making an application to the Farm Debt Mediation Service.

The Farm Debt Mediation Service provides qualified farm financial counsellors to conduct a financial review and to prepare a recovery plan for your mediation meeting. Qualified mediators are provided to help you and your creditors reach a mutually satisfactory arrangement.
Application forms and more information about the service can be obtained from:

Farm Debt Mediation Service

https://agriculture.canada.ca/en/agricultural-programs-and-services/farm-debt-mediation-service

The information you provide on this document is collected by Agriculture and Agri-Food Canada under the authority of the *Farm Debt Mediation Act* for the purpose of facilitating financial arrangements between farmers and their creditors. Personal information will be protected under the provisions of the *Privacy Act* and will be stored in Personal Information Bank AAFC-PPU-227. Information may be accessible or protected as required under the provisions of the *Access to Information Act.*

A copy of this form must be sent to the FDMS Administrator

Canada
00079

Eastern Canada Office	Western Canada Office
Tel: 1-866-452-5556	Tel: 1-866-452-5556
Email: aafc.fdmseast-smmeaest.aac@agr.gc.ca	Email: aafc.fdmswest-smmeaouest.aac@agr.gc.ca
Fax: 1-506-452-4975	Fax: 1-306-780-7353

Notice of Intent by Secured Creditor

Schedule "A"

The security being (type(s) of security)	On (asset(s))
Mortgage dated March 11, 2022	Real property described therein (the "Mortgaged Property")
General Assignment of Leases and Rents dated March 11, 2022	All leases in respect of the Mortgaged Property and all rents payable in respect of the Mortgaged Property
Mortgage of Leasehold Interest, dated March 14, 2022	Leasehold interest in the portion of the property municipally known as 770 Pandora Ave, Winnipeg, MB ("**770 Pandora**") described as Building "C"
Mortgage of Leasehold Interest, dated March 14, 2022	Leasehold interest in the portion of 770 Pandora described as Building "D"
General Security Agreement dated March 11, 2022	All present and after-acquired personal property

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Canada
Tel: 604-643-7100
Fax: 604-643-7900

mccarthy tétrault

Angelica Kovac
Direct Line: 604-643-5889
Email: akovac@mccarthy.ca

Assistant: Junko Breen
Direct Line: 604-643-7114
Email: jbreen@mccarthy.ca

July 10, 2024

Via Registered Mail

Delta 9 Lifestyle Cannabis Clinic Inc.
30th Floor, 360 Main Street
Winnipeg MB R3C 4G1

Re: Secured Loan Facilities granted by SNDL Inc. (the "Lender"), as assignee of Connect First and Servus Credit Union Ltd. (formerly Connect First Credit Union Ltd.) ("Connect First"), to Delta 9 Cannabis Inc. (the "Borrower"), Delta 9 Bio-Tech Inc. ("Bio-Tech"), Delta 9 Lifestyle Cannabis Clinic Inc. ("Lifestyle"), and Delta 9 Cannabis Store Inc. ("Store", and collectively with Bio-Tech and Lifestyle, the "Guarantors" and, together with the Borrower, the "Obligors" and, each, an "Obligor")

Please be advised that we are counsel to the Lender.

As you are aware:

(a) the Obligors are indebted to the Lender pursuant to, *inter alia*, a Note Purchase Agreement, dated March 30, 2022, between the Borrower and the Lender and all related documents (collectively, the "**Note Purchase Agreement Documents**"), the Obligors are in default of their obligations thereunder, and the Lender has demanded that the Obligors immediately repay in full of all such indebtedness and issued all required statutory notices in respect of the enforcement of security granted in respect of same; and

(b) the Lender was the subordinate lender to Connect First, but, effective July 5, 2024, the Lender purchased all of Connect First's right, title, and interest in and to the Borrower Indebtedness (defined below) and the Commitment Letter Documents (defined below)

We write further to:

(a) the commitment letter, dated February 1, 2022, among the Lender, as lender, the Borrower, as borrower, and the Guarantors, as guarantors (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Commitment Letter**"), pursuant to which, *inter alia*, the Lender made available to the Borrower a commercial mortgage loan in the maximum principal amount of $23,000,000, a commercial mortgage loan in the maximum principal amount of $5,000,000, and an authorized overdraft in the maximum principal amount of $4,000,000 (collectively, the "**Credit Facilities**");

(b) the unlimited guarantee and postponement of claim, dated March 11, 2022, granted by Lifestyle, with respect to all indebtedness, liabilities, and other obligations of the

Borrower (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Guarantee**");

(c) the general security agreement, dated March 11, 2022, pursuant to which Lifestyle granted a security interest in all of its present and after-acquired property (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Security Agreement**");

(d) the assignment and postponement agreement, dated March 11, 2022 (the "**Assignment and Postponement**" and, collectively with the Security Agreement, the "**Security Documents**"); and

(e) any and all other guarantees, security documents, agreements, instruments, and documents entered into by any Obligor from time to time in connection with any of the Commitment Letter, the Guarantee, and/or the Security Documents (collectively, in each case, as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Additional Documents**" and, collectively with the Commitment Letter, the "**Commitment Letter Documents**").

Please be advised that all capitalized terms used and not defined herein have the meanings ascribed thereto in the Commitment Letter and all references herein to "dollars" or "$" are to Canadian dollars.

As you are aware, and without limiting the demand nature of any of the Credit Facilities that are payable on demand, multiple defaults have occurred and are continuing under the Commitment Letter Documents (collectively, the "**Defaults**"). The Defaults include, without limitation:

1. the defaults more particularly described in the notice of breach of financial covenant, dated July 13, 2024, issued by Connect First to the Borrower, including the Borrower failing to maintain a Debt Service Coverage Ratio of at least 1.40:1 and Current Ratio of at least 1.25:1, in each case, in accordance with the Commitment Letter;

2. the defaults by the Obligors under the Note Purchase Agreement Documents and the acceleration by the Lender of all of the indebtedness, liabilities, and other obligations of the Obligors pursuant to the same; and

3. the occurrence of a material adverse change in the financial condition, operations, assets, business, properties, and prospects of the Obligors in light of the foregoing.

Accordingly, the Lender has demanded that the Borrower immediately repay of all of its indebtedness, liabilities, and other obligations under the Commitment Letter Documents, and we enclose a copy of the demand letter sent today to the Borrower in connection therewith (the "**Demand Letter**").

As you know, Lifestyle guaranteed all of the indebtedness, liabilities, and other obligations of the Borrower pursuant to the Guarantee and granted the Security Documents as general and continuing collateral security for the payment and performance of all of its indebtedness, liabilities, and obligations. Accordingly, further to the Demand Letter, pursuant to the Commitment Letter Documents, and on behalf of the Lender, we hereby demand immediate payment of all of the

Borrower's indebtedness, liabilities, and other obligations under the Commitment Letter Documents, which, as at July 5, 2024, total $27,868,283.94 (the "**Borrower Indebtedness**").

The Borrower Indebtedness is calculated as of July 5, 2024, and does not include any interest which may accrue after such date, legal fees and expenses, and/or any other costs or amounts recoverable pursuant to the Commitment Letter Documents (collectively, "**Additional Indebtedness**").

Payment of the Borrower Indebtedness, together with all Additional Indebtedness incurred to the date of payment (collectively, the "**Total Indebtedness**"), should be made by wire transfer, bank draft or certified cheque within 22 business days of the date of this letter, payable to:

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5
Attention: Sue Danielisz

Prior to making payment, please ensure you contact Ms. Danielisz at 604-643-5904 or sdanielisz@mccarthy.ca to confirm the Total Indebtedness on the date payment is to be made.

If payment of the Total Indebtedness is not made on or within 22 business days of this letter, the Lender will take such steps as it considers necessary to protect its rights and security, including, but not limited, to commencing action against the Obligors, without further notice to you.

We hereby enclose a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended. To the extent that the *Farm Debt Mediation Act*, SC 1997, c. 21, as amended (the "**FDMA**"), also applies, we also enclose a Notice of Intent by Secured Creditor, in accordance with section 21 of the FDMA.

For the avoidance of doubt, the Lender expressly reserves all rights, powers, and privileges available to it under the Commitment Letter Documents, applicable law, and otherwise, including, without limitation, the right to appoint an interim receiver over any of the Obligors, and/or their assets and undertaking, prior to the expiry of any applicable notice period.

Yours truly,

McCarthy Tétrault LLP

Per:

Angelica Kovac
Associate | Sociétaire

AK/jb
Enclosures

NOTICE OF INTENTION TO ENFORCE A SECURITY
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: Delta 9 Lifestyle Cannabis Clinic Inc.

TAKE NOTICE THAT:

1. SNDL Inc. intends to enforce its security on Delta 9 Lifestyle Cannabis Clinic Inc.'s property described below:

    a. all present and after-acquired personal property.

2. The security that is to be enforced is the following:

    a. general security agreement dated March 11, 2022; and

    b. assignment and postponement dated March 11, 2022 (the "**Security**").

3. The total amount of indebtedness secured by the Security as at July 5, 2024 is $27,868,283.94 plus interest, costs, and other amounts recoverable and continuing to accrue to the date of payment.

4. SNDL Inc. will not have the right to enforce the Security until after the expiry of the 10-day period after this notice is sent unless Delta 9 Lifestyle Cannabis Clinic Inc. consents to an earlier enforcement, by executing the consent and waiver attached hereto as **Schedule "A"** and providing a copy to the undersigned.

Dated at Vancouver, British Columbia, this 10th day of July, 2024.

SNDL Inc., by its solicitors,
McCarthy Tétrault LLP

Angelica Kovac

SCHEDULE "A"

CONSENT TO AN EARLIER ENFORCEMENT
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: SNDL Inc.

TAKE NOTICE THAT:

The undersigned hereby acknowledges receipt of a Notice of Intention to Enforce Security dated _____, 2024 pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) with respect to the assets of Delta 9 Lifestyle Cannabis Clinic Inc., waives its right to the 10-day notice period to redeem the collateral, and consents to the immediate enforcement of the security held by SNDL Inc.

DATED at _____, this _____ day of _____, 2024.

Delta 9 Lifestyle Cannabis Clinic Inc.

Per: _____
Signature

_____
Print Name

_____
Title

Agriculture and Agri-Food Canada | Agriculture et Agroalimentaire Canada
Farm Debt Mediation Service | Service de médiation en matière d'endettement agricole

PROTECTED B when completed

NOTICE OF INTENT BY SECURED CREDITOR

As required under Section 21 of the *Farm Debt Mediation Act*, you are hereby notified that it is the intent of:

Name of creditor
SNDL Inc.

To enforce a remedy against the property of; or commence a proceeding, action, execution or other proceeding, judicial or extra-judicial, for the recovery of a debt, the realization of the security or the taking of the property of:

Full name of farmer or business name
Delta 9 Lifestyle Cannabis Clinic Inc.

Farmer's address

Unit/Suite/Apt.	Street Number	Number Suffix	Street Name	Street Type
30th Floor	360		Main	Street

Street direction	PO Box or Route Number	Municipality (City, Town, etc.)	Province	Postal code
		Winnipeg	Manitoba	R3C 4G1

The security being (type(s) of security)	on (asset(s))
General Security Agreement dated March 11, 2022	All present and after-acquired personal property
Assignment and Postponement dated March 11, 2022	Debts and liabilities of Delta 9 Cannabis Inc.

Dated this 10th day of July, 2024 at Vancouver, British Columbia

McCarthy Tétrault LLP
Name of secured creditor or authorized representative (print)

Signature of secured creditor or authorized representative

+1 604-643-5889
Creditor's phone number and ext.

akovac@mccarthy.ca
Email address of secured creditor or authorized representative

+1 604-643-7900
Creditor's fax number

You are hereby notified of your right to make application under Section 5 of the *Farm Debt Mediation Act* for a review of your financial affairs, mediation with your creditors, and to obtain a stay of proceedings against this action. Provided you are:

a) currently engaged in farming for commercial purposes; and

b) insolvent, meaning that you are:
- unable to meet your obligations as they generally become due; or
- have ceased paying your current obligations in the ordinary course of business as they generally become due; or
- the aggregate of your property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all your obligations, due and accruing due.

A secured creditor must wait 15 business days after this notice has been deemed served before beginning action to realize on their security. You may apply for mediation and a stay of proceedings at any time, before, during, or after the 15 business day period, by making an application to the Farm Debt Mediation Service.

The Farm Debt Mediation Service provides qualified farm financial counsellors to conduct a financial review and to prepare a recovery plan for your mediation meeting. Qualified mediators are provided to help you and your creditors reach a mutually satisfactory arrangement.
Application forms and more information about the service can be obtained from:

Farm Debt Mediation Service

https://agriculture.canada.ca/en/agricultural-programs-and-services/farm-debt-mediation-service

The information you provide on this document is collected by Agriculture and Agri-Food Canada under the authority of the *Farm Debt Mediation Act* for the purpose of facilitating financial arrangements between farmers and their creditors. Personal information will be protected under the provisions of the *Privacy Act* and will be stored in Personal Information Bank AAFC-PPU-227. Information may be accessible or protected as required under the provisions of the *Access to Information Act*.

A copy of this form must be sent to the FDMS Administrator

Canada

00087

Eastern Canada Office	Western Canada Office
Tel: 1-866-452-5556	Tel: 1-866-452-5556
Email: aafc.fdmseast-smmeaest.aac@agr.gc.ca	Email: aafc.fdmswest-smmeaouest.aac@agr.gc.ca
Fax: 1-506-452-4975	Fax: 1-306-780-7353

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Canada
Tel: 604-643-7100
Fax: 604-643-7900

mccarthy tétrault

Angelica Kovac
Direct Line: 604-643-5889
Email: akovac@mccarthy.ca

Assistant: Junko Breen
Direct Line: 604-643-7114
Email: jbreen@mccarthy.ca

July 10, 2024

Via Registered Mail

Delta 9 Cannabis Store Inc.
30th Floor, 360 Main Street
Winnipeg MB R3C 4G1

Delta 9 Cannabis Store Inc.
1500 – 1874 Scarth Street
Regina SK S4P 4E9

Re: Secured Loan Facilities granted by SNDL Inc. (the "Lender"), as assignee of Connect First and Servus Credit Union Ltd. (formerly Connect First Credit Union Ltd.) ("Connect First"), to Delta 9 Cannabis Inc. (the "Borrower"), Delta 9 Bio-Tech Inc. ("Bio-Tech"), Delta 9 Lifestyle Cannabis Clinic Inc. ("Lifestyle"), and Delta 9 Cannabis Store Inc. ("Store", and collectively with Bio-Tech and Lifestyle, the "Guarantors" and, together with the Borrower, the "Obligors" and, each, an "Obligor")

Please be advised that we are counsel to the Lender.

As you are aware:

(a) the Obligors are indebted to the Lender pursuant to, *inter alia*, a Note Purchase Agreement, dated March 30, 2022, between the Borrower and the Lender and all related documents (collectively, the "**Note Purchase Agreement Documents**"), the Obligors are in default of their obligations thereunder, and the Lender has demanded that the Obligors immediately repay in full of all such indebtedness and issued all required statutory notices in respect of the enforcement of security granted in respect of same; and

(b) the Lender was the subordinate lender to Connect First, but, effective July 5, 2024, the Lender purchased all of Connect First's right, title, and interest in and to the Borrower Indebtedness (defined below) and the Commitment Letter Documents (defined below)

We write further to:

(a) the commitment letter, dated February 1, 2022, among the Lender, as lender, the Borrower, as borrower, and the Guarantors, as guarantors (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Commitment Letter**"), pursuant to which, *inter alia*, the Lender made available to the Borrower a commercial mortgage loan in the maximum principal amount of $23,000,000, a commercial mortgage loan in the maximum principal amount of $5,000,000, and an authorized overdraft in the maximum principal amount of $4,000,000 (collectively, the "**Credit Facilities**");

(b) the unlimited guarantee and postponement of claim, dated March 11, 2022, granted by Store with respect to all indebtedness, liabilities, and other obligations of the Borrower

(as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Guarantee**");

(c) the general security agreement, dated March 11, 2022, pursuant to which Store granted a security interest in all of its present and after-acquired property (as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Security Agreement**"); and

(d) any and all other guarantees, security documents, agreements, instruments, and documents entered into by any Obligor from time to time in connection with any of the Commitment Letter, the Guarantee, and/or the Security Agreement (collectively, in each case, as amended, supplemented, amended and restated, replaced, or otherwise modified from time to time, the "**Additional Documents**" and, collectively with the Commitment Letter, the "**Commitment Letter Documents**").

Please be advised that all capitalized terms used and not defined herein have the meanings ascribed thereto in the Commitment Letter and all references herein to "dollars" or "$" are to Canadian dollars.

As you are aware, and without limiting the demand nature of any of the Credit Facilities that are payable on demand, multiple defaults have occurred and are continuing under the Commitment Letter Documents (collectively, the "**Defaults**"). The Defaults include, without limitation:

1. the defaults more particularly described in the notice of breach of financial covenant, dated July 13, 2024, issued by Connect First to the Borrower, including the Borrower failing to maintain a Debt Service Coverage Ratio of at least 1.40:1 and Current Ratio of at least 1.25:1, in each case, in accordance with the Commitment Letter;

2. the defaults by the Obligors under the Note Purchase Agreement Documents and the acceleration by the Lender of all of the indebtedness, liabilities, and other obligations of the Obligors pursuant to the same; and

3. the occurrence of a material adverse change in the financial condition, operations, assets, business, properties, and prospects of the Obligors in light of the foregoing.

Accordingly, the Lender has demanded that the Borrower immediately repay of all of its indebtedness, liabilities, and other obligations under the Commitment Letter Documents, and we enclose a copy of the demand letter sent today to the Borrower in connection therewith (the "**Demand Letter**").

As you know, Store guaranteed all of the indebtedness, liabilities, and other obligations of the Borrower pursuant to the Guarantee and granted the Security Agreement as general and continuing collateral security for the payment and performance of all of its indebtedness, liabilities, and obligations. Accordingly, further to the Demand Letter, pursuant to the Commitment Letter Documents, and on behalf of the Lender, we hereby demand immediate payment of all of the Borrower's indebtedness, liabilities, and other obligations under the Commitment Letter Documents, which, as at July 5, 2024, total $27,868,283.94 (the "**Borrower Indebtedness**").

The Borrower Indebtedness is calculated as of July 5, 2024, and does not include any interest which may accrue after such date, legal fees and expenses, and/or any other costs or amounts

recoverable pursuant to the Commitment Letter Documents (collectively, "**Additional Indebtedness**").

Payment of the Borrower Indebtedness, together with all Additional Indebtedness incurred to the date of payment (collectively, the "**Total Indebtedness**"), should be made by wire transfer, bank draft or certified cheque within 22 business days of the date of this letter, payable to:

McCarthy Tétrault LLP
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5
Attention: Sue Danielisz

Prior to making payment, please ensure you contact Ms. Danielisz at 604-643-5904 or sdanielisz@mccarthy.ca to confirm the Total Indebtedness on the date payment is to be made.

If payment of the Total Indebtedness is not made on or within 22 business days of this letter, the Lender will take such steps as it considers necessary to protect its rights and security, including, but not limited, to commencing action against the Obligors, without further notice to you.

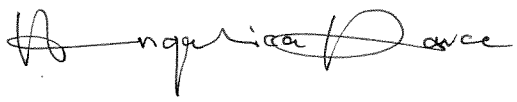
We hereby enclose a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended. To the extent that the *Farm Debt Mediation Act*, SC 1997, c. 21, as amended (the "**FDMA**"), also applies, we also enclose a Notice of Intent by Secured Creditor, in accordance with section 21 of the FDMA.

For the avoidance of doubt, the Lender expressly reserves all rights, powers, and privileges available to it under the Commitment Letter Documents, applicable law, and otherwise, including, without limitation, the right to appoint an interim receiver over any of the Obligors, and/or their assets and undertaking, prior to the expiry of any applicable notice period.

Yours truly,

McCarthy Tétrault LLP

Per:



Angelica Kovac
Associate | Sociétaire

AK/jb
Enclosures

NOTICE OF INTENTION TO ENFORCE A SECURITY
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: Delta 9 Cannabis Store Inc.

TAKE NOTICE THAT:

1. SNDL Inc. intends to enforce its security on Delta 9 Cannabis Store Inc.'s property described below:

    a. all present and after-acquired personal property.

2. The security that is to be enforced is the following:

    a. general security agreement dated March 11, 2022 (the "**Security**").

3. The total amount of indebtedness secured by the Security as at July 5, 2024 is $27,868,283.94 plus interest, costs, and other amounts recoverable and continuing to accrue to the date of payment.

4. SNDL Inc. will not have the right to enforce the Security until after the expiry of the 10-day period after this notice is sent unless Delta 9 Cannabis Store Inc. consents to an earlier enforcement, by executing the consent and waiver attached hereto as **Schedule "A"** and providing a copy to the undersigned.

Dated at Vancouver, British Columbia, this 10th day of July, 2024.

SNDL Inc., by its solicitors,
McCarthy Tétrault LLP

Angelica Kovac

SCHEDULE "A"

CONSENT TO AN EARLIER ENFORCEMENT
UNDER SECTION 244 OF THE *BANKRUPTCY AND INSOLVENCY ACT* (CANADA)

To: SNDL Inc.

TAKE NOTICE THAT:

The undersigned hereby acknowledges receipt of a Notice of Intention to Enforce Security dated _____, 2024 pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) with respect to the assets of Delta 9 Cannabis Store Inc., waives its right to the 10-day notice period to redeem the collateral, and consents to the immediate enforcement of the security held by SNDL Inc.

DATED at _____, this _____ day of _____, 2024.

Delta 9 Cannabis Store Inc.

Per: _____
Signature

_____
Print Name

_____
Title

Agriculture and Agri-Food Canada / Agriculture et Agroalimentaire Canada

Farm Debt Mediation Service / Service de médiation en matière d'endettement agricole

PROTECTED B when completed

NOTICE OF INTENT BY SECURED CREDITOR

As required under Section 21 of the *Farm Debt Mediation Act*, you are hereby notified that it is the intent of:

Name of creditor
SNDL Inc.

To enforce a remedy against the property of; or commence a proceeding, action, execution or other proceeding, judicial or extra-judicial, for the recovery of a debt, the realization of the security or the taking of the property of:

Full name of farmer or business name
Delta 9 Cannabis Store Inc.

Farmer's address

Unit/Suite/Apt.	Street Number	Number Suffix	Street Name	Street Type
30th Floor	360		Main	Street

Street direction	PO Box or Route Number	Municipality (City, Town, etc.)	Province	Postal code
		Winnipeg	Manitoba	R3C 4G1

The security being (type(s) of security)	on (asset(s))
General Security Agreement dated March 11, 2022	All present and after-acquired personal property

Dated this 10th day of July, 2024 at Vancouver, British Columbia

McCarthy Tétrault LLP
Name of secured creditor or authorized representative (print)

Signature of secured creditor or authorized representative

+1 604-643-5889
Creditor's phone number and ext.

akovac@mccarthy.ca
Email address of secured creditor or authorized representative

+1 604-643-7900
Creditor's fax number

You are hereby notified of your right to make application under Section 5 of the *Farm Debt Mediation Act* for a review of your financial affairs, mediation with your creditors, and to obtain a stay of proceedings against this action. Provided you are:

a) currently engaged in farming for commercial purposes; and

b) insolvent, meaning that you are:
- unable to meet your obligations as they generally become due; or
- have ceased paying your current obligations in the ordinary course of business as they generally become due; or
- the aggregate of your property is not, at fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process would not be sufficient, to enable payment of all your obligations, due and accruing due.

A secured creditor must wait 15 business days after this notice has been deemed served before beginning action to realize on their security. You may apply for mediation and a stay of proceedings at any time, before, during, or after the 15 business day period, by making an application to the Farm Debt Mediation Service.

The Farm Debt Mediation Service provides qualified farm financial counsellors to conduct a financial review and to prepare a recovery plan for your mediation meeting. Qualified mediators are provided to help you and your creditors reach a mutually satisfactory arrangement.
Application forms and more information about the service can be obtained from:

Farm Debt Mediation Service
https://agriculture.canada.ca/en/agricultural-programs-and-services/farm-debt-mediation-service

The information you provide on this document is collected by Agriculture and Agri-Food Canada under the authority of the *Farm Debt Mediation Act* for the purpose of facilitating financial arrangements between farmers and their creditors. Personal information will be protected under the provisions of the *Privacy Act* and will be stored in Personal Information Bank AAFC-PPU-227. Information may be accessible or protected as required under the provisions of the *Access to Information Act*.

A copy of this form must be sent to the FDMS Administrator

Canada

00094

Eastern Canada Office	Western Canada Office
Tel: 1-866-452-5556	Tel: 1-866-452-5556
Email: aafc.fdmseast-smmeaest.aac@agr.gc.ca	Email: aafc.fdmswest-smmeaouest.aac@agr.gc.ca
Fax: 1-506-452-4975	Fax: 1-306-780-7353

PLAN SPONSOR TERM SHEET

July 12, 2024

RECITALS:

A. Delta 9 Cannabis Inc. ("**Delta Parent**") is a publicly traded, vertically integrated cannabis company, operating as a licensed producer of cannabis (the "**Production Business**") through its wholly owned subsidiary, Delta 9 Bio-Tech Inc. ("**Delta LP**"), as a retail cannabis business (the "**Retail Business**") with shops throughout Manitoba, Saskatchewan and Alberta through its subsidiaries Delta 9 Cannabis Store Inc. ("**Delta Retail**"), and Delta 9 Lifestyle Cannabis Clinic Inc. ("**Delta Lifestyle**") and as a distributor through its subsidiary, Delta 9 Logistics Inc. ("**Delta Logistics**", and together with Delta Parent, Delta LP, Delta Retail and Delta Lifestyle, the "**Delta 9 Group**").

B. The Delta 9 Group is indebted to: (i) SNDL Inc. (f/k/a Sundial Growers Inc.) ("**SNDL**") pursuant to certain secured credit facilities made available to the Delta 9 Group (the "**SNDL Debt**"); and (ii) Delta LP is indebted to the Canada Revenue Agency ("**CRA**") for certain unpaid excise tax arrears (collectively, the "**Secured Debt**").

C. On May 21, 2024, SNDL issued a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act* (Canada) as a result of defaults under the applicable secured loan facilities made available to the Delta 9 Group by SNDL.

D. In addition to the Secured Debt, the Delta 9 Group is indebted to various unsecured creditors, including amounts owing under certain shareholder loans, CRA in respect of the unsecured potion of Delta LP's excise tax arrears, employee claims, and other unsecured claims (collectively, the "**Unsecured Claims**").

E. The Delta 9 Group has engaged in negotiations with 2759054 Ontario Inc. o/a Fika Herbal Goods ("**Fika**" or the "**Plan Sponsor**", and together with the Delta 9 Group, the "**Parties**") regarding a transaction whereby Fika would acquire the Retail Business and, potentially, the assets of the Production Business. As a result of the Delta 9 Group's desire to return value to shareholders, the Parties have agreed to an acquisition structure whereby Fika will acquire the Delta 9 Group and all of its assets in exchange for consideration that includes an equity swap and the assumption of certain debt, as further described herein (the "**Acquisition Transaction**").

F. In order to effect the Acquisition Transaction, the Delta 9 Group intends to make an application for an initial order (the "**Initial Order**"), among other things, commencing proceedings (the "**CCAA Proceedings**") under the *Companies Creditors' Arrangement Act* (the "**CCAA**"), and appointing Alvarez & Marsal Canada Inc. ("**A&M**") as monitor to supervise the affairs of the Delta 9 Group for the CCAA Proceedings (the "**Monitor**").

G. Fika intends to participate as Plan Sponsor in the CCAA Proceedings, and to present one or more plans of compromise or arrangement (collectively, the "**Plan**") to the Delta 9 Group's creditors to effect the Acquisition Transaction and acquire up to 100% of the Delta 9 Group, its assets and the proceeds from any divestiture completed through the CCAA Proceedings (the "**Restructuring**").

H. In addition to the consideration proposed to complete the Acquisition Transaction (as described herein), the Plan Sponsor has agreed to provide debtor in possession funding to the Delta 9 Group to fund the CCAA Proceedings, including the Restructuring and the implementation of the Plan, all subject to, and in accordance with, the terms and conditions set out in this binding plan sponsor term sheet (this "**Term Sheet**").

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties acknowledge and agree that the terms and conditions set out below are intended to form the basis of the Plan.

1. PLAN CONSIDERATION	The Plan Sponsor will contribute the following consideration to complete the Acquisition Transaction and fund the CCAA Proceedings: (a) Subject to (d) below, the Plan Sponsor shall establish a debtor-in-possession loan facility in favour of the Delta 9 Group in the maximum aggregate principal amount of $16,000,000 (the "**DIP Loan**") in accordance with the terms of a debtor-in-possession term sheet (the "**DIP Term Sheet**"), comprised of the following: (i) up to $3,000,000, available upon the issuance of the ARIO (as defined herein), to be advanced on a weekly basis in accordance with the Cash Flow Forecast (as defined herein) to fund the CCAA Proceedings ("**Tranche 1**"); and (ii) up to $13,000,000, to repay any and all secured obligations owing to SNDL under the Note Purchase Agreement dated March 30, 2022 and the Senior Secured Second-Lien Convertible Debenture dated March 30, 2022 (the "**SNDL Mezzanine Debt**") promptly following issuance of the ARIO, provided that the amount of such obligations shall be confirmed by the Monitor ("**Tranche 2**"). The DIP Loan shall bear interest at a rate equal to the Toronto Dominion Bank "prime rate" plus 3%. The DIP Loan shall be secured by a Court-ordered charge over all of the assets of the Delta 9 Group, to be granted in the ARIO (the "**DIP Loan Charge**"). The DIP Loan Charge shall be a priority charge subject only to: (i) a Court-ordered administration charge not to exceed $750,000; (ii) a Court-ordered Directors and Officers Charge not to exceed $900,000 (the "**D&O Charge**"); (iii) a Court-ordered KERP charge not to exceed $655,000; and (iv) secured obligations owing to SNDL. The Delta 9 Group shall use Tranche 1 to, among other things, pay all debt servicing payments that would otherwise be due and payable to SNDL but for these CCAA Proceedings. For greater certainty, the ARIO shall explicitly authorize the payment of such amounts. (b) The Plan Sponsor shall issue voting common shares in the capital of Fika to the shareholders of Delta Parent, with an aggregate value of $2,000,000 at a valuation agreed between the Parties. Such Fika shares shall be issued through a structure satisfactory to the Parties, acting reasonably, and shall be deposited in a voting trust, with a trustee agreed upon by the Delta 9 Group and the Plan Sponsor.

	(c) The Plan Sponsor shall make available voting common shares in the capital of Fika to the Equity Conversion Electing Creditors, defined below, with an aggregate value of $4,000,000 at a valuation agreed between the Parties (such Fika shares being the "**Fika Conversion Shares**"). The Fika Conversion Shares shall be issued through a structure satisfactory to the Parties, acting reasonably, and shall be deposited in a voting trust, with a trustee agreed upon by the Delta 9 Group and the Plan Sponsor. "**Equity Conversion Electing Creditors**" means the creditors of Delta Retail and Delta Lifestyle holding Unsecured Claims who elect, prior to the implementation of the Plan, to convert all of their Unsecured Claims in Delta Retail or Delta Lifestyle, as applicable, into Fika Conversion Shares, at a ratio of Unsecured Claims to Fika Conversion Shares to be determined by the Plan Sponsor, at its sole discretion. (d) The Plan Sponsor shall pay out the outstanding balance of the SNDL Debt on Plan implementation. (e) The Plan Sponsor will fund any increase to the DIP Loan, if necessary, to cover the costs of the CCAA Proceedings, including, but not limited to, reasonable professional fees, costs and expenses of the CRO (as defined herein), general working capital, and the KERP. For certainty, the cash position of the Delta 9 Group shall be the responsibility of the Plan Sponsor from and after the commencement of the CCAA Proceedings. (f) The Plan Sponsor shall fund the Plan, including any distributions to creditors of the Delta 9 Group holding Unsecured Claims which, for certainty, shall exceed the amount that such creditors would receive in a bankruptcy provided that, for certainty, the minimum aggregate amount for all creditors holding Unsecured Claims in respect of the Delta 9 Group shall be no less than $750,000. The consideration noted in this Section 1 is hereinafter referred to as the "**Plan Consideration**".
2. CONVENIENCE CLASS	Creditors, when voting on the Plan, may select the convenience option (each a "**Convenience Creditor**" and collectively, the "**Convenience Creditors**"). Any creditor with a claim that has a value of less than an amount to be determined by the Plan Sponsor, in its sole discretion (the "**Convenience Creditor Amount**") shall be deemed a Convenience Creditor. Convenience Creditors shall be deemed to vote in favour of the Plan. Convenience Creditors shall receive the lesser of the Convenience Creditor Amount or the quantum of their proven claim in full and final satisfaction of their claim. For greater certainty, there shall be a separate Convenience Creditor Amount for each of the Delta 9 Group entities, to be determined by the Plan Sponsor, in its sole discretion.

3. DELTA LP SISP	The Production Business and/or assets of Delta LP shall be monetized through a Court-approved sales process (the "**Delta LP SISP**"). The Parties shall make best efforts to seek the Court's approval of the Delta LP SISP concurrent with the issuance of the ARIO. The Delta LP SISP shall be designed and agreed upon by the Delta 9 Group, the Plan Sponsor, and the Monitor. The Delta 9 Group shall not accept any offer made within the Delta LP SISP unless the Plan Sponsor consents to accepting such offer. The Parties acknowledge and agree that the proceeds of sale resulting from the Delta LP SISP shall be distributed in accordance with the Plan and with the approval of creditors with an economic interest in the financial outcome.
4. PLAN SPONSOR COVENANTS	In addition to paying the Plan Consideration, the Plan Sponsor hereby covenants and agrees as follows: (a) The Plan Sponsor intends to offer continued employment to each of the Delta 9 Group's employees who are necessary to operate the Retail Business. (b) The Plan Sponsor shall support any request of the Delta 9 Group for the Court to approve third-party releases in favour of the board of directors and officers of the Delta 9 Group as part of any sanction order issued in connection with the Plan. (c) The Plan Sponsor shall support any request of the Delta 9 Group for the Court to approve third party releases in favour of the board of directors of Delta LP as part of any approval and reverse vesting order sought in the CCAA Proceedings. (d) The Plan Sponsor shall support the Delta 9 Group's request for the Court to approve a Key Employee Retention Plan (the "**KERP**"), in form and substance acceptable to the Plan Sponsor, acting reasonably, but with aggregate consideration of no less than $655,000.00, and it shall be a term of the KERP that the officers receive a release under any Plan or in any approval and reverse vesting transaction consummated for Delta LP. The Delta 9 Group shall provide the Plan Sponsor with a proposed draft of the KERP as soon as reasonably practicable following the execution of this Term Sheet.
5. DELTA 9 GROUP COVENANTS	The Delta 9 Group hereby covenants and agrees as follows: (a) The Delta 9 Group will make best efforts to effect the Acquisition Transaction in accordance with the terms of this Term Sheet and the Plan. (b) The Delta 9 Group shall consult with the Plan Sponsor regarding any and all material decisions affecting the Restructuring that diverge from the terms and conditions of this Term Sheet and, for certainty, such decisions shall require the prior approval of the Plan Sponsor, not to be unreasonably withheld, conditioned or delayed. For certainty, if the Plan Sponsor does not accept or

	reject (with reasons) any such approval request within 48 hours, it will be deemed to approve such course of action.
	(c) The Delta 9 Group shall engage Mark Townsend as Chief Restructuring Officer ("**CRO**") to facilitate the Restructuring. The CRO shall report to the CEO of Delta Parent and shall have no agency or ability to bind the Delta 9 Group without the express consent of the CEO or the board of directors of Delta Parent. The costs and expense of the CRO shall be funded by the DIP Loan. The CRO shall be given full access to all of the Delta 9 Group's books and records and facilities. The CRO shall have the right to attend at all meetings of the board of directors of any of the Delta 9 Group entities. The CRO shall be consulted prior to any Delta 9 Group entity making any material decision related to the Restructuring and the CRO shall have the authority to make decisions and bind the Plan Sponsor for the purposes of this Binding Term Sheet.
	(d) The Delta 9 Group shall, as soon as reasonably practicable following the execution of this Term Sheet, provide the Plan Sponsor with a 13-week cash flow forecast (the "**Cash Flow Forecast**"). The Plan Sponsor shall have the right to comment on the Cash Flow Forecast. The Delta 9 Group shall obtain the Plan Sponsor's approval of any Cash Flow Forecast prior to providing the same to the Court, provided such approval shall not be unreasonably withheld, conditioned or delayed.
	(e) The Delta 9 Group shall not file any documents with the Court unless the Plan Sponsor has approved the form and content of such documents, provided such approval shall not be unreasonably withheld, conditioned or delayed.
	(f) The Delta 9 Group shall oppose, and shall support Fika in opposing, any attempt by any person to seek the Court's approval of any order that is not consistent with or would lead to an outcome that is not consistent with the terms of this Term Sheet.
	(g) In the circumstance whereby the Parties determine that the effecting of a successful Plan isn't achievable, at the Plan Sponsor's sole discretion, the Delta 9 Group shall: (i) initiate a process for the sale of the Delta 9 Group; and (ii) execute a stalking horse purchase agreement whereby the Plan Sponsor will act as stalking horse purchaser, with consideration substantially similar to that provided for herein.
	(h) The Delta 9 Group shall obtain the Court's authorization to continue its existing cash management process in the ordinary course during the CCAA Proceedings.
	(i) The Delta 9 Group shall pay a break fee of $1,500,000 to the Plan Sponsor in the event that: (i) the Court approves any plan of compromise or arrangement or any other transaction that

	would have the effect of precluding the consummation of the Acquisition Transaction; or (ii) the Delta 9 Group otherwise enters into any agreement that would have the effect of precluding the consummation of the Acquisition Transaction. (j) The Delta 9 Group shall pay the Plan Sponsor a commitment fee of $50,000 upon the execution of this Term Sheet (the "**Commitment Fee**"). The Commitment Fee shall be fully earned and payable upon the execution of this Term Sheet. (k) Delta Parent shall, on the execution of this Term Sheet, assign, transfer, and convey $2,000,000 of debt owing by Delta Lifestyle to Delta Parent (the "**Intercompany Debt**") such that the Plan Sponsor shall become the owner of the Intercompany Debt and all legal rights thereto, including but not limited to the right to further assign the Intercompany Debt. (l) At any meeting of the creditors of the Delta 9 Group held pursuant to the Meeting Order for the purpose of voting on the Plan, the Delta 9 Group entities shall not cast any votes in respect of the Plan on the basis of any intercompany debt that, at the time of such meeting of creditors, is owing to any Delta 9 Group entity from any other Delta 9 Group entity.
6. CONDITIONS PRECEDENT	The Parties agree that the obligation of the Plan Sponsor to perform its obligations under this Term Sheet will be subject to the following conditions precedent (which, for certainty, shall be staggered to reflect the relative timing of each event)): (a) The respective boards of directors of each of the Parties shall approve and ratify the execution of this Term Sheet; (b) the Court shall issue the initial order (the "**Initial Order**") in the CCAA Proceedings, in substantially the form of the Alberta Template CCAA Initial Order, as may be amended by the Parties to reflect the terms and conditions set out herein, in form and substance satisfactory to the Plan Sponsor, acting reasonably; (c) the Court shall issue an amended and restated Initial Order ("**ARIO**"), in substantially the form of the Alberta Template CCAA Initial Order, as may be amended by the Parties to reflect the terms and conditions set out herein, in form and substance satisfactory to the Plan Sponsor, acting reasonably. For certainty, the ARIO will approve this Term Sheet, the DIP Loan, the DIP Loan Charge, the D&O Charge, the DIP Term Sheet, the KERP the appointment of the CRO and payment of Tranche 2 to SNDL promptly following the issuance of the ARIO in full satisfaction of the SNDL Mezzanine Debt; (d) the Court shall issue an order, in form and substance satisfactory to the Plan Sponsor, acting reasonably, approving the Delta LP SISP (the "**Delta LP SISP Order**");

	(e) the Court shall issue an order, in form and substance satisfactory to the Plan Sponsor, acting reasonably, approving a creditor meeting order (the "**Meeting Order**"); (f) the Court shall issue an order, in form and substance satisfactory to the Plan Sponsor, acting reasonably, approving a claims procedure (the "**Claims Process Order**"); (g) a majority in number representing two thirds in value of each class of creditors shall vote in favour of the Plan (provided that if the Plan is not approved, the offer of Fika contemplated herein will be deemed to convert to a stalking horse bid within a Court-supervised sale and investment solicitation process ("**SISP**"); and (h) if not converted to a SISP, the Court shall issue an order, in form and substance satisfactory to the Plan Sponsor, acting reasonably, approving the Plan (the "**Plan Approval Order**").
7. CREDITOR DISTRIBUTION	Creditors shall be paid in accordance with the Plan or in accordance with relative priorities from the outcome of the Delta LP SISP (subject to any other agreement amongst the creditors of Delta Parent), as follows: (a) The Convenience Creditors shall be paid their applicable Convenience Creditor Amount upon the implementation of the Plan. (b) The Equity Conversion Electing Creditors shall receive the Fika Conversion Shares upon the implementation of the Plan, in satisfaction of their Unsecured Claims. (c) All creditors of the Delta 9 Group who hold Unsecured Claims and are not Convenience Creditors or Equity Conversion Electing Creditors shall receive a payment, to be determined by the Plan Sponsor, in consultation with the Monitor, which shall exceed the amount that such creditors would receive in a bankruptcy, in satisfaction of their Unsecured Claims but in aggregate shall be equal to or exceed the amounts contemplated herein.
8. EQUITY	Upon implementation of the Plan: (a) Delta Parent shall issue new common shares to the Plan Sponsor (the "**New Shares**"), in a manner satisfactory to the Plan Sponsor and, following the cancellation described in Section 8(b), such New Shares shall represent 100% of the issued and outstanding equity of Delta Parent; (b) all issued and outstanding common shares of Delta Parent shall be cancelled, terminated and extinguished without compensation or consideration, save and except for the New Shares; and

	(c) any other equity interests of any nature or kind of Delta Parent, excluding the New Shares, shall be cancelled, terminated and extinguished without compensation or consideration.
9. CLAIMS PROCESS	The procedure for determining the validity of creditor's claims will be governed by the Claims Process Order. The Claims Process Order shall consider, among other things, the following: (a) classification of creditors; (b) claims bar date; and (c) review, assessment and determination of claims. The Claims Process Order shall be on usual and customary terms and shall be in form and substance acceptable to the Plan Sponsor acting reasonably.
10. MEETING ORDER	The procedure for conducting the creditors' meetings (the "**Creditors Meetings**") for each member of the Delta 9 Group filing a Plan shall be set out in the Meeting Order. The Meeting Order shall be in form and substance acceptable to the Plan Sponsor, acting reasonably. The Meeting Order shall consider, among other things, the following: (a) the date(s) that the Creditors' Meetings shall be held; (b) Plan voting procedures; (c) adjournment and postponement procedures; and (d) Plan related disclosure and associated timeline and schedule.
11. RESTRUCTURING STEPS	The Restructuring shall be completed in accordance with the steps set out below. The Parties agree that they shall make best efforts to complete each step within the timelines set out below, provided a failure to meet such deadlines despite acting in good faith shall not be a breach of this Term Sheet or a condition precedent: (a) the Delta 9 Group engages A&M as Monitor; (b) the Court approves the Initial Order on the "**Filing Date**"; (c) the Court approves the ARIO, the Delta LP SISP Order, and the Claims Process Order no more than 10 days after the Filing Date; (d) the Parties settle the terms of the Plan as soon as reasonably possible but no later than 21 days after the Filing Date; (e) the Court approves the Meeting Order no later than 28 days after the Filing Date; (f) the Delta LP SISP, including any auction held therewith, concludes no later than 40 days after the Filing Date;

	(g) the claims process is completed no later than 45 days after the Filing Date; (h) the creditors meet to vote on the Plan no later than 75 days after the Filing Date, subject to any adjournments as contemplated by the terms of the Meeting Order; (i) the Court approves the Plan no later than 90 days after the Filing Date; (j) the Plan is implemented, including but not limited to payment of creditors in accordance with the Plan by no later than 90 days after the Filing Date; (k) all payments to creditors are completed by the Monitor no later than 90 days after the Filing Date; and (l) Delta Parent issues new common shares to the Plan Sponsor in accordance with Section **Error! Reference source not found.** hereof, and completes all necessary amendments to Delta Parent's articles of incorporation, amalgamation or continuance, as applicable, no later than 120 days after the Filing Date.
12. JURISDICTION	The Parties agree to submit to the non-exclusive jurisdiction of the courts of the Province of Alberta and agree to be bound to any suit, action or proceeding commenced in such courts and by any order or judgment resulting from such suit, action or proceeding. For certainty, the Delta 9 Group shall use best efforts to have the CCAA Proceedings commenced in the courts in the Province of Alberta (the "**Court**").
13. TERMINATION	This Term Sheet and the obligations of the Parties contained herein shall automatically cease and terminate if the Restructuring is not implemented on or before October 14, 2024.
14. AMENDMENT	This Term Sheet may not be amended without the mutual agreement of the parties.
15. CURRENCY	All references to currency noted in this Term Sheet shall be a reference to Canadian dollars.
16. EXCLUSIVITY	Other than within the context of a SISP contemplated under this Term Sheet, the Delta 9 Group agrees to negotiate exclusively with the Plan Sponsor in respect of the Restructuring contemplated herein for a period beginning on the date of this Term Sheet and ending 93 days after the date hereof (the "**Exclusivity Period**") in an effort to negotiate and complete the Restructuring, the Delta 9 Group shall not, and shall not cause or permit any of its officers, directors, employees, representatives or agents to, directly or indirectly: (a) encourage, solicit, initiate or participate in any way in discussions or negotiations with; (b) provide any information to; or (c) enter into any agreement, arrangement or understanding with any person or group of persons, in each case concerning any transactions, whether by merger, business combination, sale of all or a material portion of the assets of the Delta 9 Group or the

	equity securities of the Delta 9 Group or any other disposition of Delta 9 Group that would be competitive with or have an adverse impact on the Restructuring or Acquisition Transaction (or would otherwise not be in the ordinary course for the Delta 9 Group).
17. ASSIGNMENT	Fika may assign its rights or obligations under this Term Sheet to any affiliate with prior written notice to the Delta 9 Group, but without prior written consent; provided that Fika shall remain primarily liable to the Delta 9 Group for the performance of all of its obligations contemplated herein. Other than the foregoing, neither Party may assign its rights or obligations hereunder without the prior written consent of the other Party. For certainty, and notwithstanding any assignment by Fika, all Delta Parent Shares and Fika Conversion Shares shall be issued in the capital of Fika.
18. COSTS	Upon approval of the DIP Loan, and subject to section 1(d), all reasonable accrued and continuing costs and expenses of the Parties incurred in connection with the Restructuring (**"Costs and Expenses"**) shall be borne by the Delta 9 Group and shall be paid in accordance with the Cash Flow Forecast. In addition to the foregoing, any of the Plan Sponsor's Costs and Expenses not paid in accordance with the Cash Flow Forecast shall become due and payable to the Plan Sponsor, on behalf of the Delta 9 Group, two (2) business days after the earlier of: (i) the implementation of the Plan; (ii) the Court approving any plan of compromise and arrangement or any other transaction that would have the effect of precluding the consummation of the Acquisition Transaction; or (iii) the Delta 9 Group otherwise entering into any agreement that would have the effect of precluding the consummation of the Acquisition Transaction.
19. COUNTERPARTS	This Term Sheet may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same agreement. Transmission by e-mail of an executed counterpart of this Term Sheet shall be deemed to constitute due and sufficient delivery of such counterpart.
20. BINDING AGREEMENT	This Term Sheet shall constitute a binding agreement between the Parties. Each Party agrees to execute and deliver such further documents and do such further acts and things as may be necessary to carry out the intent and purpose of this Term Sheet.

IN WITNESS WHEREOF the Parties hereto have executed this Term Sheet as of the day and year first above written.

2759054 ONTARIO INC. O/A FIKA HERBAL GOODS

Signed by:
Per: Mark Vasey
2B0E634ED2884FB...
Name: Mark Vasey
Title: CEO

DELTA 9 CANNABIS INC.

Per: _____
Name: John Arbuthnot
Title:

DELTA 9 LOGISTICS INC.

Per: _____
Name: John Arbuthnot
Title:

DELTA 9 CANNABIS STORE INC.

Per: _____
Name: John Arbuthnot
Title:

DELTA 9 BIO-TECH INC.

Per: _____
Name: John Arbuthnot
Title:

DELTA 9 LIFESTYLE CANNABIS CLINIC INC.

Per: _____
Name: John Arbuthnot
Title:

connectFirst
credit union

2720, 700 – 9th Ave SW
Calgary, AB T2P 3V4

Writer's Direct Line: (403) 736-4182

E-Mail: sneogi@connectfirstcu.com

February 1, 2022

Delta 9 Cannabis Inc.
777 8th Ave SW, Unit 210
Calgary, AB T2P 3R5

Attention: John Arbuthnot

Dear Member(s):

RE: COMMITMENT LETTER

Connect First Credit Union Ltd. (hereinafter called the "Credit Union") is pleased to advise that the following credit facilities (the "Credit Facilities" and each, a "Credit Facility") have been approved on the terms and conditions set forth below. If you agree with these terms and conditions, please sign the duplicate copy of this letter under the heading "Acceptance" and return same to the writer's attention.

Borrower: Delta 9 Cannabis Inc.

Guarantors: Delta 9 Bio-Tech Inc.
Delta 9 Lifestyle Cannabis Clinic Inc.
Delta 9 Cannabis Store Inc.

Credit Facilities	New/Existing	Loan No.	Authorized Amount/Current Principal Balance Outstanding
Commercial Mortgage Loan	New	TBD	$23,000,000.00
Commercial Mortgage Loan	New	TBD	$5,000,000.00
Authorized Overdraft	New	TBD	$4,000,000.00

Credit Facility 1: **Commercial Mortgage Loan – New**

Amount of Loan: $23,000,000.00 available in multiple advances

Purpose: To pay out CWB and Debentures, or as otherwise agreed by the Lender

Rate of Interest:

The Committed Rate is a fixed rate of 4.55% per annum, calculated daily, payable monthly in arrears

Term:

5 Years from the Interest Adjustment Date

Amortization:

12 Years from the Interest Adjustment Date

Repayment:

Interest calculated at the Committed Rate shall accrue from the date of the advance and be paid on the fifth day of the month following the date of advance (the "Interest Adjustment Date"). Thereafter on the fifth day of each month, during the term, the payment outlined below on account of principal and interest shall be due and payable.

Term	Payment Amount
5 year closed	$207,570.01

Prepayment:

The Borrower when not in default under this Credit Facility, shall have the following privileges:

a) In any calendar year, the Borrower shall have the privilege of prepaying additional amounts of principal under the Credit Facility without notice or bonus provided that the aggregate amount thereof in such calendar year does not exceed 20% of the Original Principal amount of this Credit Facility (the "Annual Prepayment"). The Annual Prepayment is not cumulative.

b) The Borrower shall have the privilege, once in any calendar year, of increasing the amount of the monthly payment by not more than 20% of the amount of the monthly payment then payable under the Credit Facility (the "Increase Privilege"). The Increase Privilege is not cumulative.

In the event the Borrower has exercised the "Increase Privilege" contained in this Credit Facility, then the Borrower shall, once in any calendar year, have the privilege of decreasing the amount of the then monthly payment payable under the Credit Facility to an amount which is not less than the amount of monthly payment payable at the beginning of the current term. For purposes hereof "current term" means the term of the Credit Facility in the event there has been no extension or renewal of such term, and if such term has been extended or renewed then it means the extended or renewed term commencing on the first day of the extended or renewed term.

c) The Borrower shall have the privilege of prepaying the entire balance outstanding under this Credit Facility (the "Full Payout Privilege") subject to the payment of a bonus equal to the greater of (i) three (3) months' interest on the outstanding Principal Amount of the Credit Facility at the interest rate then payable under the Credit Facility, or (ii) an amount in compensation for loss of interest, if any, where the interest rate then payable under this Credit Facility is greater than the Credit Union's current interest rate for reinvestment for the remainder of the term of this Credit Facility. The current interest rate for reinvestment is the applicable Government of Canada Bond rate or Treasury Bill yield.

Applicable Government of Canada Bond or Treasury Bill is that with a term not greater than (i) the remainder of the current term of the Credit Facility, and (ii) the next shorter term offered, provided that where the remainder of the term of the Credit Facility is less than the next shorter term offered, the Credit Union's current interest rate for reinvestment for the next shorter term shall apply. The bonus payable hereunder shall be calculated by the Credit Union and, in the absence of an obvious error, shall be conclusive.

Outstanding Balance shall be the outstanding principal amount of the Credit Facility on the date of the prepayment provided the Borrower had not exercised its 20/20 prepayment privilege in the 30 days preceding the pay-out date. Where the Borrower has exercised its 20/20 prepayment privilege within 30 days prior to the prepayment date, the Borrower would be required to pay a bonus as defined above on the partial prepayment.

Credit Facility 2: **Commercial Mortgage Loan – New**

Amount of Loan: $5,000,000.00 available in a single advance

Purpose: Acquisition financing for Uncle Sam's Cannabis

Rate of Interest:

The Committed Rate is a fixed rate of 4.55% per annum, calculated daily, payable monthly in arrears

Term:

5 Years from the Interest Adjustment Date

Amortization:

12 Years from the Interest Adjustment Date

Repayment:

Interest calculated at the Committed Rate shall accrue from the date of the advance and be paid on the fifth day of the month following the date of advance (the "Interest Adjustment Date"). Thereafter on the fifth day of each month, during the term, the payment outlined below on account of principal and interest shall be due and payable.

Term	Payment Amount
5 year closed	$45,123.92

Prepayment:

The Borrower when not in default under this Credit Facility, shall have the following privileges:

a) In any calendar year, the Borrower shall have the privilege of prepaying additional amounts of principal under the Credit Facility without notice or bonus provided that the aggregate amount thereof in such calendar year does not exceed 20% of the Original Principal amount of this Credit Facility (the "Annual Prepayment"). The Annual Prepayment is not cumulative.

b) The Borrower shall have the privilege, once in any calendar year, of increasing the amount of the monthly payment by not more than 20% of the amount of the monthly payment then payable under the Credit Facility (the "Increase Privilege"). The Increase Privilege is not cumulative.

In the event the Borrower has exercised the "Increase Privilege" contained in this Credit Facility, then the Borrower shall, once in any calendar year, have the privilege of decreasing the amount of the then monthly payment payable under the Credit Facility to an amount which is not less than the amount of monthly payment payable at the beginning of the current term. For purposes hereof "current term" means the term of the Credit Facility in the event there has been no extension or renewal of such term, and if such term has been extended or renewed then it means the extended or renewed term commencing on the first day of the extended or renewed term.

c) The Borrower shall have the privilege of prepaying the entire balance outstanding under this Credit Facility (the "Full Payout Privilege") subject to the payment of a bonus equal to the greater of (i) three (3) months' interest on the outstanding Principal Amount of the Credit Facility at the interest rate then payable under the Credit Facility, or (ii) an amount in compensation for loss of interest, if any, where the interest rate then payable under this Credit Facility is greater than the Credit Union's current interest rate for reinvestment for the remainder of the term of this Credit Facility. The current interest rate for reinvestment is the applicable Government of Canada Bond rate or Treasury Bill yield.

Applicable Government of Canada Bond or Treasury Bill is that with a term not greater than (i) the remainder of the current term of the Credit Facility, and (ii) the next shorter term offered, provided that where the remainder of the term of the Credit Facility is less than the next shorter term offered, the Credit Union's current interest rate for reinvestment for the next shorter term shall apply. The bonus payable hereunder shall be calculated by the Credit Union and, in the absence of an obvious error, shall be conclusive.

Outstanding Balance shall be the outstanding principal amount of the Credit Facility on the date of the prepayment provided the Borrower had not exercised its 20/20 prepayment privilege in the 30 days preceding the pay-out date. Where the Borrower has exercised its 20/20 prepayment privilege within 30 days prior to the prepayment date, the Borrower would be required to pay a bonus as defined above on the partial prepayment.

Credit Facility 3: **Authorized Overdraft - New**

Amount: Up to a maximum of $4,000,000.00

Purpose: To finance day to day operating requirements

Interest Rate:

The committed rate is the Credit Union's Prime Lending Rate plus 1.50% per annum, calculated daily, payable monthly in arrears. The Credit Union's Prime Lending Rate means the annual rate of interest announced from time to time by the Credit Union. As of the date hereof the Credit Union's Prime Lending Rate is 2.45% per annum.

Conditions of Margining:

Advances to be tested monthly on the 20th day of the month, will be contained within the lesser of (supported by Delta 9 Bio-Tech Inc. and Delta 9 Lifestyle Cannabis Clinic Inc.,):

a) the authorized limit, or

b) On a forward margin basis, a maximum of 75% of the Credit Union's valuation of assigned, good quality Accounts Receivable after deducting the entire account past due 90 days or more, accounts in dispute, inter-company accounts, contra accounts, holdbacks, foreign accounts, source deductions (including Workers Compensation Board Premiums, GST, Employee Payroll deductions, Health Canada etc.) and any other accounts deemed unacceptable by the Credit Union;

Plus, 50% of Inventory at cost. "Inventory" means: (i) all inventory pertaining to fully completed self-contained cannabis growing pods; and (ii) all non-cannabis ancillary product inventory.

Repayment:

Payable on demand but until demand, interest only is payable monthly in arrears on the first day of each month.

Monthly Facility Fees:

$250.00 per month, payable in advance on the first of each month.

This fee will be charged for each month this Credit Facility is available, even if the Borrower does not use or maintain a balance in this Credit Facility.

Review Date:

The next annual review date of all the Credit Facilities has been established as May 31, 2022 but may be changed at the discretion of the Credit Union.

Non-refundable Application Fee:

$132,000.00 ($32,000.00 collected, balance of $100,000.00 will be deducted from initial loan advance)

Late Financial Reporting Fee:

$500.00 per occurrence

Annual Review Fee:

$10,000.00 is due and payable at annual review date

Renewal Fee:

0.25% of the principal balance outstanding at renewal (to be paid 5 years from the Interest Adjustment Date)

Legal Fees:

The Credit Union's lawyer's fees, taxes and disbursements are payable by the Borrower, which fees, taxes and disbursements will be deducted from the initial advance hereunder.

NOTE: In addition to these fees, the Borrower will be responsible for direct payment of the Borrower's own lawyer's fees/disbursements/G.S.T. for this transaction.

Financial Covenants:

The Borrower and the Guarantors shall at all times maintain, on a consolidated basis, a Current Ratio of not less than 1.25:1, to be tested Monthly

Current Ratio is defined as the Borrower's and the Guarantors', on a consolidated basis, current assets, as defined by Accounting Standards for Private Enterprises ("ASPE") / International Financial Reporting Standards ("IFRS"), divided by the Borrower's current liabilities, as defined by ASPE / IFRS.

The Borrower's and Guarantors' (on a consolidated basis) Debt Service Coverage Ratio shall at all times prior to June 30, 2022 be not less than 1:1x, to be tested Quarterly based on a Trailing 4 Quarters, increasing to 1.40:1x starting June 30, 2022 and at all times thereafter.

Covenants – as of June 30, 2022:

a) DSC before Corporate distributions >= 1.40:1
EBITDA ÷ Debt Service Obligations

b) DSC after Corporate distributions >= 1:1
[EBITDA – Corporate Distribution]÷ Debt Service Obligations

Definitions:

EBITDA *means from continuing operations for the fiscal year under review and specifically, income before taxes + depreciation + amortization + other non-cash expenses + stock based compensation + interest expense, extraordinary gains and losses and capital leases are excluded from EBITDA*

Debt Service *means the sum of principal & interest payments for the corresponding fiscal year paid by the Borrower and the Guarantors, on a consolidated basis, on all funded indebtedness not specifically subordinated to the Credit Union.*

Corporate Distribution *means, payment of cash dividends and unfinanced Capital Expenditures*

Corporate Distributions are permitted provided the Borrower and the Guarantors remain in compliance with the covenants, i. e., after giving effect to the Corporate Distributions, DSC >= 1.0x

The Borrower's and the Guarantors' (on a consolidated basis) Debt to Equity Ratio shall at all times be less than 1:1, to be tested Annually.

Debt to Equity Ratio is defined as the Borrower's and the Guarantors' (on a consolidated basis) total liabilities, as defined by Accounting Standards for Private Enterprises ("ASPE") / International Financial Reporting Standards ("IFRS"), including the redemption value of any Preferred Shares not formally postponed to the Credit Union, excluding shareholder loans formally postponed and assigned to the Credit Union, divided by the Borrower's total equity, as defined by ASPE / IFRS, plus shareholder loans formally postponed and assigned to the Credit Union. At the discretion the Credit Union adjustments to total equity may be made for items such as intangibles and appraisal surplus

Financial Reporting Requirements:

Monthly

a) Aged list of Accounts Receivable as at month end, by the 20th day of the following month.

b) Aged list of Accounts Payable as at month end, by the 20th day of the following month.

c) Statement of priority payables.

d) List of inventories as at month end, by the 20th day of the following month.

e) In-house financial statements (Balance Sheet and Income and Expense Statement) as at month end, by the 20th day of the following month.

f) Current Ratio calculator worksheet.

g) Monthly management commentary on Borrower's performance as it relates to financial projections.

h) Signed monthly cover sheet (by signing officer for Borrower) regarding reports submitted.

Annually

Within 120 days of the Borrower's fiscal year-end, the borrower will provide the following:

a) Audited, Consolidated Accountant Prepared financial statements of Delta 9 Cannabis Inc (including Delta 9 Bio-Tech Inc; Delta 9 Lifestyle Cannabis Clinic Inc; Delta 9 Cannabis Store Inc; and any other wholly owned subsidiary of Delta 9 Cannabis Inc.)

b) Status of any and all Health Canada Licenses

c) Confirmation of paid property taxes on 760 Pandora Ave E, Winnipeg MB

Authorization is provided to the Credit Union to contact the Accounting firm of the Borrower and Guarantor(s) to obtain copies of all financial statements and to answer questions relating to same.

Pre-disbursement Conditions:

The Credit Union's obligation to advance the Credit Facilities 1 and 2, and establish Credit Facility 3 is conditional upon receipt by the Credit Union of the following, all in form and substance satisfactory to it.

a) Completion and, where applicable, registration of all security.

b) Receipt of satisfactory Transmittal Letter from Altus Group, permitting the Credit Union Ltd to use their appraisal for mortgage lending purposes.

c) Receipt of a satisfactory Phase I Environmental Site Assessment of 760 Pandora Ave E, Winnipeg MB prepared by an Environmental Consultant acceptable to the Credit Union. The report is to be addressed to the Credit Union or one of its Divisions or be accompanied by a Transmittal Letter authorizing the Credit Union or one of its Divisions to rely on the report for mortgage lending purposes.

d) Review and Acceptance of Accountant Prepared Financial Statements (Year to date) of Uncle Sam's Cannabis Ltd.

e) Evidence of satisfactory Equity raise sufficient to close Uncle Sam's Cannabis Ltd. transaction. For certainty, the Borrower acknowledges and agrees that, both before and following the closing of the said transaction the Borrower shall remain in compliance with the provisions hereof, including, without limitation, the Financial Covenants set forth herein above.

f) Business Valuation for Delta 9 Lifestyle Cannabis Clinic Inc. in final format along with necessary Transmittal Letter authorizing the Credit Union or one of its Divisions to rely on the report for mortgage lending purposes.

Conditions of Credit:

a) The Borrower or the applicable Guarantor(s) to be and remain the sole legal and beneficial owner of the Health Canada cannabis license granted in favour of the Borrower or the applicable Guarantor(s) (the "License");

b) The Borrower and/or any applicable Guarantor(s) shall not take any action, or fail to perform the necessary action, to impede, jeopardize or otherwise place any risk on their ability to renew or maintain: (i) the License; or (ii) any material licenses, permits or approvals required to operate the Borrower's business (collectively, the "Other Licenses");

c) The Borrower and/or the applicable Guarantor(s) shall with due diligence and in a reasonable manner, enforce the rights granted to it under and in connection with the License and the Other Licenses, and without limiting the foregoing, the Borrower and/or the applicable Guarantor(s) shall consistently apply yield improvement initiatives to its product produced in its cannabis facilities. The Borrower and/or the applicable Guarantor(s) shall further make commercially-reasonable efforts to ensure that the appropriate yield improvement initiatives, as well as all other applicable growing techniques and growing capacity, are in place to maximize the Borrower's and/or the applicable Guarantor's production;

d) The Borrower and/or any applicable Guarantor(s) shall not dispose of or abandon any right, title or interest in the License or any Other License; and

e) The Borrower an/or any applicable Guarantor(s) shall apply for and obtain each future License and Other License on or before such time as it shall be required by applicable law.

Other Conditions:

a) Neither the Borrower nor any Guarantor will further encumber any of its property pledged in favour of the Credit Union, without the prior written consent of the Credit Union.

b) Out of pocket expenses to be paid by Borrower (e.g. legal fees, appraisal fees, interim inspection fees and Land Title Searches).

c) Implementation and continuation the Credit Facilities is subject to periodic review, at least annually, by the Credit Union, and is also subject to no materially adverse changes in the financial position of the Borrower.

d) No change in the type or nature business carried on by the Borrower and the Guarantors, taken as a whole, shall occur during the life of the Credit Facility without the written consent of the Credit Union. Should the Borrower or any Guarantor wish to sell all or substantially all of their respective assets or business (subject to the Credit Union's written consent), proceeds of such sale shall be applied towards the repayment in full of the loans hereunder except otherwise agreed to by the Credit Union.

e) No shareholder distribution or dividend shall be greater than an amount that ensures all financial covenants are met shall be permitted.

Registration of Mortgage Amount:

Although the Credit Union may register its mortgage for a sum greater than the amount of the Credit Facilities set out in this Commitment Letter, the Credit Union has no obligation to advance funds greater than the amount of the Credit Facilities set out in this Commitment Letter.

Syndication:

The Borrower and the Guarantor(s), if any, hereby acknowledge that the Credit Union is entitled to syndicate any portion of the proposed Credit Facilities to third parties without notice. The Borrower and Guarantor(s), if any, further acknowledge that should the Credit Union decide to syndicate any portion of the Credit Facilities that they will be required to provide information respecting the Borrower and the Guarantor(s), if any, to any potential syndication partner, providing that any such potential syndication partner agrees to maintain such information in confidence. In the event of any syndication of the Credit Facilities, the Credit Union shall be the sole administrator of the Credit Facilities, and will hold all Security exclusively in its own name. Notwithstanding the foregoing, any syndication partner will be entitled to all information in the possession of the Credit Union from time to time with respect to the Credit Facilities.

Renewal of Loan Beyond Maturity Date:

In the event that the Borrower fails to repay the outstanding principal and interest balance of the loan(s) on the maturity date, or fails to accept a renewal offer tendered by the Credit Union within the reasonable time period permitted by the Credit Union's offer to renew (where such failure to repay or renew, as aforesaid, is not attributable to the Credit Union), and provided that there are no arrears in principal and interest under the loan, then the Credit Union may, at its sole option, extend the term of a loan for such period from the expiry date to be determined by the Credit Union in its sole discretion. In such case, the loan from the date of this extension (and not for any period before) shall bear interest both before and after this new maturity at an interest rate being the greater of the contractual rate of interest or a rate equivalent to the Credit Union's Prime Rate plus Five (5%) percent per annum, as it may vary and be determined as provided below. This interest rate shall be determined by the Credit Union on the first Banking Day of the month in which the term of the loan expires and thereafter on the first Banking Day of each month until full repayment of the loan in principal, interest, costs and accessories. Unpaid interest accrued on the principal also bears interest at the same rate.

This interest shall be calculated daily and payable monthly. In the event that the renewal or repayment of the Credit Union's monies owing has not been finalized within the extension period, then there shall be no further extensions and the Credit Union will be at liberty to exercise any remedies available to it under the loan and the Security.

For the purposes of this clause, the Credit Union's Prime Rate is defined as the annual rate of interest announced from time to time by the Credit Union as being a reference rate then in effect for determining interest rates on Canadian dollar commercial loans.

For the purposes of this clause, "Banking Day" is defined as a day on which the head office of the Credit Union is open for business and which is not a Saturday, Sunday or civic or statutory holiday.

When the term is extended as mentioned above, the balance of the loan of principal and interest, as well as unpaid costs and accessories (money owed) may be paid in full on the expiry date or at any time during

the extension period, without notice or bonus. However, if not paid before, they shall be paid at expiry of the extension period.

A processing fee representing the greater of $1,000.00 or one tenth (1/10th) of one percent (1%) of the outstanding principal balance at the expiry date shall be automatically added to the principal balance if this extension period is utilized.

Security and Other Documents:

The Borrower agrees to provide to the Credit Union in form and substance satisfactory to it and its solicitors, all security and supporting agreements requested by the Credit Union including the following documentation (the "Security") which will be held by the Credit Union as security for the Credit Facilities and all other direct and indirect liabilities of the Borrower and the Guarantor(s) (or any of them) to the Credit Union from time to time.

Documentation to be Obtained:

a) Membership/Account opening documents

Security to be obtained for all Credit Facilities:

a) All corporate documents, including:

- Resolution of Directors re Banking and Security,
- Certified Copy of Resolution of the Directors,
- Incumbency Certificate,
- Officer's Certificate with constating documents attached or Notarized copies of all Certificates, Articles and By-laws, and
- Certificate of Non-restriction

b) Borrowing Resolution in the amount of $32,000,000.00

c) Loan Agreement in the amount of $23,000,000.00 *(Credit Facility 1)*

d) Loan Agreement in the amount of $5,000,000.00 *(Credit Facility 2)*

e) Overdraft Protection Agreement in the amount of $4,000,000.00 *(Credit Facility 3)*

f) Unlimited Guarantee and Postponement of Claim granted by Delta 9 Bio-Tech Inc. *(including supporting corporate documents)* supported by:

A first charge demand collateral mortgage of a freehold interest in the amount of $28,000,000.00 over the property beneficially owned by and registered in the name of Delta 9 Bio-Tech Inc., which is municipally described as:

760 Pandora Ave, Winnipeg MB

and briefly legally described as:

Title No. 2977656/1
Parcels A, B, C, D, E and F Plan 51110 WLTO, in SW ¼ 3 and SE ¼ 4-11-4 EPM

(hereinafter referred to as "760 Pandora")

A first charge demand collateral mortgage of a leasehold interest in the amount of $28,000,000.00 over the property leased by Delta 9 Bio-Tech Inc., which is municipally described as:

770 Pandora Ave, Winnipeg MB

and briefly legally described as:

Title No. 2513702/1
Parcel "G" Plan 51110 WLTO

Title No. 2513712/1
PARCEL "H" PLAN 51110 WLTO

Title No. 2513726/1
PARCEL "J" PLAN 51110 WLTO

Title No. 2513735/1
PARCEL "K" PLAN 51110 WLTO

Title No. 2513739/1
PARCEL "L" PLAN 51110 WLTO

(collectively, hereinafter referred to as "770 Pandora" and together with 760 Pandora being, the "Property")

Although the Credit Union's mortgage will be registered at 15.00%, the Credit Union is only entitled to interest at the Committed Rate.

and

A General Security Agreement comprising a first charge security interest over all present and after-acquired personal property located at or on or related to the Property, registered at Personal Property Registry

g) A First Assignment of All Rents and Leases over the property beneficially owned by and registered in the name of Delta 9 Bio-Tech Inc.

h) A General Security Agreement granted by the Borrower comprising a first charge security interest over all present and after acquired personal property, registered at Personal Property Registry

i) Unlimited Guarantee and Postponement of Claim granted by Delta 9 Cannabis Store Inc.

(including supporting corporate documents), supported by:

A General Security Agreement comprising a first charge security interest over all present and after acquired personal property, registered at Personal Property Registry

j) Unlimited Guarantee and Postponement of Claim granted by Delta 9 Lifestyle Cannabis Clinic Inc. *(including supporting corporate documents)*, supported by:

A General Security Agreement comprising a first charge security interest over all present and after acquired personal property, registered at Personal Property Registry

k) A formal Assignment and Postponement of Shareholders' Loans/Affiliated Company Loans/Debentures in the amount of $2,459,856.00 acknowledged by the Borrower, registered at Personal Property Registry

l) Evidence of Commercial General Liability insurance in a minimum amount of $5,000,000.00 showing the Credit Union as additional insured, and assignment of adequate All Risk Insurance over subject Property/assets or security pledged showing the Credit Union as first loss payee via Standard Mortgage Endorsement Clause as follows

Building Replacement Cost

Insurance Certificate will be reviewed by the Credit Union approved Insurance Consultant. Insurance Review fee will be deducted from initial loan advance.

m) The Credit Union's Master form Title Insurance Policy to be obtained through First Canadian Title or Chicago Title

n) Environmental Indemnity Agreement in an unlimited amount from the Borrower and Guarantor(s)

o) Direction and Authority to Pay

p) An Opinion of Counsel to the Borrower and the Corporate Guarantor(s) in such form as the Credit Union shall require

q) A Satisfactory Opinion of Counsel to the Credit Union in a form satisfactory to it

r) Such other supporting documentation as the Credit Union or its solicitors, in the course of finalization, may determine as necessary for the protection of the advances

All the above documentation will be prepared by the Credit Union's solicitors. The Credit Union's solicitors in this transaction are:

Dentons
850 – 2nd Street SW, 15th Floor
Bankers Court
Calgary AB T2P 0R8

Attention: Glen Peterson

Please advise of the name, address and contact information of your solicitor:

MLT Aikins LLP
30th Floor, 360 Main Street
Winnipeg, Manitoba R3C 4G1
Attention: Eric Buettner

Your acceptance of this letter will constitute authority for the Credit Union to instruct its solicitors to prepare the necessary documentation

Commitment Expiry Date:

In the event initial advance of the Credit Facilities is not disbursed by August 31, 2022, this commitment expires.

Additional Terms and Conditions:

The attached Schedule "A" outlines additional terms and conditions that form part of this Commitment Letter.

The terms of this Commitment Letter are open for acceptance by the Borrower and the Guarantor(s) executing the duplicate copy of this letter where indicated below and returning it to our office at #2720, 700 – 9th Avenue, S.W., Calgary, Alberta, T2P 3V4, on or before 3:00 p.m. on February 15, 2022, after which date and time, this offer shall lapse if it is not accepted.

This Commitment Letter and any amendments, renewals or replacements thereof may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument. Counterparts may be executed in original, faxed or electronic PDF format and the parties adopt any signatures received by a receiving fax machine or electronic transmission as original signatures of the parties.

We wish to thank you for allowing the Credit Union the opportunity of being of assistance to you.

Yours truly,

CONNECT FIRST CREDIT UNION LTD.

Sourav Neogi, Relationship Manager
Corporate & Commercial Banking

Encs.

ACCEPTANCE

We hereby **accept and agree** to the Credit Facilities on the terms and conditions outlined by the Commitment Letter dated February 1, 2022 on this 1 day of February, 2022.

Delta 9 Cannabis Inc. – *Borrower*

Per: _____

Per: _____

(Affix Corporate Seal)

Delta 9 Bio-Tech Inc. – *Guarantor*

Per: _____

Per: _____

(Affix Corporate Seal)

Delta 9 Cannabis Store Inc. – *Guarantor*

Per: _____

Per: _____

(Affix Corporate Seal)

Delta 9 Lifestyle Cannabis Clinic Inc. – *Guarantor*

Per: _____

Per: _____

(Affix Corporate Seal)

SCHEDULE "A"
ADDITIONAL TERMS AND CONDITIONS

Representations and Warranties:

Each of the Borrower and the Guarantor(s), to the extent applicable, represents and warrants to the Credit Union that:

a. It is a corporation validly incorporated and subsisting under the laws of the jurisdictions where it has been incorporated, and that it is duly registered or qualified to carry on business in all jurisdictions where the character of the properties owned by it or the nature of its business transacted make such registration or qualification necessary;

b. The execution and delivery of this Commitment Letter and of the Security has or will have been duly authorized by all necessary actions and does not:
   i) violate any law or any provisions of its charter,
   ii) result in a breach of, a default under, or the creation of any encumbrance on its properties or assets under any agreement or instrument to which it or any of its properties and assets may be bound or affected, and
   iii) require any regulatory approval which has not been obtained;

c. No event has occurred which is or which, with the giving notice, lapse of time or other condition, would constitute an event having material adverse effect on its financial condition under or in respect of any agreement, undertaking, or instrument to which it is a party or to which it or any of its properties or assets may be subject.

Events of Default:

Without in any way affecting the Credit Union's right to demand repayment in respect of any Credit Facility that is repayable on demand, it is an event of default ("Event of Default") if any one or more of the following events has occurred and is continuing:

a. The non-payment, when due, of principal, interest or any other amount due under this Commitment Letter;

b. The breach by the Borrower or any Guarantor under any provision of this Commitment Letter or any other agreement with the Credit Union;

c. There is a change in applicable laws which materially changes, in the sole opinion of the Credit Union, the nature of the Borrower's or any Guarantor's business and would reasonably be expected to have a material adverse effect on the business of the Borrower and/or such Guarantor;

d. There is any event, occurrence, action, or failure to take the necessary action, which impedes, jeopardizes or otherwise poses any material risk to the Borrower's or any applicable Guarantor's ability to maintain the License or any Other License;

e. The revocation of the License or any Other License;

f. The default by the Borrower or any Guarantor under any obligation to repay borrowed money other than amounts due under this Commitment Letter, or in the performance or observance of any agreement or condition in respect of such borrowed money as a result of which the maturity of such obligation is accelerated or may be accelerated;

g. If any representation or warranty made herein shall be false or inaccurate in any adverse respect;

h. If in the opinion of the Credit Union, in its sole discretion, there is:

i) A material adverse change in, or a material adverse effect upon, the financial condition, operations, assets, business, properties or prospects of the Borrower or any Guarantor;

ii) A material impairment of the ability of the Borrower or any Guarantor to perform any of their obligations under any of the Security; or

iii) A material adverse effect upon any substantial portion of the assets or the property subject to the Security in favor of the Credit Union or upon the legality, validity, binding effect, rank or enforceability of any Security;

i. If an order is made or an effective resolution is passed for the winding-up of the Borrower or any Guarantor or if a petition is filed for the winding-up of the Borrower or any Guarantor;

j. If the Borrower or any Guarantor becomes insolvent, or makes an assignment or bulk sale of its assets, or if a petition in bankruptcy is filed or presented against the Borrower or any Guarantor;

k. If any proceeding with respect to the Borrower or any Guarantor is commenced under the *Companies' Creditors Arrangements Act*;

l. If any execution, sequestration, writ of enforcement or any other process of any court becomes enforceable against the Borrower or any Guarantor, or if a distress or analogous process is levied upon the property of the Borrower or any Guarantor or any part thereof, provided that such execution, sequestration, writ of enforcement or other process is not in good faith being contested by any Borrower or any Guarantor; or

m. If the Borrower or any Guarantor ceases or threatens to cease to carry on its business or if the Borrower or any Guarantor commits or threatens to commit any act of bankruptcy.

The Credit Union will, to the extent that such an event is curable, provide the Borrower a 30-day cure period to rectify the above-mentioned events, with reasonable notice, before the events of default are enforced.

Remedies in the Event of Default on Credit Facilities:

If an Event of Default occurs, the Credit Union has the right in addition to its other rights at law or in equity to require immediate payment in full of all Credit Facilities.

Right of Termination:

The Credit Union shall have the right to terminate this Commitment Letter and be relieved of all obligations in connection therewith in the event any of the following events should occur:

a. An Event of Default occurs and is continuing beyond any applicable cure period.; or

b. The Borrower or any Guarantor(s) fails or is unable or is unwilling for any reason whatsoever to comply with any of the terms and conditions set out in this Commitment Letter within the time indicated for such compliance; or

c. The Borrower or any Guarantor(s) fails or refuses to execute any documentation requested by our solicitors or to deliver such documentation to our solicitors; or

d. The net proceeds of the loan have not been fully advanced on or before the commitment expiry date referred to herein; or

e. The Borrower refuses to accept the funds when advanced; or

f. The Borrower or any Guarantor(s) or any other person or corporation whose covenant is required shall become bankrupt, or subject to bankruptcy, receivership or insolvency proceedings; or

g. There has been, in the sole opinion of the Credit Union, acting reasonably, a material adverse change in the condition of the Property or the Borrower or any Guarantor(s) or in the actual or anticipated revenues from the Property; or

h. Urea formaldehyde foam insulation or any construction material containing asbestos or other substance considered harmful by the Credit Union has been used or will be used in the Property; or there is in, or on about the Property any product or substance including, without restriction, PCBs contaminants or hazardous materials, equipment or anything which does, or is likely to, constitute an environmental hazard or contravenes any environmental law, regulation, order, decree or directive; or

i. The Borrower has not complied with all the provisions of the *Builders' Lien Act* of Alberta and amendments thereto, to our satisfaction; or

j. The Credit Union or its solicitor, acting reasonably, is not satisfied with the matters set out under the heading "Title"; or

k. All legal matters and documentation relating to the transaction has not been completed to the Credit Union's and its counsel's satisfaction.

If the Credit Union elects to terminate this Commitment Letter or the Credit Facilities set out therein prior to the advance of the entire amount under the Credit Facilities, the amount advanced under the Credit Facilities, if any, together with interest thereon at the rate set out herein shall become immediately due and payable and the Credit Union shall, whether or not any proceeds have been advanced, be entitled to retain the Commitment Fee as compensation for all damages sustained by it, it being agreed that the

amount of such Commitment Fee is a fair estimate of the damages which will be suffered by the Credit Union in such event.

Collection, Use, Disclosure and Release of Financial and Other Information and Materials:

For the purposes of making, administering, reporting, selling or assigning in whole or in part, in connection with securitization or otherwise, and collecting the Credit Facilities, the following parties (collectively, "Authorized Parties") will be reviewing and examining financial and other information and materials provided to or obtained by the Credit Union concerning the Credit Facilities, the Borrower and the Guarantor(s), if any:

a) The Credit Union and/or any holder or servicer of the Credit Facilities or of an interest therein from time to time and/or their respective affiliates and/or agents;

b) Rating agencies, purchasers or investors and prospective purchasers or investors;
c) Respective third party advisors of the parties listed in a) and b) above, such as lawyers, accountants, real estate brokers, investment dealers and underwriters, consultants, and appraisers; and,

d) Credit verification sources.

The Borrower and the Guarantor(s), if any, acknowledges and irrevocably consents to the foregoing and irrevocably agrees that, in such manner as the Authorized Parties may determine to be necessary or desirable for these purposes, the Authorized Parties may disclose, release, exchange and share such information and materials:

a) To and with any Individual(s), corporations(s) or other entities designated from time to time to hold title to the Credit Facilities and/or security documents as custodian(s) or agent(s);

b) To and with each other;

c) The Borrower and the Guarantor(s), if any, hereby consents to the Authorized Parties conducting such credit inquires, as they may from time to time consider advisable for these purposes; and,

d) The provisions of this paragraph shall apply until all loans have been fully and completely repaid and the security documents have been discharged.

Evidence of Advances:

The Borrower and the Guarantor(s), if any, agree that the Credit Union's records evidencing an advance shall be complete and final proof, absent manifest error, that funds have been advanced under any one or more of the Credit Facilities set forth in the Commitment Letter and may, from time to time dependent upon the type of Credit Facilities made available, be evidenced by other documentation such as, for example and without limitation, promissory notes, direct deposits, drafts or cheques made payable to other parties including solicitors and agents and any other means by which the Credit Union provides value to the Borrower under any one or more of the Credit Facilities.

Noteless Advances:

The Borrower acknowledges that the actual recording of the amount of any advance or repayment thereof under the Credit Facilities, and interest, fees and other amounts due in connection with the Credit Facilities, in an account of the Borrower maintained by the Credit Union, shall constitute prima facie evidence of the Borrower's indebtedness and liability under the applicable Credit Facilities; provided that the obligation of the Borrower to pay or repay any indebtedness and liability in accordance with the terms and conditions of the applicable Credit Facilities set out in the Commitment Letter shall not be affected by the failure of the Credit Union to make such recording. The Borrower also hereby acknowledges being indebted to the Credit Union for principal amounts shown as outstanding in the Credit Union's account records, and all accrued and unpaid interest in respect thereto, which principal and interest the Borrower hereby undertakes to pay to the Credit Union in accordance with the terms and conditions applicable to the Credit Facilities as set out in this Commitment Letter.

Automatic Debit:

The Borrower authorizes and directs the Credit Union to automatically debit payment, by mechanical, electronic, or manual means, payable by the Borrower under this Commitment Letter or by the Borrower under the Security, as defined below, including, but not limited to, the repayment of principal and the payment of interest, fees, and all charges for the keeping of the accounts of the Borrower.

Taxes:

All realty taxes and local improvement assessments are to be paid by Borrower or the applicable Guarantor(s) or, as and if applicable, the tenants to the municipality when due and you shall provide the Credit Union annually, if requested, with receipted copies of the realty tax bills for the Property. The Credit Union may, at its sole option, require that the Borrower or the applicable Guarantor(s) pays on the monthly payment date provided for herein one-twelfth of the annual realty taxes payable or estimated by the Credit Union to be payable for the forthcoming year. Any deficiency between actual and estimated taxes shall be payable to the Credit Union forthwith upon demand.

Insurance:

The Borrower will insure and keep fully insured the Property and all tangible personal property against the following perils:

a. With respect to all buildings and other improvements now or hereafter situated on the Property and all insurable property included within the buildings, coverage against loss or damage by fire and other insurable hazards defined in an "All Risks" insurance policy for the full replacement cost with the same/adjacent site requirement removed and with automatic vacancy permit;

b. Equipment Breakdown insurance, if applicable, for the full replacement cost of 760 Pandora and all improvements thereon or such lesser amount as shall be acceptable to the Credit Union;

c. Loss or damage of all personal property by fire or other insurable hazards, including theft, in an amount not less than the full replacement cost thereof, and

d. Commercial General Liability insurance to an amount not less than $5,000,000 on an occurrence basis.

The policies of insurance to be maintained shall contain a stated amount co-insurance clause or not be subject to any co-insurance clauses and shall be in form and with insurers satisfactory to the Credit Union. The insurance shall include the agreement of the insurer that the policy will not be cancelled without at least thirty (30) days prior written notice of cancellation to the Credit Union. The Credit Union shall be named as the first mortgagee and loss payee subject to the standard Insurance Bureau of Canada Mortgage Clause. The Credit Union will be included as an additional insured on the Commercial General Liability coverage.

The Borrower, at least ten (10) days prior to the advance of any funds, will furnish to the Credit Union or its solicitors evidence of insurance.

Title:

Delta 9 Bio-Tech Inc. is the legal and beneficial owner of 760 Pandora and has been granted a leasehold interest in 770 Pandora, each of which are being mortgaged hereunder.

The Property and all improvements thereon shall have been duly authorized and comply in all respects with all applicable laws, by-laws, government requirements, whether federal, provincial or municipal including, without restriction, those dealing with planning, zoning, use, occupancy, subdivision, parking, historical designations, fire, access, loading facilities, landscaped areas, pollution of the environment, toxic materials or other environmental hazards, building construction, public health and safety and there shall be no outstanding work orders against the Property or the improvements or any part thereof.

Delta 9 Bio-Tech Inc. shall provide such certificates or other written confirmation as the Credit Union's solicitors may reasonably require, certifying that no control orders, stop orders or prosecutions exist with respect to the Property or any activity or operation carried out thereon pursuant to any federal, provincial, municipal or local environmental, health and safety laws, statutes and regulations as may apply to the Property or the activities or operations carried out thereon.

Leases:

In the event 760 Pandora is leased, it shall be in accordance with the terms set out in the lease document(s) between landlord and each tenant. Delta 9 Bio-Tech Inc. will provide at the Credit Union's request, executed copies of such leases for our review which must be in a form and upon terms acceptable to the Credit Union. Delta 9 Bio-Tech Inc. will also provide to our solicitors an Estoppel Certificate with the written acknowledgement of each tenant as to the status of its tenancy at the time of advance of funds. At the time of advance of the funds each tenant must be in possession of the whole of its leased premises, carrying on business thereon and paying rent pursuant to the terms of the lease and the landlord and tenant shall otherwise have performed all their obligations contained in the lease.

The Credit Union may at its option require that all present and future leases of 760 Pandora be postponed by way of a registered postponement agreement in favour of the Credit Union's interest in 760 Pandora.

In the event the forgoing is required, the Credit Union agrees to execute a Non Disturbance Agreement with a Tenant, in a form acceptable to the Credit Union.

Payment of Costs:

The Borrower agrees to pay all expenses, fees and charges incurred by the Credit Union in relation to all loans and credits, the preparation and registration of all security, enforcement or preservation of any or all of the Credit Union's rights and remedies, whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-its-own-client full indemnity basis), costs of accountants, engineers, architects, consultants, appraisers and the costs of any and all searches and registrations the Credit Union or its solicitor deems either necessary or desirable.

Signs:

In the event this loan is for the purpose of providing financing for a building or other major improvements to be constructed on the Property, the Credit Union shall have the right to require a sign or signs supplied by it to be erected and maintained by you on the Property in a location acceptable to the Credit Union, which sign or signs shall indicate that the Credit Union has provided financing for the Property.

Environmental Representations:

As set out in the security documentation.

Mandatory Membership:

Membership with the Credit Union requires that every Borrower invest a minimum of $1.00 in Common Shares of the Credit Union and such ownership and membership must be maintained so long as there are any monies and obligations outstanding by the Borrower to the Credit Union.

Amendment:

Any amendment to this Commitment Letter or security documents must be in writing and signed by the Borrower (s), Guarantor (s), and the Credit Union.

Assignment:

The Borrower understands and acknowledges that, after the occurrence of an Event of Default which is continuing, the Credit Union shall have the unrestricted right to sell or assign the Credit Facilities or any loan thereunder, and/or the security documents (including this Commitment Letter) or any parts thereof to a third party of its choice. The Borrower consents to the disclosure by the Credit Union to any such assignee and its agents of personal information of the undersigned relating to the Credit Facilities, and/or the security documents (including this Commitment Letter) or any parts thereof and consents to the collection and use of such personal information by such assignee and its agents. The Borrower also consents to the collection and use of said personal information by third parties involved in the assignment or sale of the Credit Facilities and the further disclosure of such information to the third parties' agents and assignees and those parties' subsequent collection and use of the information, in each case, for the purpose of the ongoing management of the Credit Facilities.

Governing Law:

This Commitment Letter constituted by your acceptance shall be governed by the laws of the Province of Alberta.

Headings:

The headings contained in this letter are for reference only and shall not constitute any part of the terms and conditions contained herein.

Payments:

Unless otherwise directed and agreed to by the Credit Union all amounts payable by the Borrower hereunder shall be paid to the Credit Union at its Commercial Banking Office/Branch, 2720, 700 – 9th Avenue SW, Calgary, Alberta T2P 3V4, in Canadian dollars.

Successors and Assigns:

Subject to the provisions hereof, this Commitment Letter shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns.

Severability:

Each provision of this Commitment Letter is severable and any term or provisions hereby declared to the contrary to, prohibited by, or invalid under applicable laws or regulations shall be inapplicable and deemed omitted herefrom, but shall not invalidate the remaining terms and provisions hereof.

Conflict:

The terms and conditions of this Commitment Letter shall not be merged by and shall survive the execution, delivery and registration of any and all security documents. In the event of a conflict between the terms of this Commitment Letter and the terms of any security document, the terms of this Commitment Letter shall prevail. For clarity, the mention of a provision in either the Commitment Letter and not in the Security or vice versa shall not constitute a conflict but shall be deemed to be supplemental and in addition to any of the terms and conditions available under either the Credit Facilities or the Security as the case may be.

Time:

Time shall in all respects be of the essence hereof.

Waiver:

No terms or requirement of this Commitment Letter or any security documents may be waived or varied orally or by any course of conduct or any officer, employee, or agent of the Credit Union. Any failure by the Credit Union to exercise any rights or remedies hereunder or under any of the Security shall not constitute a waiver thereof.

TAB 16

I hereby certify this to be a true copy of
the original AMENDED AND RESTATED INITIAL ORDER
Dated this 29th day of July, 2024
Stephanie Beaumont
for Clerk of the Court

Clerk's stamp
JUDICIAL CENTRE OF CALGARY
FILED
Jul 29, 2024
by Email
CLERK OF THE COURT
SB

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
APPLICANTS	DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 LIFESTYLE CANNABIS CLINIC INC. and DELTA 9 CANNABIS STORE INC.
DOCUMENT	**AMENDED AND RESTATED INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MLT AIKINS LLP** Barristers and Solicitors #2100 – 222 3rd Ave SW Calgary, AB T2P 0B4 Attention: Ryan Zahara / Kaitlin Ward Telephone: (403) 693-5420 / 4311 Email: rzahara@mltaikins.com / kward@mltaikins.com File No. 0136555.00034

DATE ON WHICH ORDER WAS PRONOUNCED:	**JULY 24, 2024**
LOCATION WHERE ORDER WAS PRONOUNCED:	**EDMONTON, ALBERTA**
NAME OF JUSTICE WHO MADE THIS ORDER:	**THE HONOURABLE ASSOCIATE CHIEF JUSTICE K.G. NIELSEN**

UPON the application (the "**Comeback Application**") of Delta 9 Cannabis Inc. ("**D9 Parent**"), Delta 9 Logistics Inc. ("**Logistics**"), Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Lifestyle**"), and Delta 9 Cannabis Store Inc. ("**Store**", and collectively with D9 Parent, Logistics, Bio-Tech, and Lifestyle, the "**Applicants**" or "**Delta 9**") for, among other things, an Amended and Restated Order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"); **AND UPON** having read the Comeback

Application filed on July 19, 2024, the First Affidavit of John Arbuthnot IV, sworn on July 12, 2024 and filed on July 15, 2024 (the "**First Arbuthnot Affidavit**"), the Second Affidavit of John Arbuthnot IV sworn and filed on July 18, 2024 (the "**Second Arbuthnot Affidavit**"), the Second Supplemental Affidavit of John Arbuthnot IV, sworn and filed on July 22, 2024, the Affidavit of Mark Townsend sworn on July 19, 2024 and filed on July 22, 2024, the Confidential Affidavit of Danielle Christiansen sworn on July 24, 2024 (the "**Confidential Affidavit**") and the Affidavit of Service of Regie Agcaoili sworn July 23, 2024; **AND UPON** having read the First Report of the monitor, Alvarez & Marsal Canada Inc. (the "**Monitor**"), dated July 22, 2024 and the Confidential Appendices appended thereto, and the Bench Brief of the Applicants, filed on July 22, 2024;

AND UPON being advised that the initial order (the "**Initial Order**") was granted on July 15, 2024 (the "**Initial Order Date**") by the Honourable Justice D.R. Mah; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this Comeback Application; **AND UPON** hearing counsel for the Applicants, counsel for Monitor, counsel for 2759054 Ontario Inc., o/a Fika Herbal Goods (the "**Plan Sponsor**" or "**Interim Lender**"), counsel for SNDL Inc., and counsel for any other parties present; **IT IS HEREBY ORDERED AND DECLARED THAT**:

DEFINED TERMS

1. Any capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the First Arbuthnot Affidavit or the Second Arbuthnot Affidavit.

SERVICE

2. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

3. The Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

4. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

   (d) be entitled to continue to utilize the central cash management system currently in place as described in the First Arbuthnot Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after the Initial Order Date:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the Initial Order Date, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the Initial Order Date;

(c) with the consent of the Monitor and in accordance with the Cash Flow Forecast, for goods and services, supplied to the Applicants, including for periods prior to the Initial Order Date if, in the opinion of the Applicants following consultation with the Monitor, the supplier or vendor of such goods or services is necessary for the operation or preservation of the Business or Property; and

(d) pursuant to the Interim Financing Term Sheet (defined below), the amount required to pay SNDL Inc. ("**SNDL**") in full for the SNDL Mezzanine Debt (as defined in the Second Arbuthnot Affidavit) within 10 business days of the issuance of this Order and upon the Monitor confirming: (i) the quantum of the SNDL Mezzanine Debt; and (ii) the security granted in favour of SNDL in respect of the SNDL Mezzanine Debt is valid and enforceable. The Interim Lender is hereby authorized to pay out the confirmed amount of the SNDL Mezzanine Debt directly to SNDL on behalf of the Applicants.

7. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after the Initial Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the Initial Order Date.

8. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any payroll remittances in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be remitted in respect of employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iv) income taxes,

but only where such remittance obligations arise after the Initial Order Date, or are not required to be remitted until after the Initial Order Date, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the Initial Order Date, or where such Sales Taxes were accrued or collected prior to the Initial Order Date but not required to be remitted until on or after the Initial Order Date; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants.

9. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the Initial Order Date ("**Rent**"), but shall not pay any rent in arrears.

10. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the Initial Order Date, except for the payment to SNDL directed pursuant to paragraph 5(c) of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. The Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 34), have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $50,000 in any one transaction or $500,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deems appropriate, in accordance with section 32 of the CCAA; and

(d) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicantss, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including September 15, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**")

shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

    (e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment.

16. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the Initial Order Date are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Initial Order Date, nor shall any person, other than the Plan Sponsor where applicable, be under any obligation on or after the Initial Order Date to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any

of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the Initial Order Date and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court. Further, no Proceeding may be commenced or continued against John Arbuthnot IV in respect of his personal obligations in respect of amounts owed by the Applicants during the pendency of the Stay Period.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

22. The directors and officers (collectively, the "**Directors**") of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $900,000, as security for the indemnity provided in paragraph 21 of this Order and the professional fees and disbursements incurred both before and after the granting of this Order for the Directors' legal counsel incurred in respect of the within CCAA proceedings. The Directors' Charge shall have the priority set out in paragraphs 51 and 53 herein.

23. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

    (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

24. Alvarez & Marsal Canada Inc. (the "**Monitor**") is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in its dissemination to the Interim Lender and its counsel on a bi-weekly basis of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than bi-weekly, or as otherwise agreed to by the Interim Lender;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

26. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

27. The Monitor shall provide any creditor of the Applicants and the Plan Sponsor with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants

is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

28. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

29. The Monitor, counsel to the Monitor, counsel to the Applicants and counsel to the Plan Sponsor shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and counsel to the Plan Sponsor on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, counsel to the Applicants, and counsel to the Directors', retainers in the respective amounts of $50,000, to be held by each of them as security for payment of their respective fees and disbursements outstanding from time to time.

30. The Monitor and its legal counsel shall pass their accounts from time to time.

31. The Monitor, counsel to the Monitor, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of **$750,000.00**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the Initial Order Date in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 51 and 53 hereof.

INTERIM FINANCING

32. The Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from the Interim Lender in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided

that borrowings under such credit facility shall not exceed the principal amount of $16,000,000.00 unless permitted by further order of this Court.

33. Such credit facility shall be on the terms and subject to the conditions set forth in the interim financing term sheet between the Applicants and the Inteirm Lender dated as of July 18, 2024 (the "**Interim Financing Term Sheet**"), appended to the Second Arbuthnot Affidavit at Exhibit "2".

34. The Applicants are hereby authorized and empowered to execute the Interim Financing Term Sheet and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Interim Financing Term Sheet or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Interim Financing Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Financing Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Interim Financing Term Sheet or the Definitive Documents, plus all accrued interest, fees and costs, as appliable, under the Interim Financing Term Sheet. The Interim Financing Charge shall not secure any obligation existing before this the date this Order is made. The Interim Financing Charge shall have the priority set out in paragraphs 51 and 53 hereof.

36. Notwithstanding any other provision of this Order:

    (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Financing Charge or any of the Definitive Documents;

    (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Financing Charge, the Interim Lender, upon 3 days' notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies

against the Applicants or the Property under or pursuant to the Interim Financing Term Sheet, Definitive Documents, and the Interim Financing Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Interim Financing Term Sheet, the Definitive Documents or the Interim Financing Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

37. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

KEY EMPLOYEE RETENTION PLAN

38. The Key Employee Retention Plan (the "**KERP**"), as described in the Second Arbuthnot Affidavit and appended in unredacted form to the Confidential Affidavit, is hereby approved and the Applicants are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

39. Payments by the Applicants pursuant to the KERP do not and shall not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

40. The key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted a charge on the Property, which charge shall not exceed an aggregate amount of $655,000 (the "**KERP Charge**"), as security for amounts payable to the Key Employees pursuant to the KERP. The KERP Charge shall have the priority set out in paragraphs 51 and 53 hereof.

APPOINTMENT OF CHIEF RESTRUCTURING OFFICER

41. Mark Townsend is hereby appointed as the Chief Restructuring Officer ("**CRO**") over and in respect of the Applicants and shall have the powers and obligations set out in the engagement agreement between the Applicants and 1198184 B.C. Ltd., dated July 18, 2024 (the "**CRO Agreement**") as appended in the Confidential Affidavit.

42. The CRO Agreement is hereby approved, subject to such minor amendments as the parties may agree to with the Monitor's consent, and the Applicants are hereby authorized and directed to perform all of their obligations pursuant to the CRO Agreement.

43. Subject to the terms of this Order and authorization from the Applicants, the CRO is hereby authorized to assist the Applicants and to do all things, carry out all actions and perform all duties described in the CRO Agreement, and without limiting the generality of the foregoing, the CRO is hereby empowered to do the following:

    (a) assist the Applicants with the Restructuring (as defined in the CRO Agreement);

    (b) communicate with and provide information to the Monitor and other professionals involved in the Restructuring regarding the business and affairs of the Applicants;

    (c) assist the Applicants in managing and providing information to, and serving as a contact with, the Applicants' stakeholders;

    (d) assist the Applicants in preparing and evaluating their projected cash flow statements and approving the same, in accordance with the terms of the Interim Financing Term Sheet and the Restructuring Term Sheet (collectively, the "**Term Sheets**");

    (e) assist with the proposed plan of arrangement in accordance with the terms of the Term Sheets and the applicable orders of this Court, and any potential sale and investment solicitation process in connection with these proceedings;

    (f) assist the Applicants with any deliverables owed to the Plan Sponsor pursuant to the Term Sheets;

    (g) assist with these proceedings on the Applicants' behalf, including dealing with the administration of financing, any insolvency-related claims and other related matters;

(h) deal with the key stakeholders in these proceedings, including employees, lenders, vendors and suppliers;

(i) participate in the Applicants' respective management and executive teams;

(j) review all of the Applicants' planned disbursements during the Stay Period as prepared by the Applicants' officers and accounting departments; and

(k) such other services as requested or directed by the Applicants' management, which services are subject to approval and agreement and not duplicative of work otherwise performed by the Applicants,

provided that each of the foregoing actions, agreements, expenses and obligations shall be construed to be those of the Applicants and not of the CRO nor any of his employees, representatives or agents.

44. In addition to the rights and protections afforded to the CRO by this Court, the CRO shall not be deemed to be a director, officer or trustee of the Applicants.

45. The CRO shall not take possession of the Property and shall not, by fulfilling his obligations hereunder, be deemed to have taken or maintained possession or control of the Business or the Property, or any part thereof.

46. In addition to the rights and protections afforded to the CRO by this Court, the CRO shall not incur any liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save an except for any liability or obligation incurred as a result of the CRO's gross negligence or wilful misconduct.

47. No action or other proceeding shall be commenced directly, or by way of counterclaim, third party claim or otherwise, against or in respect of the CRO, and all rights and remedies of any Person against or in respect of the CRO are hereby stayed and suspended, except with: (i) written consent of the CRO and the Monitor; or (ii) leave of this Court. Notice of any such application seeking leave of this Court shall be served upon the CRO and the Monitor at least seven (7) days prior to the return date of any such application for leave.

48. The CRO's fees shall be secured by the Interim Financing Charge provided for herein.

PLAN SPONSOR PROTECTION CHARGE

49. Pursuant to the provisions of the Restructuring Term Sheet (as defined in the Second Arbuthnot Affidavit), the Plan Sponsor shall receive a break fee of $1,500,000.00 (the "**Break Fee**") that shall become due and payable immediately upon the occurrence of the following events: (i) the Court approves any plan of compromise or arrangement or any other transaction that would have the effect of precluding the consummation of the Acquisition Transaction (as defined in the Restructuring Term Sheet); or (ii) the Applicants otherwise enter into any agreement that would have the effect of precluding the consummation of the Acquisition Transaction.

50. The Plan Sponsor is entitled to the benefit of, and is hereby granted, a charge (the "**Plan Sponsor Protection Charge**") on the Property, which charge shall not exceed an aggregate amount of $1,500,000 as security for the amounts payable by way of the Break Fee. The Plan Sponsor Protection Charge shall have the validity and priority set out in paragraphs 51 and 53.

VALIDITY AND PRIORITY OF CHARGES

51. The priorities of the Directors' Charge, the Administration Charge, the Interim Financing Charge, the KERP Charge and the Plan Sponsor Protection Charge as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $750,000);

Second – Directors' Charge (to the maximum amount of $900,000);

Third – KERP Charge (to the maximum amount of $655,000);

Fourth – Interim Financing Charge (to the maximum amount set out in paragraph 35); and

Fifth – Plan Sponsor Protection Charge (to the maximum amount of $1,500,000).

52. The filing, registration or perfection of the Administration Charge, the Directors' Charge, the KERP Charge, the Interim Financing Charge, and the Plan Sponsor Protection Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

53. Each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA, such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, provided, however, that: (i) the registrations in favour of SNDL for only the CFCU Loan and the CFCU Outstanding Indebtedness (both as defined in the First Arbuthnot Affidavit) shall rank in priority to the KERP Charge, the Interim Financing Charge and the Plan Sponsor Protection Charge; and (ii) all other registrations in favour of SNDL shall rank in priority to the Interim Financing Charge and the Plan Sponsor Protection Charge, but will remain subordinate to the Administration Charge, the Directors' Charge and the KERP Charge.

54. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the Monitor, the Plan Sponsor, and the beneficiaries of the Administration Charge, Directors' Charge or KERP Charge or further order of this Court.

55. The Charges, the Interim Financing Term Sheet and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Plan Sponsor thereunder shall not otherwise be limited or impaired in any way by:

    (a) the pendency of these proceedings and the declarations of insolvency made in this Order;

    (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;

    (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

    (d) the provisions of any federal or provincial statutes; or

    (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement

(collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof including the Interim Financing Term Sheet or the Definitive Documents shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party;

(ii) none of the Chargees or the Plan Sponsor shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Applicants entering into the Interim Financing Term Sheet or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this Order, including the Interim Financing Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

56. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets comprising the Property.

CORPORATE MATTERS

57. The Applicants are hereby relieved of any obligation to call and hold an annual meeting of their shareholders until further Order of this Court.

RELIEF FROM SECURITIES REPORTING AND FILING OBLIGATIONS

58. D9 Parent is hereby directed to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "**Securities Filings**") that may be required by any federal, provincial or other law

respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, *The Securities Act* (Manitoba), CCSM c S50 and comparable statutes enacted by other provinces of Canada, the CSE Policies 1-10 and other rules, regulations and policies of the Canadian Securities Exchange and the Toronto Stock Exchange (collectively, the "**Securities Provisions**"), is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of D9 Parent failing to make any Securities Filings required by the Securities Provisions

59. None of the directors, officers, employees, and other representatives of D9 Parent, nor the Monitor, shall have any personal liability for any failure by D9 Parent to make any Securities Filings required by the Securities Provisions.

SERVICE AND NOTICE

60. The Monitor shall, if not already completed pursuant to the Initial Order: (i) without delay, publish in Insolvency Insider, *The Globe and Mail*, the *Calgary Herald,* and the *Winnipeg Free Press* a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

61. The Monitor shall establish a case website in respect of the within proceedings at: www.alvarezandmarsal.com/delta9.

62. The Applicants and the Monitor are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, recorded mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent

by ordinary mail or recorded mail, on the seventh day after mailing. Any person that wishes to be served with any application and other materials in these proceedings must deliver to the Applicants or the Monitor by way of ordinary mail, courier, or electronic transmission, a request to be added to the service list (the "**Service List**") to be maintained by the Monitor.

63. Any party to these proceedings may serve any court materials in these proceeding by emailing a PDF or other electronic copy of such materials to counsel's email addresses as recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on the Monitor's website.

64. The Applicants and, where applicable, the Monitor, are at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by sending true copies thereof by prepaid ordinary mail, recorded mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses last shown on the records of the Appilcants, or as otherwise updated on the Service List.

GENERAL

65. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

66. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

67. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

68. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative

bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

69. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

70. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

71. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

The Honourable Associate Chief Justice K.G Nielsen
Justice of the Court of King's Bench of Alberta
July 26, 2024

TAB 17

FORM 4
Notice by Debtor Company to Disclaim or Resiliate an Agreement
(Section 32 of the *Companies' Creditors Arrangement Act* (Canada))

To: Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed monitor and not in its corporate or personal capacity (the "**Monitor**")

And to: SNDL Inc.

TAKE NOTICE THAT:

1. Proceedings under the *Companies' Creditors Arrangement Act* (the "**Act**") in respect of Delta 9 Logistics Inc. (the "**Debtor Company**"), among other parties, were commenced on the 15th day of July 2024.

2. In accordance with subsection 32(1) of the Act, the Debtor Company gives you notice of its intention to disclaim or resiliate the following agreement:

   Delivery Services Agreement commenced on August 31, 2023, by and between SNDL Inc., as Producer, and the Debtor Company, as the Service Provider

   (the "**Agreement**").

3. In accordance with subsection 32(2) of the Act, any party to the Agreement may, within 15 days after the day on which this notice is given and with notice to the other parties to the Agreement and to the Monitor, apply to the Court for an order that the Agreement is not to be disclaimed or resiliated.

4. In accordance with paragraph 32(5)(a) of the Act, if no application for an order is made in accordance with subsection 32(2) of the Act, the Agreement is disclaimed or resiliated on the 29 day of September, 2024 being 30 days after the day on which this notice has been given.

Dated at Winnipeg, Manitoba, on August 30, 2024.

John Arbuthnot

Delta 9 Logistics Inc.

The Monitor approves the proposed disclaimer or resiliation.

Dated at Calgary, Alberta, on August 26, 2024.

Alvarez & Marsal Canada Inc., in its capacity as Monitor of Delta 9 Logistics Inc., and not in its personal or corporate capacity

CCAA Form 4 Disclaimer - SNDL Inc. - Delta 9 Logistics Inc.

Final Audit Report 2024-08-30

Created:	2024-08-29
By:	Regie Agcaoili (ragcaoili@mltaikins.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAPg1QB9C5koGbVRfbAK-EZr2ji4lf67Fi

"CCAA Form 4 Disclaimer - SNDL Inc. - Delta 9 Logistics Inc." History

Document created by Regie Agcaoili (ragcaoili@mltaikins.com)
2024-08-29 - 8:50:06 PM GMT

Document emailed to john.arbuthnot@delta9.ca for signature
2024-08-29 - 8:50:31 PM GMT

Email viewed by john.arbuthnot@delta9.ca
2024-08-30 - 5:55:01 PM GMT

Signer john.arbuthnot@delta9.ca entered name at signing as John Arbuthnot
2024-08-30 - 5:55:18 PM GMT

Document e-signed by John Arbuthnot (john.arbuthnot@delta9.ca)
Signature Date: 2024-08-30 - 5:55:20 PM GMT - Time Source: server

Agreement completed.
2024-08-30 - 5:55:20 PM GMT

TAB 18

SCHEDULE "1"

Plan of Compromise or Arrangement

See attached.

Clerk's stamp:

COURT FILE NUMBER	2401-09688
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DELTA 9 CANNABIS INC., DELTA 9 LOGISTICS INC., DELTA 9 BIO-TECH INC., DELTA 9 CANNABIS STORE INC., and DELTA 9 LIFESTYLE CANNABIS CLINIC INC.
DOCUMENT	**PLAN OF COMPROMISE OR ARRANGEMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**MILLER THOMSON LLP** Suite 5800, 40 King Street West Toronto, Ontario M5H 3S1 43rd Floor, 525 – 8th Avenue SW Calgary, Alberta T2P 1G1 Attention: Larry Ellis / James Reid Telephone: (416) 597-4311 / (403) 298-2418 Email: lellis@millerthomson.com / jwreid@millerthomson.com

PLAN OF COMPROMISE OR ARRANGEMENT
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PLAN OF COMPROMISE OR ARRANGEMENT

WHEREAS:

A. Pursuant to the order of the Honourable Justice D.R. Mah of the Court of King's Bench of Alberta (the "**Court**") issued July 15, 2024 (as amended and restated on July 24, 2024, and as may be further amended and restated, the "**Initial Order**"), Delta 9 Cannabis Inc. ("**Delta Parent**"), Delta 9 Cannabis Store Inc. ("**Delta Retail**"), Delta 9 Lifestyle Cannabis Clinic Inc. ("**Delta Lifestyle**") and Delta 9 Logistics Inc. ("**Delta Logistics**", and together with Delta Parent, Delta Retail and Delta Lifestyle, the "**Applicants**") commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and Alvarez & Marsal Canada Inc. was appointed Monitor of the Applicants (in such capacity, the "**Monitor**") for the proceedings commenced by the Initial Order (the "**CCAA Proceedings**");

B. Delta 9 Bio-Tech Inc. ("**Bio-Tech**"), a wholly owned subsidiary of Delta Parent, is a licensed producer of cannabis and is subject to the CCAA Proceedings. Bio-Tech has generated losses of approximately $26 million over the past two years. On July 24, 2024, the Court issued an order approving, and authorizing the Monitor to conduct, a sales and investment solicitation process for the business and/or assets of Bio-Tech (the "**Bio-Tech-SISP**").

C. The Applicants and Bio-Tech are parties to a binding term sheet dated July 12, 2024, pursuant to which 2759054 Ontario Inc. o/a Fika Herbal Goods (the "**Plan Sponsor**") agreed to develop, submit and present a plan of compromise or arrangement to the Applicants' creditors for the purpose of, among other things, effecting a transaction whereby the Plan Sponsor would provide consideration of approximately $51,000,000 to the creditors and stakeholders of the Applicants and Bio-Tech and acquire 100% of the issued and outstanding equity of the Applicants, along with the proceeds of sale resulting from the monetization of Bio-Tech's business and/or assets (through the Bio-Tech SISP or in accordance with the terms set out herein).

D. The Plan Sponsor hereby proposes and presents this Plan to the Affected Creditors (as defined below) under and pursuant to the CCAA.

ARTICLE 1
INTERPRETATION

Section 1.1 Definitions

In this Plan, including the recitals herein, unless otherwise stated or unless the subject matter otherwise requires, all capitalized terms used shall have the meanings, and grammatical variations of such words and phrases shall have the corresponding meanings, set out below:

"**Administration Charge**" has the meaning set out in the Initial Order.

"**Administration Expenses**" has the meaning set out in Section 4.2.

"**Administrative Expense Reserve**" means an amount to be determined as between the Plan Sponsor and the Monitor, each acting reasonably.

"**Affected Claim**" means any Claim that is not an Unaffected Claim.

"**Affected Creditor**" means any Creditor of the Applicants with an Affected Claim, but only with respect to and to the extent of such Affected Claim.

"**Affected Creditor Class**" means the class consisting of the Affected Creditors established under and for the purposes of the Plan, including voting in respect thereof.

"**Allowed Affected Claims**" means any Affected Claim of a Creditor against the Applicants, or such portion thereof, that is not barred by any provision of the Claims Procedure Order and which has been finally accepted and allowed for the purposes of voting at the Meeting and receiving distributions under the Plan, in accordance with the provisions of the Claims Procedure Order or any other Final Order of the Court in the CCAA Proceedings.

"**Applicable Law**" means any law, statute, order, decree, judgment, rule, regulation, ordinance or other pronouncement having the effect of law whether in Canada or any other country, or any domestic or foreign state, county, province, city or other political subdivision of any Governmental Entity.

"**Applicants**" has the meaning set out in the recitals hereto.

"**Approval and Vesting Order**" means an order by the Court, substantially in the form attached hereto as Schedule "**C**", among other things: (a) approving and authorizing the Bio-Tech Transaction; (b) vesting in the Plan Sponsor all right, title and interest in and to the New Delta Parent Common Shares, free and clear from any Encumbrances; (c) cancelling all of the Existing Delta Parent Common Shares; and (d) seeking a release of the directors and officers of Bio-Tech.

"**Articles**" means the articles of incorporation of the Applicants and Bio-Tech, as applicable.

"**Assessments**" means Claims of His Majesty the King in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority.

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

"**Bio-Tech**" has the meaning set out in the recitals hereto.

"**Bio-Tech Certificate**" has the meaning set out in Section 10.4.

"**Bio-Tech Closing Date**" means the date of the closing and consummation of the Bio-Tech Transaction, being the date that the Monitor files the Bio-Tech Certificate in accordance with Section 10.4.

"**Bio-Tech Excess**" has the meaning set out in Section 10.5(c).

"**Bio-Tech Restructuring Steps Supplement**" has the meaning set out in Section 10.1(b).

"**Bio-Tech SISP**" has the meaning set out in the recitals hereto.

"**Bio-Tech Threshold**" means an amount equal to the outstanding indebtedness on Tranche 1 and Tranche 3 as of the date on which a Successful Bid closes, such amount being $23,592,036.25 as of July 31, 2024.

"**Bio-Tech Transaction**" has the meaning set out in Section 10.1.

"**Bio-Tech Transaction Effective Time**" means 12:01 a.m. (Calgary time) on the Bio-Tech Closing Date or such other time on such date as the Plan Sponsor may determine.

"**Business Day**" means a day on which banks are open for business in Calgary, Alberta but does not include a Saturday, Sunday or statutory holiday in the Province of Alberta.

"**Bylaws**" means the bylaws of the Applicants and Bio-Tech, as applicable.

"**Canadian Tax Act**" means the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended.

"**Cash Payment**" means the entitlement of an Eligible Voting Creditor to receive such Creditor's Pro-Rata Share of the Creditor Cash Pool.

"**CCAA**" has the meaning set out in the recitals hereto.

"**CCAA Proceedings**" has the meaning set out in the recitals hereto.

"**Charges**" means the Administration Charge, the Directors' Charge, the KERP Charge, the Interim Lender's Charge and the Plan Sponsor Protection Charge.

"**Claim**" means any or all Pre-Filing Claims, Restructuring Period Claims and D&O Claims, including any Claim arising through subrogation against any Applicant or any Director or Officer.

"**Claims Bar Date**" has the meaning provided for in the Claims Procedure Order.

"**Claims Procedure Order**" means the Order of the Court granted on July 24, 2024, establishing a claims procedure in respect of the Applicants, as same may be further amended, restated or varied from time to time.

"**Conditions Precedent**" has the meaning set out in Section 8.1.

"**Continuing Contract**" means a contract, arrangement, or other agreement (oral or written) for which a notice of disclaimer pursuant to section 32 of the CCAA has not been sent by any of the Applicants.

"**Convenience Amount**" means, in respect of any Allowed Affected Claim that is a Convenience Claim, the lesser of: (a) a cash amount equal to $4,000; and (b) the amount of such Allowed Affected Claim.

"**Convenience Claim**" means any Affected Claim that is equal to or less than $4,000, provided that: (a) any Claim denominated in a foreign currency will be converted to Canadian dollars at the Bank of Canada noon spot exchange rate (if available) or the spot exchange rate in effect on the Filing Date for the sole purpose of determining whether or not it is less than or equal to$4,000; (b) Creditors shall not be entitled to divide a Claim for the purpose of qualifying such Claim as a Convenience Claim; and (c) Creditors shall be permitted to make a Convenience Election to reduce the amount of their Allowed Affected Claim to $4,000 to qualify as a Convenience Claim and shall be deemed to have released and waived the balance of any such Allowed Affected Claim.

"**Convenience Creditor**" means an Affected Creditor having a Convenience Claim.

"**Convenience Election**" means an election made by an Affected Creditor with an Allowed Affected Claim greater than $4,000 by delivery of a duly completed and executed Convenience Election Notice to the Plan Sponsor, the Applicants and the Monitor by no later than the Convenience Election Deadline, electing to receive the Convenience Amount in full satisfaction of its Allowed Affected Claim.

"**Convenience Election Deadline**" has the meaning ascribed thereto in the Meeting Order.

"**Convenience Election Notice**" means a notice substantially in the form attached to the Meeting Order.

"**Court**" has the meaning set out in the recitals hereto.

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Claims Procedure Order or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person.

"**Creditor Cash Pool**" means the amount of $750,000.

"**Creditor Equity Pool**" means 270,270 Class "A" voting common shares in the capital of the Plan Sponsor.

"**CRO**" has the meaning set out in the Initial Order.

"**Crown Claims**" means any Claim of His Majesty in Right of Canada or any Governmental Entity of a kind that could be subject to demand under section 6(3) of the CCAA that were outstanding at the Filing Date and which have not been paid by the Retail Implementation Date.

"**D&O Claims**" means any or all Pre-Filing D&O Claims and Restructuring Period D&O Claims.

"**D&O Indemnity Claims**" means any existing or future right of any Director or Officer against any of the Applicants which arose or arises as a result of any D&O Claim for which such Director or Officer is entitled to be indemnified by any of the Applicants.

"**Delta Lifestyle**" has the meaning set out in the recitals hereto.

"**Delta Lifestyle Shares**" means all of the issued and outstanding shares of Delta Lifestyle that are owned by Bio-Tech and the Plan Sponsor.

"**Delta Logistics**" has the meaning set out in the recitals hereto.

"**Delta Logistics Shares**" means all of the issued and outstanding shares of Delta Logistics that are owned by Delta Parent.

"**Delta Parent**" has the meaning set out in the recitals hereto.

"**Delta Retail**" has the meaning set out in the recitals hereto.

"**Delta Retail Shares**" means all of the issued and outstanding shares of Delta Retail that are owned by Delta Parent.

"**Delta Retail Entities**" means, collectively, Delta Lifestyle, Delta Retail and Delta Logistics.

"**Disallowed Claims**" means any Claim of a Creditor against the Applicants, or such portion thereof, that has been barred or finally disallowed in accordance with the Claims Procedure Order or any other Final Order of the Court in the CCAA Proceedings.

"**Directors**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Applicants.

"**Directors' Charge**" has the meaning set out in the Initial Order.

"**Disputed Claim**" means an Affected Claim (including a contingent Affected Claim that may crystallize upon the occurrence of an event or events occurring after the Filing Date) or such portion thereof which is not barred by any provision of the Claims Procedure Order, which has not been allowed as an Allowed Affected Claim, which is validly disputed for distribution purposes in accordance with the Claims Procedure Order and which remains subject to adjudication for distribution purposes in accordance with the Claims Procedure Order.

"**Eligible Voting Creditors**" means Affected Creditors with Allowed Affected Claims that are not Convenience Claims.

"**Employee**" means an individual who is employed by an Applicant, whether on a full-time or a part-time basis, and includes an employee on disability leave.

"**Employee Priority Claims**" means:

(a) Claims equal to the amounts that such Employees and former employees would have been entitled to receive under paragraph 136(l)(d) of the BIA if the Applicants had become bankrupt on the Filing Date; and

(b) Claims for wages, salaries, commissions or compensation for services rendered by such Employees and former employees after the Filing Date and on or before the Retail Implementation Date together with disbursements properly incurred by them in and about the Applicants' business during the same period.

"**Employment Agreements**" means, collectively, the employment agreements, the management compensation plans, and indemnification agreements of, or for the benefit of, the Directors, Officers, and employees of any of the Applicants that were in effect as at the Filing Date.

"**Encumbrance**" means any security interest, lien, claim, charge, hypothec, reservation of ownership, pledge, encumbrance, mortgage, adverse claim or right of a third party of any nature or kind whatsoever and any agreement, option or privilege (whether by law, contract or otherwise) capable of becoming any of the foregoing, (including any conditional sale or title retention agreement, or any capital or financing lease).

"**Equity Claims**" means any or all Claims that meet the definition of "equity claim" in section 2(1) of the CCAA.

"**Equity Claimant**" means any Person with an Equity Claim or holding Existing Equity, in such capacity.

"**Equity Interest**" has the meaning ascribed thereto in section 2(1) of the CCAA but, for certainty, does not include the Purchased Retail Common Shares or the New Delta Parent Common Shares.

"**Equity Payment**" means the entitlement of an Eligible Voting Creditor to receive such Creditor's Pro-Rata Share of the equity comprising the Creditor Equity Pool.

"**Existing Common Shareholders**" means all Persons holding Existing Delta Parent Common Shares immediately prior to the Retail Restructuring Effective Time.

"**Existing Delta Parent Common Shares**" means any and all common shares in the capital of Delta Parent that are duly issued and outstanding immediately prior to the Retail Restructuring Effective Time and, for certainty, do not include: (a) the New Delta Parent Common Shares; or (b) any other form of Existing Delta Parent Equity other than th**e** common shares in the capital of Delta Parent.

"**Existing Delta Parent Equity**" means: (a) all Existing Delta Parent Common Shares; (b) all other Equity Interests in Delta Parent, including all options, warrants, rights, or similar instruments, derived from, relating to, or exercisable, convertible, or exchangeable therefor; and (c) all instruments whose value is based upon or determined by reference to any Equity Interest in Delta Parent, whether or not such instrument is exercisable, convertible, or exchangeable for such an Equity Interest, and, in all such cases, which are issued and outstanding immediately prior to the Retail Restructuring Effective Time.

"**Existing Equity**" means, collectively, Existing Delta Parent Equity and Existing Retail Equity.

"**Existing Retail Equity**" means: (a) any and all common shares in the capital of the Delta Retail Entities that are duly issues and outstanding immediately prior to the Retail Restructuring Effective Time, save and except for the Purchased Retail Common Shares; (b) all other Equity Interests in the Delta Retail Entities, including all options, warrants, rights, or similar instruments, derived from, relating to, or exercisable, convertible, or exchangeable therefor; and (c) all instruments whose value is based upon or determined by reference to any Equity Interest in the Delta Retail Entities, whether or not such instrument is exercisable, convertible, or exchangeable for such an Equity Interest, and, in all such cases, which are issued and outstanding immediately prior to the Retail Restructuring Effective Time.

"**Filing Date**" means July 15, 2024.

"**Final Order**" means any order, ruling or judgment of the Court, or any other court of competent jurisdiction: (a) that is in full force and effect; (b) that has not been reversed, modified or vacated and is not subject to any stay; and (c) in respect of which all applicable appeal periods have expired and any appeals therefrom have been finally disposed of, leaving such order, ruling or judgment wholly operable.

"**Governmental Entity**" means any domestic or foreign government, whether federal, provincial, state, territorial or municipal; and any governmental agency, ministry, department, court (including the Court), tribunal, commission, stock exchange, bureau, board or other instrumentality exercising or purporting to exercise legislative, judicial, regulatory or administrative functions of, or pertaining to, government or securities market regulation.

"**Initial Order**" has the meaning set out in the recitals hereto.

"**Intercompany Claim**" means any claim that may be asserted against any of the Applicants by or on behalf of any other Applicant or any of their affiliated companies, partnerships, or other corporate entities.

"**Interim Lender's Charge**" has the meaning set out in the Initial Order.

"**KERP**" has the meaning set out in the Initial Order.

"**KERP Charge**" has the meaning set out in the Initial Order.

"**KERP Prepayment**" has the meaning set out in Section 5.5(d)(iv).

"**Licence Termination**" has the meaning set out in Section 10.1(a).

"**List of Claims**" has the meaning set out in the Meeting Order.

"**Material**" means a fact, circumstance, change, effect, matter, action, condition, event, occurrence or development that, individually or in the aggregate, is, or would reasonably be expected to be, material to the business, affairs, results of operations or financial condition of the Applicants, taken as a whole.

"**Meeting**" means a meeting of Affected Creditors to be held on the Meeting Date called for the purpose of considering and voting on the Plan pursuant to the CCAA, and includes any adjournment, postponement or other rescheduling of such meeting in accordance with the Meeting Order.

"**Meeting Date**" means the date on which the Meeting is held in accordance with the Meeting Order.

"**Meeting Order**" means the Order of the Court granted in these CCAA Proceedings, among other things, setting the date for the Meeting, as same may be amended, restated or varied from time to time, in form and substance satisfactory to the Plan Sponsor.

"**Monitor**" has the meaning set out in the recitals hereto.

"**Monitor's Website**" means www.AlvarezandMarsal.com/Delta9.

"**New Boards**" means the board of directors of the Delta Retail Entities, as applicable, to be appointed on the Retail Implementation Date, as determined by the Plan Sponsor in its sole discretion.

"**New Delta Parent Common Shares**" means the common shares issued by Delta Parent to the Plan Sponsor pursuant to Article 10 of the Plan and the Bio-Tech Restructuring Steps Supplement, which will constitute all of the issued and outstanding shares of Delta Parent from and after the Bio-Tech Transaction Effective Time.

"**Notice to Known Claimants**" means a notice that shall be referred to in the Claims Procedure Order, advising each known Creditor of its Claim against an Applicant as determined by the Monitor based on the books and records of the Applicants.

"**Officers**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Applicants, in such capacity.

"**Order**" means any order of the Court made in connection with the CCAA Proceeding.

"**Outside Date**" means January 31, 2025, or such later date as agreed to by the Applicants and the Plan Sponsor, with the consent of the Monitor.

"**Person**" means any individual, partnership, limited partnership, limited liability company, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, receiver, liquidator, monitor, executor, administrator or other legal personal representative, Governmental Authority or other entity however designated or constituted.

"**Plan**" means this Plan of Compromise or Arrangement filed by the Plan Sponsor pursuant to the CCAA, as it may be amended, supplemented or restated from time to time in accordance with the terms hereof.

"**Plan Implementation Fund**" has the meaning set out in Section 4.1.

"**Plan Sponsor**" has the meaning set out in the recitals hereto.

"**Plan Sponsor Protection Charge**" has the meaning set out in the Initial Order.

"**Post-Filing Claim**" means any or all indebtedness, liability, or obligation of the Applicants of any kind that arises during and in respect of the period commencing on the Filing Date and ending on the day immediately preceding the Retail Implementation Date in respect of services rendered or supplies provided to the Applicants during such period or under or in accordance with any Continuing Contract; provided that, for certainty, such amounts are not a Restructuring Period Claim or a Restructuring Period D&O Claim.

"**Pre-Filing Claim**" means any or all right or claim of any Person against any of the Applicants, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of any such Applicant to such Person, in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any right or claim with respect to any Assessment, or contract, or by reason of any Equity Interest, right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against any of the Applicants with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which right or claim, including in connection with indebtedness, liability or obligation, is based in whole or in part on facts that existed prior to the Filing Date, including for greater certainty any Equity Claim, any claim brought by any proposed or confirmed representative plaintiff on behalf of a class in a class action, and any D&O Indemnity Claim.

"**Pre-Filing D&O Claim**" means any or all right or claim of any Person against one or more of the Directors and/or Officers arising based in whole or in part on facts that existed prior to the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments, any claim brought by any proposed or confirmed representative plaintiff on behalf of a class in a class action, and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or arising or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer.

"**Pro-Rata Share**" means, as at any relevant date of determination, the percentage that each Eligible Voting Creditor's Allowed Affected Claim bears to the aggregate of all Allowed Affected Claims and Disputed Claims (for certainty, valued at the amounts asserted by the Affected Creditors holding such Disputed Claims).

"**Proof of Claim**" means the Proof of Claim referred to in the Claims Procedure Order to be filed by unknown Creditors.

"**Purchased Retail Common Shares**" means the Delta Lifestyle Shares, the Delta Retail Shares, and the Delta Logistics Shares, which will constitute all of the issued and outstanding shares of such entities from and after the Retail Restructuring Effective Time.

"**Qualifying Existing Common Shareholders**" means all Existing Common Shareholders holding 50,000 or more Existing Delta Parent Common Shares immediately prior to the Retail Restructuring Effective Time.

"**Qualifying Existing Common Shares**" means the Existing Delta Parent Common Shares held by the Qualifying Existing Common Shareholders that are duly issued and outstanding immediately prior to the Retail Restructuring Effective Time and, for certainty, do not include the New Delta Parent Common Shares.

"**Released Claims**" has the meaning set out in Section 9.2.

"**Released Parties**" means, collectively, and in their capacities as such: (a) the Applicants; (b) the past and current employees, legal and financial advisors, and other representatives of the Applicants; (c) the Directors and Officers; (d) the Monitor and its legal advisors; (e) the Plan Sponsor; and (f) any other Person who is the beneficiary of a release under the Plan.

"**Required Majority**" means a majority in number of Affected Creditors representing at least two thirds in value of the Allowed Affected Claims of Affected Creditors who are entitled to vote at the Meeting in accordance with the Meeting Order and who are present and voting in person or by proxy on the resolution approving the Plan at the Meeting.

"**Restructuring Period Claim**" means any or all right or claim of any Person against any of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever owed by any such Applicant to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by such Applicant on or after the Filing Date of any contract, lease or other agreement, whether written or oral, and including any right or claim with respect to any Assessment.

"**Restructuring Period D&O Claim**" means any or all right or claim of any Person against one or more of the Directors and/or Officers arising after the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or arising or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer.

"**Retail Implementation Date**" means the Business Day on which the Plan becomes effective in respect of the Retail Restructuring, which shall be the Business Day on which, pursuant to Section 8.3, the Plan Sponsor (or its counsel) delivers written notice to the Applicants (or their counsel) and the Monitor (or its counsel) that the Plan Sponsor Conditions Precedent set out in Section 8.1 have been satisfied or waived in accordance with the terms hereof.

"**Retail Restructuring**" means the restructuring contemplated by this Plan, whereby the Plan Sponsor will acquire 100% ownership of the Delta Retail Entities in accordance with the terms and conditions of this Plan, the Retail Restructuring Steps Supplement and the Sanction Order.

"**Retail Restructuring Effective Time**" means 12:01 a.m. (Calgary time) on the Retail Implementation Date or such other time on such date as the Plan Sponsor may determine.

"**Retail Restructuring Steps Supplement**" has the meaning set out in Section 6.2.

"**Sanction Order**" means an Order of the Court sanctioning and approving the Plan, as it may be amended by the Court, in form and substance satisfactory to the Plan Sponsor.

"**Secured Claim**" means any or all Claims of a "secured creditor" as defined in section 2(1) of the CCAA.

"**Shareholder Equity Pool**" means 135,135 Class "A" voting common shares in the capital of the Plan Sponsor.

"**SNDL**" means SNDL Inc.

"**SNDL Claim**" means all amounts owing by the Applicants and Bio-Tech to SNDL under the SNDL Credit Agreement, plus all accrued and outstanding pre-filing fees, costs, interest, or other amounts confirmed to be owing pursuant to the SNDL Credit Agreement pursuant to a Final Order or agreement between the Plan Sponsor and SNDL.

"**SNDL Credit Agreement**" means the Commitment Letter dated February 1, 2022 among Connect First Credit Union Ltd., as lender, Delta Parent, as borrower, and Bio-Tech, Delta Lifestyle and Delta Retail, as guarantors, pursuant to which Connect First Credit Union Ltd. made available to Delta Parent a commercial mortgage loan in the maximum principal amount of $23,000,000, a commercial mortgage loan in the maximum principal amount of $5,000,000, and an authorized overdraft facility in the maximum principal amount of $4,000,000; as assigned to SNDL on July 5, 2024.

"**SNDL Security**" means any and all security granted by the Applicants and Bio-Tech to secure the obligations existing under the SNDL Credit Agreement.

"**Stalking Horse Purchase Agreement**" means a stalking horse purchase agreement to be negotiated among the Applicants and the Plan Sponsor, to be settled no later than 15 days prior to the Meeting Date and to be attached hereto as Schedule "**D**".

"**Successful Bid**" has the meaning set out in the Bio-Tech SISP.

"**Termination Notice**" has the meaning set out in Section 10.1(b).

"**Tranche 1**" means the commercial mortgage loan in the maximum principal amount of $23,000,000 made by Connect First Credit Union Ltd. to Delta Parent pursuant to the SNDL Credit Agreement.

"**Tranche 3**" means the authorized overdraft facility in the maximum principal amount of $4,000,000 made by Connect First Credit Union Ltd. to Delta Parent pursuant to the SNDL Credit Agreement.

"**Unaffected Claims**" means any and all:

(a) Claims against Bio-Tech in accordance with Section 2.6;

(b) Post-Filing Claims;

(c) Crown Claims;

(d) Secured Claims;

(e) Claims secured by a Charge;

(f) Employee Priority Claims;

(g) Intercompany Claims, subject to Section 5.5(f);

(h) D&O Claims that cannot be compromised pursuant to the provisions of Section 5.1(2) of the CCAA; and

(i) Claims that cannot be compromised pursuant to the provisions of section 19(2) of the CCAA.

and for certainty, shall include any Unaffected Claim arising through subrogation.

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim.

"**Undeliverable Distribution**" has the meaning set out in Section 5.10.

"**Voting Trust**" means an equity voting trust to be established by the Plan Sponsor, into which the Creditor Equity Pool and Shareholder Equity Pool shall be deposited, held by the Voting Trustee, for the benefit of the Existing Common Shareholders and the Eligible Voting Creditors.

"**Voting Trustee**" means a Person agreed upon by the Applicants and the Plan Sponsor, to act as trustee of the Voting Trust.

"**Withholding Obligation**" has the meaning set out in Section 5.12.

Section 1.2 Interpretation Not Affected by Headings, etc.

The division of this Plan into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Plan.

Section 1.3 General Construction.

The terms "this Plan", "hereof", "herein" and "hereunder" and similar expressions refer to this Plan and not to any particular section hereof. The expression "Section" or reference to another subdivision followed by a number mean and refer to the specified Section or other subdivision of this Plan.

Section 1.4 Extended Meanings

Words importing the singular include the plural and vice versa and words importing gender include all genders. The term "including" means "including, without limitation," and such terms as "includes" have similar meanings.

Section 1.5 Currency

All references in this Plan to dollars, monetary amounts or to $ are expressed in the lawful currency of Canada unless otherwise specifically indicated.

Section 1.6 Statutes

Except as otherwise provided in this Plan, any reference in this Plan to a statute refers to such statute and all rules, regulations and interpretations made under it, as it or they may have been or may from time to time be modified, amended or re-enacted.

Section 1.7 Date and Time for any Action

For purposes of the Plan:

(a) in the event that any date on which any action is required to be taken under the Plan by any Person is not a Business Day, that action shall be required to be taken on the next succeeding day which is a Business Day, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day; and

(b) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day.

Section 1.8 Schedules

The following Schedules are incorporated in and form part of this Plan:

Schedule "**A**"	Retail Restructuring Steps Supplement
Schedule "**B**"	Bio-Tech Restructuring Steps Supplement
Schedule "**C**"	Approval and Vesting Order
Schedule "**D**"	Stalking Horse Purchase Agreement

ARTICLE 2
PURPOSE AND EFFECT OF PLAN

Section 2.1 Purpose

(a) The purpose of the Plan is to effect the Retail Restructuring on the Retail Implementation Date pursuant to the terms and conditions of this Plan and the Retail Restructuring Steps Supplement, and to:

(i) effect a compromise, settlement, release and discharge of all Affected Claims in exchange for distributions to Affected Creditors with Allowed Affected Claims;

(ii) facilitate the distribution of the Creditor Cash Pool and the Creditor Equity Pool to Affected Creditors with Allowed Affected Claims;

(iii) facilitate the distribution of the Shareholder Equity Pool to Existing Common Shareholders;

(iv) ensure the continuation of the operations of the Delta Retail Entities;

to ensure that Persons with a valid economic interest in the Applicants will, collectively, derive a greater benefit from the implementation of this Plan than they would derive from a bankruptcy or liquidation of the Applicants.

(b) The Plan also allows for the closing and consummation of the Bio-Tech Transaction on the Bio-Tech Closing Date, pursuant to the terms of Article 10 of this Plan, the Bio-Tech Restructuring Steps Supplement and the Approval and Vesting Order.

(c) The Monitor will report to Affected Creditors and the Court regarding the Plan prior to the date Affected Creditors are to vote on the Plan. Creditors wishing to review copies of Court orders and other materials filed in these proceedings, including copies of the Monitor's reports, are directed to the Monitor's Website.

(d) All Creditors should review this Plan and the Monitor's report on the Plan before voting to accept or to reject this Plan.

Section 2.2 Persons Affected

(a) The Plan provides for, among other things, the compromise, discharge and release of all Affected Claims, and the settlement of, and consideration for, all Allowed Affected Claims.

(b) The Retail Restructuring will become effective at the Retail Restructuring Effective Time on the Retail Implementation Date in accordance with the terms and conditions contained herein, and in the sequence set forth in the Retail Restructuring Steps Supplement, and shall be binding on and enure to the benefit of the Applicants, the Affected Creditors, the Plan Sponsor and all other Persons directly or indirectly named, referred to in, subject to, or receiving the benefit of, the Plan, and each of their respective heirs, executors, administrators, legal representatives, successors and assigns in accordance with the terms hereof.

Section 2.3 Persons Not Affected by the Plan

This Plan does not affect the Unaffected Creditors with respect to and to the extent of their Unaffected Claims. Nothing in this Plan shall affect the Applicants' rights and defences, both legal and equitable, with respect to any Unaffected Claims including all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

Section 2.4 Equity Claimants

(a) On the Retail Implementation Date, the Plan will be binding on all Equity Claimants, including the Existing Common Shareholders. Equity Claimants, including the Existing Common Shareholders, shall not be entitled to vote on the Plan in respect of their Equity Claims or Existing Equity or attend the Meeting.

(b) On the Retail Implementation Date, in accordance with the steps and sequences set forth in the Retail Restructuring Steps Supplement, all Existing Retail Equity (other than, for certainty, the Purchased Retail Common Shares purchased by the Plan Sponsor on the Retail Implementation Date in accordance with the Retail Restructuring Steps Supplement) shall be cancelled and extinguished and all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged and barred without any compensation of any kind whatsoever.

(c) From and after the Retail Implementation Date, the rights of Existing Common Shareholders shall be subject to the balance of the terms and provisions of this Plan and, for certainty, Existing Delta Parent Common Shares will be cancelled pursuant to the Bio-Tech Transaction and the Approval and Vesting Order.

Section 2.5 Treatment of Employment Agreements

Unless otherwise expressly required by the terms of this Plan or agreed to in writing by and between the Plan Sponsor and the applicable Employee (or Employees) affected by any change or modification, each of the Employment Agreements that have not been disclaimed prior to the Retail Implementation Date will remain in place from and after the Retail Implementation Date.

Section 2.6 Bio-Tech

As a result of the decision to sell or liquidate Bio-Tech, creditors of Bio-Tech shall not be considered Creditors for the purposes of this Plan, and shall not be entitled to vote on this Plan.

ARTICLE 3
CLASSIFICATION OF CREDITORS, VOTING AND TREATMENT OF CLAIMS

Section 3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims and for resolving Disputed Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA, the Plan and any further Order of the Court.

Section 3.2 Classification of Creditors

In accordance with the Meeting Order, for the purposes of considering and voting on the Plan and receiving a distribution hereunder, the Affected Creditors shall constitute one class of Creditors, being the Affected Creditors Class.

Section 3.3 Meeting

The Meeting shall be held in accordance with the Plan, the Meeting Order, the Claims Procedure Order and any further Order of the Court in the CCAA Proceedings. The only Persons entitled to attend the Meeting, are representatives of the Applicants, the Monitor, the Plan Sponsor and their respective legal counsel and advisors, and Eligible Voting Creditors or their respective duly appointed proxyholders and their respective legal counsel and advisors. Any other Person may be admitted on invitation of the chair of the Meeting or as permitted under the Meeting Order or any further Order of the Court.

Section 3.4 Voting

Pursuant to and in accordance with the Meeting Order, each of the following Creditors shall be entitled to vote on the Plan at the Meeting for the Affected Creditors Class:

(a) Convenience Creditors. Each Affected Creditor with an Allowed Affected Claim or a Disputed Claim that constitutes a Convenience Claim, including Affected Creditors that have made a Convenience Election, shall be deemed to vote in favour of the Plan.

(b) Affected Creditors Class. Each Affected Creditor with an Allowed Affected Claim that does not constitute a Convenience Claim shall be entitled to one vote for the purpose of determining a majority in number, in the amount equal to such Creditor's Allowed Affected Claim. For voting purposes only, the dollar value of an Allowed Affected Claim held by an Affected Creditor shall be:

(i) the amount shown as owing to such Affected Creditor as of the Filing Date (to the extent such amount continues to remain unpaid), as set out in the List of Claims;

(ii) if the Affected Creditor does not appear on the List of Claims, then the amount shown on the applicable Applicant's books and records as currently due or which but for the Plan would become due to such Affected Creditor as a Restructuring Period Claim as a result of the disclaimer or resiliation by an Applicant of any agreement to which such Applicant is a party, as applicable; or

(iii) the amount agreed to between such Affected Creditor and the Applicants, and consented to by the Monitor.

Section 3.5 Treatment of Affected Claims

An Affected Creditor shall receive distributions as set forth below only to the extent that such Affected Creditor's Claim is an Allowed Affected Claim and has not been paid, released, or otherwise satisfied prior to the Retail Implementation Date. In accordance with the steps and sequence set forth in the Retail Restructuring Steps Supplement, under the supervision of the Monitor, and in full and final satisfaction of all Affected Claims, each Affected Creditor with an Allowed Affected Claim will receive the following consideration:

(a) with respect to Affected Creditors with Allowed Affected Claims that constitute Convenience Claims, including Affected Creditors that have made a Convenience Election, each such Convenience Creditor shall receive a cash payment on the Retail Implementation Date equal to the Convenience Amount; and

(b) with respect to Affected Creditors with Allowed Affected Claims that do not constitute Convenience Claims, each such Eligible Voting Creditor shall receive a Cash Payment and an Equity Payment on the Retail Implementation Date.

All Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Retail Implementation Date.

Section 3.6 Treatment of Unaffected Claims

Unaffected Claims shall not be compromised, released, discharged, cancelled or barred by the Plan. Unaffected Creditors will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims, unless specifically provided for under and pursuant to the Plan, and they shall not be entitled to vote on the Plan at the Meeting in respect of their Unaffected Claims.

Section 3.7 Treatment of Intercompany Claims

On the Retail Implementation Date and in accordance with the steps and sequence as set forth herein, all Intercompany Claims shall be preserved or extinguished at the election of the Plan Sponsor. For certainty, if the Plan Sponsor elects to extinguish the Intercompany Claims, the structure for extinguishing such claims shall be at the discretion of the Plan Sponsor.

Section 3.8 Treatment of D&O Claims

All D&O Claims shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished and barred on the Retail Implementation Date. All D&O Indemnity Claims shall be treated

for all purposes under the Plan as Pre-Filing Claims and shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished and barred on the Retail Implementation Date. Any D&O Claims that cannot be compromised pursuant to the provisions of Section 5.1(2) of the CCAA shall constitute Unaffected Claims and shall continue to exist against the Directors or Officers of the Applicants, as applicable; provided that in no event shall such D&O Claims become obligations or liabilities of the Applicants, Bio-Tech or the Plan Sponsor.

Section 3.9 Treatment of SNDL Claim

As a Secured Claim, the SNDL Claim shall constitute an Unaffected Claim under the Plan. Subject to the terms and conditions of the Plan, from and after the Retail Implementation Date, the SNDL Claim shall constitute valid outstanding indebtedness of the Applicants, which shall be serviced in the ordinary course in accordance with the terms of the SNDL Credit Agreement. The SNDL Credit Agreement and the SNDL Security shall constitute Continuing Contracts which shall remain in place, unaffected by the implementation of the Plan. For certainty:

(a) The SNDL Security will remain valid and effective as against the Applicants and Bio-Tech, unaffected by the Plan in all respects, and shall be discharged upon the full and final satisfaction of the SNDL Claim.

(b) From and after the Retail Implementation Date, the Plan Sponsor will service the SNDL Claim in the ordinary course and in accordance with the terms of the SNDL Credit Agreement. The Plan Sponsor will keep the SNDL Credit Agreement in good standing and, if necessary, will provide a guarantee of the outstanding obligations of the Applicants and Bio-Tech under the SNDL Credit Agreement.

(c) The Plan Sponsor will execute such documents and other agreements as SNDL may reasonably require to acknowledge and confirm the continued validity of the SNDL Security following and notwithstanding the Retail Implementation Date.

(d) In the event that the Plan Sponsor acquires the assets and/or equity of Bio-Tech in accordance with Section 10 of this Plan, the SNDL Security will remain valid and effective against the assets of Bio-Tech following and notwithstanding the issuance of the Bio-Tech Certificate, and the Plan Sponsor agrees that it shall execute such documents and other agreements as SNDL may reasonably require to confirm the continued validity and enforceability of the SNDL Security.

Section 3.10 Disputed Claims

An Affected Creditor with a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of such Disputed Claim or any portion thereof unless and until, and then only to the extent that, such Disputed Claim becomes an Allowed Affected Claim in accordance with the Meeting Order and the Claims Procedure Order. Distributions pursuant to and in accordance with this Plan shall be paid or distributed in respect of any Disputed Claim that is finally determined to be an Allowed Affected Claim in accordance with this Plan and the Meeting Order.

Section 3.11 Extinguishment of Claims

On the Retail Implementation Date, in accordance with the terms and in the steps and sequence set forth in the Retail Restructuring Steps Supplement and in accordance with the provisions of the Sanction Order, the treatment of Affected Claims, as set forth herein, shall be final and binding on the Applicants and all

Affected Creditors (and, in each case, their respective heirs, executors, administrators, legal personal representatives, successors and assigns), and all Affected Claims shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred, and the Applicants shall thereupon have no further obligation whatsoever in respect of the Affected Claims; provided that nothing herein releases the Applicants or any other Person from their obligations to make distributions in the manner and to the extent provided for in the Plan and provided further that such discharge and release of the Applicants shall be without prejudice to the right of a Creditor in respect of a Disputed Claim to prove such Disputed Claim in accordance with the Claims Procedure Order so that such Disputed Claim may become an Allowed Affected Claim entitled to receive consideration under Section 3.5 hereof.

Section 3.12 Guarantees and Similar Covenants

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim that is compromised and released under the Plan, or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of a Claim that is compromised under the Plan, shall be entitled to any greater rights than the Person whose Claim is compromised under the Plan.

Section 3.13 Set-Off

The law of set-off applies to all Affected Claims.

ARTICLE 4
PLAN IMPLEMENTATION FUND; ADMINISTRATIVE EXPENSE RESERVE

Section 4.1 Plan Implementation Fund

On or prior to the Retail Implementation Date, the Plan Sponsor shall deliver, or cause to be delivered, to the Monitor, an amount equal to the Creditor Cash Pool, together with funding sufficient to satisfy the Allowed Affected Claims of Convenience Creditors (the "**Plan Implementation Fund**"). The Plan Implementation Fund shall be held by the Monitor in a segregated account of the Monitor, and shall be used by the Monitor to pay, on behalf of the Plan Sponsor and the Applicants, all amounts payable to Eligible Voting Creditors and Convenience Creditors under the Plan.

Section 4.2 Administrative Expense Reserve

On or prior to the Retail Implementation Date, the Plan Sponsor shall pay to the Monitor the Administrative Expense Reserve. From and after the Retail Implementation Date, the Monitor shall pay from the Administrative Expense Reserve, the reasonable and documented fees and disbursements (plus any applicable taxes thereon) for any post-Retail Implementation Date services incurred by the Applicants and Bio-Tech and their legal counsel, the CRO, the Monitor, its legal counsel, and any other Persons from time to time retained or engaged by the Monitor, in connection with administrative and estate matters (collectively, the "**Administration Expenses**"). Any unused portion of the Administrative Expense Reserve shall be transferred by the Monitor to the Plan Sponsor.

ARTICLE 5
DISTRIBUTIONS AND PAYMENTS

Section 5.1 Distributions Generally

All distributions to be effected pursuant to the Plan shall be made pursuant to this Article 5 and shall occur in the manner set forth herein. All cash distributions to be made under the Plan to Convenience Creditors

and Eligible Voting Creditors shall be made by the Monitor on behalf of the Plan Sponsor and the Applicants by cheque or by wire transfer and: (a) in the case of a cheque, will be sent, via regular mail, to such Creditor to the address specified in the Proof of Claim filed by such Creditor or such other address as the Creditor may from time to time notify the Monitor in writing in accordance with Section 11.9; or (b) in the case of a wire transfer, shall be sent to an account specified by such Creditor to the Monitor in writing to the satisfaction of the Monitor. Notwithstanding any other provision of the Plan, an Affected Creditor holding a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of any portion thereof unless and until such Disputed Claim becomes an Allowed Affected Claim.

Section 5.2 Distributions to Convenience Creditors

If the Plan is approved by the Required Majority of the Affected Creditor Class and the Sanction Order is granted by the Court, then the Monitor, on behalf of the Plan Sponsor and the Applicants, shall make a payment to each Convenience Creditor on the Retail Implementation Date equal to such Convenience Creditor's Convenience Amount, and such payment shall be in full consideration for the irrevocable, full and final compromise and satisfaction of such Convenience Creditor's Affected Claim.

Section 5.3 Distributions to Eligible Voting Creditors

If the Plan is approved by the Required Majority of the Affected Creditor Class and the Sanction Order is granted by the Court, then each Eligible Voting Creditor shall be entitled to receive their Cash Payment and Equity Payment on the Retail Implementation Date, and such distributions shall be in full consideration for the irrevocable, full and final compromise and satisfaction of such Affected Creditor's Affected Claim. All shares issued on account of Equity Payments will be deposited into the Voting Trust on the Retail Implementation Date.

Section 5.4 Distribution to Existing Common Shareholders; Shareholder Equity Pool

(a) In addition to the distributions described in Section 5.3, if this Plan is approved by the Required Majority of the Affected Creditor Class and the Sanction Order is granted by the Court, the Plan Sponsor shall establish the Shareholder Equity Pool, consisting of voting common shares in the capital of the Plan Sponsor with an aggregate value of $2,000,000 at a valuation that has been agreed to among the Applicants and the Plan Sponsor, with the approval of the Monitor.

(b) The equity comprising the Shareholder Equity Pool shall be distributed to the Qualifying Existing Common Shareholders in proportion to their holdings of Qualifying Existing Common Shares as of the Filing Date. All shares issued on account of the Shareholder Equity Pool will be deposited into the Voting Trust on the Retail Implementation Date. The Plan Sponsor and the Monitor shall be entitled to rely on the register maintained by the Applicants' transfer agent in determining the Qualifying Existing Common Shares held by Qualifying Existing Common Shareholders.

Section 5.5 Distributions, Payments and Settlements of Unaffected Claims

(a) Post-Filing Claims;

All Post-Filing Claims outstanding as of the Retail Implementation Date, if any, shall be paid by the applicable Applicant in the ordinary course consistent with past practice.

(b) Crown Claims;

On or as soon as reasonably practicable following the Retail Implementation Date, the applicable Applicant shall pay or cause to be paid in full all Crown Claims, if any, outstanding as at the Filing Date or related to the period ending on the Filing Date, to the applicable Governmental Entity.

(c) SNDL Claim;

All amounts owing to SNDL as of the Retail Implementation Date under or in connection with the SNDL Claim shall be paid by the Applicants in the ordinary course consistent with past practice and in accordance with the terms of the SNDL Credit Agreement.

(d) Claims secured by a Charge;

(i) Administration Charge

On the Retail Implementation Date, in accordance with the steps and sequences set forth in the Retail Restructuring Steps Supplement, all outstanding obligations, liabilities, fees, and disbursements secured by the Administration Charge which are evidenced by invoices of the beneficiaries thereof delivered to the Plan Sponsor as at the Retail Implementation Date, shall be fully paid by the Plan Sponsor. Following such payment, the Administration Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Delta Retail Entities and the Plan Implementation Fund, but shall continue to exist in respect of, and attach to any and all assets of, Delta Parent and Bio-Tech, to be released and discharged in accordance with the Bio-Tech Restructuring Steps Supplement. Following the Retail Implementation Date, Administrative Expenses shall be paid from the Administrative Expense Reserve.

(ii) Directors Charge

On the Retail Implementation Date, all D&O Claims shall be fully, finally, and irrevocably compromised, released, discharged, cancelled, extinguished, and barred in accordance with Article 9 and the Directors' Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Delta Retail Entities and the Plan Implementation Fund, but shall continue to exist in respect of, and attach to any and all assets of, Delta Parent and Bio-Tech, to be released and discharged in accordance with the Bio-Tech Restructuring Steps Supplement.

(iii) Interim Lender's Charge

On the Retail Implementation Date, all outstanding amounts secured by the Interim Lender's Charge shall remain in place, unaffected by the Plan, and the Interim Lenders' Charge shall be discharged from and against any and all assets of the Delta Retail Entities and the Plan Implementation Fund, but shall continue to exist in respect of, and attach to any and all assets of, Delta Parent and Bio-Tech, to be released and discharged in accordance with the Bio-Tech Restructuring Steps Supplement.

(iv) KERP Charge

On the Retail Implementation Date, the Plan Sponsor will pay the lesser of $655,000 and the maximum possible payment remaining pursuant to the KERP, to the Monitor, in trust (the "**KERP Prepayment**"), and following such payment the KERP Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Applicants, Bio-Tech and the Plan Implementation Fund. The Monitor shall, from the KERP Prepayment, make all KERP Payments, as defined in the KERP, upon such payments becoming due and payable under the KERP. Any unused portion of the KERP Prepayment shall be transferred by the Monitor to the Plan Sponsor.

(v) Plan Sponsor Protection Charge

Upon the Retail Implementation Date, the Plan Sponsor Protection Charge shall be and be deemed to be fully and finally satisfied and discharged from and against any and all assets of the Applicants, Bio-Tech and the Plan Implementation Fund.

(e) Employee Priority Claims

On the Retail Implementation Date, applicable Applicants shall pay or cause to be paid in full all Employee Priority Claims due and accrued to the Retail Implementation Date, to each holder of an Employee Priority Claim to the full amount of his, her, or their respective Employee Priority Claim.

(f) Intercompany Claims

On or prior to the Retail Implementation Date, Intercompany Claims shall be set-off, cancelled, maintained, re-instated, contributed or distributed, or otherwise addressed, in each case, as set forth on the books and records of, and/or in documents executed by, the applicable Applicant (provided that any such documents shall be in form and substance satisfactory to the Plan Sponsor, acting reasonably), and in accordance with the terms and in the steps and sequences set forth in the Retail Restructuring Steps Supplement, all of which, in the manner directed by the Plan Sponsor.

Section 5.6 Fractional Interests

No fractional interests of shares will be issued or allocated to Eligible Voting Creditors or Existing Common Shareholders on account of the Creditor Equity Pool or the Shareholder Equity Pool, and any legal, equitable, contractual and any other rights or claims of any Person with respect to any fractional interest shall be rounded down to the nearest whole number without compensation therefor.

Section 5.7 Cancellation of Instruments Evidencing Affected Claims

On the Retail Implementation Date, in accordance with the terms and in the steps and sequences set forth in the Retail Restructuring Steps Supplement, except as otherwise expressly provided for herein, all debentures, indentures, notes, certificates, agreements, invoices, guarantees, pledges and other instruments evidencing Affected Claims and Existing Retail Equity shall: (a) not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan; and (b) be cancelled and will be null and void (other than, for certainty, the Purchased Retail Common Shares). Notwithstanding the foregoing, the Continuing Contracts (including the SNDL Credit Agreement) shall continue in full force and effect in accordance with the terms hereof.

Section 5.8 Interest

Interest shall not accrue or be paid on Affected Claims on or after the Filing Date (other than interest accruing on the Secured Claim), and no holder of an Affected Claim shall be entitled to interest accruing on or after the Filing Date.

Section 5.9 Allocation of Distributions

All distributions made to Affected Creditors pursuant to the Plan shall be allocated first towards the repayment of the principal amount in respect of such Affected Creditor's Claim and second, if any, towards the repayment of all accrued but unpaid interest in respect of such Affected Creditor's Claim.

Section 5.10 Treatment of Undeliverable Distributions

If any Creditor's distribution under this Article 6 is returned as undeliverable or is not cashed (an "**Undeliverable Distribution**"), no further distributions to such Creditor shall be made unless and until the Applicants and the Monitor are notified by such Creditor of such Creditor's current address, at which time all past distributions shall be made to such Creditor. All claims for Undeliverable Distributions must be made on or before the date that is six months following the Retail Implementation Date, after which date any entitlement with respect to such Undeliverable Distribution shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any federal, state or provincial laws to the contrary, at which time any such Undeliverable Distributions shall be returned to the relevant Applicant. Nothing contained in the Plan shall require the Applicants or the Monitor to attempt to locate any Person to whom a distribution is payable. No interest is payable in respect of an Undeliverable Distribution.

Section 5.11 Assignment of Claims for Voting and Distribution Purposes

(a) Assignment of Claims Prior to Meeting

Subject to any restrictions contained in Applicable Laws, Affected Creditors may transfer or assign the whole of their Claims prior to the Meeting provided that the Applicants, the Plan Sponsor and the Monitor shall not be obliged to deal with any transferee or assignee as an Affected Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment has been given to the Applicants, the Plan Sponsor and the Monitor prior to the commencement of the Meeting. In the event of such notice of transfer or assignment prior to the Meeting, the transferee or assignee shall, for all purposes, be treated as the Affected Creditor of the assigned or transferred Claim, will be bound by any and all notices previously given to the transferor or assignor in respect of such Claim and shall be bound, in all respects, by any and all notices given and by the Orders of the Court in the CCAA Proceeding. For greater certainty, other than as described above, the Applicants shall not recognize partial transfers or assignments of Claims.

(b) Assignment of Claims Subsequent to Meeting

Subject to any restrictions contained in Applicable Laws, Affected Creditors may transfer or assign the whole of their Claims after the Meeting provided that the Applicants, the Plan Sponsor and the Monitor shall not be obliged to deal with any transferee or assignee as an Affected Creditor and the Monitor shall not be obliged to make any distributions to the transferee or assignee in respect thereof unless and until actual notice of the transfer or assignment, together with evidence of the transfer or assignment and a letter of direction executed by the transferor or assignor, all satisfactory to the Applicants, the Plan Sponsor and the Monitor, has been given to the Applicants, the Plan Sponsor and the Monitor by 5:00 p.m. on the day that is at least one (1) Business Day immediately prior to the Retail Implementation Date, or such other date as the Monitor may agree. Thereafter, the transferee or assignee shall, for all purposes, be treated as the Affected Creditor of the assigned or transferred Claim, will be bound by any notices previously given to the transferor or assignor in respect of such Claim and shall be bound, in all respects, by notices given and steps taken, and by the orders of the Court in the CCAA Proceedings.

Section 5.12 Withholding Rights

The Applicants, the Plan Sponsor and the Monitor shall be entitled to deduct and withhold consideration otherwise payable to an Affected Creditor in such amounts (a "**Withholding Obligation**") as the Applicants, the Plan Sponsor or Monitor, as the case may be, is required or entitled to deduct and withhold with respect to such payment under the Canadian Tax Act or any other provision of any Applicable Law. To the extent that amounts are so deducted or withheld and remitted to the applicable Governmental Entity

or as required by Applicable Law, such amounts deducted or withheld shall be treated for all purposes of the Plan as having been paid to such Person as the remainder of the payment in respect of which such withholding and deduction were made. For greater certainty, and notwithstanding any other provision of the Plan: (a) each Affected Creditor that is to receive a distribution pursuant to the Plan shall have sole and exclusive responsibility for the satisfaction and payment of any Withholding Obligations imposed by any Governmental Entity on account of such distribution; and (b) no consideration shall be paid to or on behalf of a holder of an Allowed Affected Claim pursuant to the Plan unless and until such Person has made arrangements satisfactory to the Applicants, the Plan Sponsor or the Monitor, as the case may be, for the payment and satisfaction of any Withholding Obligations imposed on the Applicants, the Plan Sponsor or the Monitor by any Governmental Entity.

ARTICLE 6
RETAIL RESTRUCTURING TRANSACTION

Section 6.1 Corporate Actions

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan in connection with the Retail Restructuring and involving corporate actions of the Applicants will occur and be effective as of the Retail Implementation Date (or such later date as may be contemplated by the Plan or the Retail Restructuring Steps Supplement), and shall be deemed to be authorized and approved under the Plan and by the Court as part of the Sanction Order in all respects and for all purposes without any requirement of further action by the shareholders, Directors or Officers of the Applicants. All necessary approvals to take such actions shall be deemed to have been obtained from the Directors, Officers or the shareholders of the Applicants, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and any shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the Plan shall be deemed to have no force or effect.

Section 6.2 Retail Implementation Date Transactions

The steps and compromises and releases to be effected in the implementation of the Plan shall occur, and be deemed to have occurred in the order and manner to be set out in Schedule "**A**", attached hereto (the "**Retail Restructuring Steps Supplement**") (which shall be finalized on or before the date that is 15 days prior to the Meeting Date). The Retail Restructuring Steps Supplement may be updated by the Plan Sponsor prior to the Retail Implementation Date in accordance with Section 11.3, without any further act or formality, provided that in no event will any revision to the Retail Restructuring Steps Supplement be materially prejudicial to the interests of any Creditors under the other sections of this Plan.

Section 6.3 Issuance Free and Clear

Any transfer or issuance of any securities or other consideration pursuant to the Plan, including the Purchased Retail Common Shares, will be free and clear of any Encumbrances, except as otherwise provided herein.

ARTICLE 7
COURT SANCTION

Section 7.1 Application for Sanction Order

If the Required Majority of Affected Creditors approves the Plan, the Applicants shall apply to the Court for the Sanction Order.

Section 7.2 Sanction Order

The Applicants shall seek a Sanction Order that is in form and substance satisfactory to the Plan Sponsor and, among other things:

(a) declares that the Meeting was duly called and held in accordance with the Meeting Order;

(b) declares that the Plan Sponsor was authorized to present the Plan;

(c) declares that: (i) the Plan has been approved by the Required Majority in conformity with the CCAA; (ii) the activities of the Applicants have been in good faith and in reasonable compliance with the provisions of the CCAA and the Orders of the Court made in this CCAA Proceedings in all respects; (iii) the Court is satisfied that the Applicants have not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the transactions contemplated thereby are fair and reasonable;

(d) declares that as of the Retail Restructuring Effective Time, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved pursuant to section 6 of the CCAA, binding and effective as herein set out upon and with respect to the Applicants, the Plan Sponsor, all Affected Creditors, the Directors and Officers and all other Persons named or referred to in or subject to the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(e) declares that the steps to be taken and the compromises and releases to be effective on the Retail Implementation Date are deemed to occur and be effected in the sequential order contemplated by the Retail Restructuring Steps Supplement on the Retail Implementation Date, beginning at the Retail Restructuring Effective Time;

(f) declares that the releases effected by this Plan shall be approved and declared to be binding and effective as of the Retail Implementation Date upon all Affected Creditors and all other Persons affected by this Plan and shall enure to the benefit of such Persons;

(g) declares that, except as provided in the Plan, all obligations, agreements or leases to which the Applicants are a party on the Retail Implementation Date, including all Continuing Contracts, shall be and remain in full force and effect, unamended, as at the Retail Implementation Date, except as they may have been amended by the parties thereto subsequent to the Filing Date, and no party to any such obligation or agreement shall on or following the Retail Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right (including any right of set-off, option, dilution or other remedy) or remedy under or in respect of any such obligation or agreement, by reason:

(i) of any event which occurred prior to, and is not continuing after, the Retail Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled such party to enforce those rights or remedies;

(ii) that the Applicants have sought or obtained relief or have taken steps as part of the Plan or under the CCAA, or that the Plan has been implemented;

(iii) of any default or event of default arising as a result of the financial condition or insolvency of the Applicants;

(iv) of the effect upon the Applicants of the completion of any of the transactions contemplated by the Plan, including any change of control of the Applicants arising from the implementation of the transactions contemplated by the Plan; or

(v) of any compromises, settlements, restructuring, recapitalizations, reorganizations or steps effected pursuant to the Plan;

and declares that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition agreement or obligation, provided that such agreement shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Applicants and the applicable Persons;

(h) authorizes the establishment of the Plan Implementation Fund with the Monitor and authorizes the Monitor to perform its functions and fulfil its obligations under the Plan and to facilitate the implementation of the Plan on and after the Retail Implementation Date, including matters relating to the Bio-Tech Transaction, resolution of the Disputed Claims, distributions and payments from the Plan Implementation Fund and the termination of the CCAA Proceedings;

(i) subject to payment of any amounts secured thereby, declares that each of the Charges shall be dealt with as set out in Section 5.5(d) effective on the Retail Implementation Date;

(j) declares all Allowed Affected Claims and Disallowed Claims determined in accordance with the Claims Procedure Order are final and binding on the Applicants and all Creditors and that all Encumbrances of Affected Creditors (other than Encumbrances in respect of Unaffected Claims), including all security registrations in respect thereof, are discharged and extinguished, and the Applicants or their counsel shall be authorized and permitted to file discharges and full terminations of all related filings (whether pursuant to personal property security legislation or otherwise) against the Applicants in any jurisdiction without any further action or consent required whatsoever;

(k) confirms the releases contemplated in Article 9;

(l) declares that the Plan Sponsor, the Applicants or the Monitor may apply to the Court for advice and direction in respect of any matters arising from or under the Plan; and

(m) such other relief which the Plan Sponsor, the Applicants or the Monitor may request.

ARTICLE 8
CONDITIONS PRECEDENT & IMPLEMENTATION

Section 8.1 Conditions Precedent to Retail Implementation in favour of Plan Sponsor

The implementation of the Plan shall be conditional upon the satisfaction of the following conditions (the "**Plan Sponsor Conditions Precedent**") prior to or at the Retail Restructuring Effective Time, each of which is for the benefit of the Plan Sponsor and may be waived only by the Plan Sponsor in writing:

(a) the Plan shall have been approved by the Required Majority in accordance with the CCAA;

(b) the Retail Restructuring Steps Supplement and the treatment of the Intercompany Claims pursuant to the Plan shall have been finally determined by the Plan Sponsor in its sole discretion;

(c) the Sanction Order shall have been issued by the Court on terms acceptable to the Plan Sponsor, and it shall have become a Final Order by a date acceptable to the Plan Sponsor;

(d) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Plan that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit) the Plan or any part thereof or requires or purports to require a variation of the Plan;

(e) all agreements, resolutions, documents, and other instruments, which are reasonably necessary to be executed and delivered by the Applicants in order to implement the Plan or perform their respective obligations under the Plan or the Sanction Order, shall have been executed and delivered, and shall be in form and in content satisfactory to the Plan Sponsor;

(f) all Material filings under Applicable Laws shall have been made and any regulatory consents or approvals that are required in connection with the Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated, and the Plan Sponsor shall be satisfied that the Applicants have the requisite approvals, permissions and authorizations to operate subsequent to the Retail Implementation Date and in accordance with the Plan; and

(g) the New Boards shall have been appointed.

Section 8.2 Conditions Precedent to Retail Implementation in favour of Applicants

The implementation of the Plan shall be conditional upon the satisfaction of the following conditions precedent (the "**Applicants' Conditions Precedent**" and together with the Plan Sponsor Conditions Precedent, collectively, the "**Conditions Precedent**") prior to or at the Retail Restructuring Effective Time, each of which is for the benefit of the Applicants and may be waived only by the Applicants in writing:

(a) the Plan shall have been approved by the Required Majority in accordance with the CCAA;

(b) the Sanction Order shall have been issued by the Court, and it shall have become a Final Order;

(c) the Plan Implementation Fund and Administrative Expense Reserve shall have been paid to the Monitor;

(d) the Voting Trust, Creditor Equity Pool and Shareholder Equity Pool shall have been established to the satisfaction of the Applicants and such shares shall be authorized for issuance on the Retail Implementation Date;

(e) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by

any Governmental Entity, in consequence of or in connection with the Plan that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit) the Plan or any part thereof or requires or purports to require a variation of the Plan;

(f) all agreements, resolutions, documents, and other instruments, which are reasonably necessary to be executed and delivered by the Plan Sponsor in order to implement the Plan or perform its respective obligations under the Plan or the Sanction Order, shall have been executed and delivered, and shall be in form and in content satisfactory to the Applicants; and

(g) all Material filings under Applicable Laws shall have been made and any regulatory consents or approvals that are required in connection with the Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated, and the Applicants shall be satisfied that the Applicants or Plan Sponsor, as applicable, each have the requisite approvals, permissions and authorizations to operate subsequent to the Retail Implementation Date and in accordance with the Plan.

Section 8.3 Failure to Satisfy Conditions Precedent

If the Conditions Precedent are not satisfied or waived on or before the Outside Date, or if the Plan Sponsor determines that the satisfaction of any Condition Precedent is not achievable, the applicable Party may provide written notice to the other Party and the Monitor that such Party is revoking or withdrawing the Plan and, upon delivery of such notice: (a) the Plan shall be null and void in all respects; (b) any settlement or compromise embodied in the Plan and any document or agreement executed pursuant to the Plan shall be deemed null and void; and (c) in the case that the Plan Sponsor is the revoking party, the Plan Sponsor and the Applicants shall execute the Stalking Horse Purchase Agreement and shall pursue a Court-supervised sale and investment solicitation process in respect of the Applicants.

Section 8.4 Monitor's Certificate

Upon delivery of written notice from the each Party of the satisfaction or waiver of the conditions set out in Section 8.1 and Section 8.2, the Monitor shall forthwith deliver to the Plan Sponsor and the Applicants a certificate stating that the Retail Implementation Date has occurred and that the Plan, as it relates to the Retail Restructuring, is effective in accordance with its terms and the terms of the Sanction Order. As soon as practicable following the Retail Implementation Date, the Monitor shall file such certificate with the Court.

ARTICLE 9
EFFECT OF PLAN; RELEASES

Section 9.1 Binding Effect of the Plan

The Plan (including, without limitation, the releases and injunctions contained herein), upon being sanctioned and approved by the Court pursuant to the Sanction Order, will become effective and binding at the Retail Restructuring Effective Time, and the sequence of steps set out in the Retail Restructuring Steps Supplement will be implemented, and the Plan will be binding on all Persons irrespective of the jurisdiction in which the Persons reside or in which the Claims arose and shall constitute:

(a) full, final and absolute settlement of all rights of any Affected Creditor; and

(b) an absolute release, extinguishment and discharge of all indebtedness, liabilities and obligations of the Applicants in respect of any Affected Creditor, except as otherwise provided herein.

Section 9.2 Released Parties

Subject to Section 9.3, in consideration of the distribution described herein to Affected Creditors, and other good and valuable consideration from the Applicants and the Plan Sponsor pursuant, or in relation, to this Plan, from and after the Retail Restructuring Effective Time, each of the Released Parties will be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Affected Creditors (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert, including any and all claims in respect of statutory liabilities of Directors and Officers other than as set out in Section 9.3 below, whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Retail Restructuring Effective Time or, with respect to the time of such matters, relating to, arising out of or in connection with any claim, including without limitation any claim arising out of: (i) the restructuring, disclaimer, resiliation, breach or termination of any contract, lease, agreement or other arrangement, whether written or oral, by the Applicants; (ii) the business of the Applicants; (iii) the Plan, including any transaction referenced in and relating to the Plan; and (iv) the CCAA Proceedings (collectively, the "**Released Claims**").

Except for those claims described in Section 9.3, from and after the Retail Restructuring Effective Time, in accordance with the steps and sequences set forth in the Retail Restructuring Steps Supplement, all Persons, along with their respective affiliates, present and former officers, directors, employees, partners, associated individuals, auditors, financial advisors, legal counsel, other professionals, sureties, insurers, indemnities, agents, dependents, heirs, representatives and assigns, as applicable, are permanently and forever barred, estopped, stayed, and enjoined, on and after the Retail Restructuring Effective Time, with respect to any and all Released Claims against the Released Parties, from:

(c) commencing, conducting or continuing in any manner, directly or indirectly, any action, claim, suit, demand or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties;

(d) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property;

(e) commencing, conducting or continuing in any manner, directly or indirectly, any action, claim, suit or demand, including without limitation by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim in any manner or forum, against one or more of the Released Parties;

(f) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Lien or Encumbrance of any kind against the Released Parties or their property; or

(g) taking any actions to interfere with the implementation or consummation of the Plan or the transactions contemplated therein.

All Persons who have previously commenced a Released Claim in any court, which has not been finally determined, discontinued or dismissed prior to the Retail Restructuring Effective Time shall, forthwith after the Retail Restructuring Effective Time take all steps necessary to discontinue or dismiss such Released Claim, without costs.

Section 9.3 Claims Not Released

For clarity, nothing in Sections Section 9.1 and 9.2 will release or discharge:

(a) the Applicants from or in respect of any Unaffected Claim or its obligations to Affected Creditors under the Plan or under any order of the Court made in the CCAA Proceedings;

(b) a Released Party if,

(i) in connection with a Released Claim, the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed a breach of trust (whether common law or statutory), fraud or willful misconduct or to have been grossly negligent; or

(ii) in the case of Directors, in respect of any claim referred to in Section 5.1(2) of the CCAA.

Section 9.4 Consents and Agreements at the Retail Restructuring Effective Time

At the Retail Restructuring Effective Time, each Affected Creditor will be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety. Without limitation to the foregoing, each Affected Creditor will be deemed:

(a) to have executed and delivered to the Applicant all consents, assignments, releases and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety;

(b) to have waived any default by or rescinded any demand for payment against the Applicant that has occurred on or prior to the Retail Restructuring Effective Time; and

(c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and the Applicant with respect to an Affected Claim as at the Retail Restructuring Effective Time and the provisions of the Plan, then the provisions of the Plan take precedence and priority and the provisions of such agreement or other arrangement are amended accordingly; and

Section 9.5 Waiver of Defaults

From and after the Retail Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Applicants (except under the Plan) then existing or previously committed or caused by the Applicants, or any Applicant, the commencement of the CCAA Proceedings, any matter pertaining to the

CCAA Proceedings, any of the provisions in the Plan or steps or transactions contemplated in the Plan, or any non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, indenture, note, lease, guarantee, agreement for sale or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Applicants, or any Applicant, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Applicants from performing their obligations under the Plan or be a waiver of defaults by the Applicants under the Plan and the related documents.

ARTICLE 10
BIO-TECH TRANSACTION

Section 10.1 Bio-Tech Transaction

The Plan Sponsor shall, subject to Section 10.5(b), acquire a 100% equity interest in Delta Parent regardless of the outcome of the Bio-Tech SISP in accordance with this Article 10, the Bio-Tech Restructuring Steps Supplement and the Approval and Vesting Order (the "**Bio-Tech Transaction**"). The consideration for the Bio-Tech Transaction shall be the commitment noted in Section 10.5(b), the payment of all amounts noted in this Plan, the retention by the Applicants, and guarantee by the Plan Sponsor, of the SNDL Claim, and the retention by the Applicants of all obligations and indebtedness outstanding under Interim Lender's Charge.

The Bio-Tech Transaction shall proceed in accordance with the following:

(a) As soon as practicable following the conclusion of the Bio-Tech SISP, subject to Section 10.5 of this Plan, Bio-Tech shall take the steps necessary to discontinue and surrender its cannabis licenses in a manner approved by the Plan Sponsor in its sole discretion (the "**Licence Termination**").

(b) Upon receipt of written confirmation from Health Canada confirming that the Licence Termination has occurred (the "**Termination Notice**"), the Plan Sponsor and Delta Parent shall proceed to close the Bio-Tech Transaction in accordance with the steps and sequences described in Schedule "**B**" hereto (the "**Bio-Tech Restructuring Steps Supplement**") and the Approval and Vesting Order.

(c) Notwithstanding anything else in this Plan, as a component of the Bio-Tech Transaction the Plan Sponsor shall support a third-party release of Claims against (i) Bio-Tech; (ii) the past and current employees, legal and financial advisors, and other representatives of Bio-Tech; (c) Bio-Tech's directors and officers; (iv) the Monitor and its legal advisors; (v) and the Plan Sponsor; and such release shall be in substance similar to the releases contained in Article 9 hereof.

Section 10.2 Conditions Precedent in favour of the Plan Sponsor

The closing and consummation of the Bio-Tech Transaction shall be conditional upon the satisfaction of the following conditions, each of which is for the benefit of the Plan Sponsor and may be waived only by the Plan Sponsor in writing:

(a) the Plan shall have been approved by the Required Majority in accordance with the CCAA;

(b) the Bio-Tech Restructuring Steps Supplement shall have been finally determined by the Plan Sponsor in its sole discretion;

(c) the Termination Notice shall have been received in a form satisfactory to the Plan Sponsor in its sole discretion;

(d) the Sanction Order and the Approval and Vesting Order shall have been issued by the Court on terms acceptable to the Plan Sponsor, and shall have become Final Orders by a date acceptable to the Plan Sponsor;

(e) the Bio-Tech SISP shall have concluded, and, if applicable, any and all vesting orders required to close the transaction(s) contemplated by the Successful Bid in the Bio-Tech SISP shall have been granted by the Court, and such transaction(s) shall have closed;

(f) all agreements, resolutions, documents, and other instruments, which are reasonably necessary to be executed and delivered by Delta Parents in order to implement the Bio-Tech Transaction or perform its obligations in connection therewith, shall have been executed and delivered, and shall be in form and in content satisfactory to the Plan Sponsor; and

(g) all Material filings under Applicable Laws shall have been made and any regulatory consents or approvals that are required or desirable (in the Plan Sponsor's discretion) in connection with the Bio-Tech Transaction shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated, and the Plan Sponsor shall be satisfied that the Applicants have the requisite approvals, permissions and authorizations to operate subsequent to the Bio-Tech Closing Date.

Section 10.3 Conditions Precedent in favour of Delta Parent

The closing and consummation of the Bio-Tech Transaction shall be conditional upon the satisfaction of the following conditions, each of which is for the benefit of the Applicants and may be waived only by the Applicants in writing:

(a) the Plan shall have been approved by the Required Majority in accordance with the CCAA;

(b) the Sanction Order and the Approval and Vesting Order shall have been issued by the Court, and shall have become Final Orders;

(c) the applicable consideration shall have been received by the Applicants;

(d) the Bio-Tech SISP shall have concluded, and, if applicable, any and all vesting orders required to close the transaction(s) contemplated by the Successful Bid(s) in the Bio-Tech SISP shall have been granted by the Court, and such transaction(s) shall have closed;

(e) all agreements, resolutions, documents, and other instruments, which are reasonably necessary to be executed and delivered by the Plan Sponsor in order to implement the Bio-Tech Transaction or perform its obligations in connection with the Bio-Tech Transaction, shall have been executed and delivered, and shall be in form and in content satisfactory to the Delta Parent; and

(f) all Material filings under Applicable Laws shall have been made and any regulatory consents or approvals that are required in connection with the Plan shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated, and the Applicants shall be satisfied that the Applicants or Plan Sponsor, as applicable, each have the requisite approvals, permissions and authorizations to operate subsequent to the closing of the Bio-Tech Transaction and in accordance with the Plan.

Section 10.4 Bio-Tech Certificate

Upon delivery of written notice from the Plan Sponsor and Delta Parent of the satisfaction or waiver of the conditions set out in Section 10.2 and Section 10.3, the Monitor shall forthwith deliver to the Plan Sponsor and Delta Parent a certificate in the form appended to the Approval and Vesting Order (the "**Bio-Tech Certificate**"), and the Bio-Tech Transaction shall be effected and closed in accordance with its terms and the terms of this Article 10, the Bio-Tech Restructuring Steps Supplement and the Approval and Vesting Order. As soon as practicable thereafter, the Monitor shall file the Bio-Tech Certificate with the Court.

Section 10.5 Successful Bid in Bio-Tech SISP

(a) Notwithstanding the foregoing, in the event that the Bio-Tech SISP results in a Successful Bid from a Person other than the Plan Sponsor or an affiliate, the Plan Sponsor, the Applicants and Bio-Tech, as applicable, shall move to close such transaction as soon as practicable.

(b) Following the closing of a Successful Bid, the proceeds of such transaction shall be paid to the Monitor in trust for the benefit of the applicable parties in accordance with the terms of this Plan, the applicable transaction agreement(s) and the applicable orders of the Court, and the Plan Sponsor may, at its sole discretion and subject to the conditions set out herein, acquire Delta Parent in accordance with the steps and sequences described in this Article 10 and the Bio-Tech Restructuring Steps Supplement.

(c) If the Bio-Tech SISP results in a Successful Bid providing cash proceeds greater than the Bio-Tech Threshold (such cash proceeds in excess of the Bio-Tech Threshold being the "**Bio-Tech Excess**") then the Bio-Tech Excess will be paid to SNDL up to the amount of the SNDL Claim, and the Plan Sponsor shall fund an amount equal to 50% of the Bio-Tech Excess to the Monitor, to be distributed to Bio-Tech's other creditors in accordance with their respective priorities under Applicable Law. It is expected that the primary beneficiary of such contribution will be the Canada Revenue Agency.

ARTICLE 11
GENERAL

Section 11.1 Claims Bar Date

Nothing in this Plan extends or shall be interpreted as extending or amending the Claims Bar Date or gives or shall be interpreted as giving any rights to any Person in respect of Affected Claims that have been barred or extinguished pursuant to the Claims Procedure Order.

Section 11.2 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

Section 11.3 Modification of the Plan

(a) The Plan Sponsor reserves the right, at any time and from time to time, to amend, restate, modify and/or supplement the Plan with the agreement of the Applicants and the Monitor, provided that any such amendment, restatement, modification or supplement must be contained in a written document which is filed with the Court and: (i) if made prior to or at the Meeting, communicated to the Affected Creditors prior to or at the Meeting; and (ii) if made following the Meeting, approved by the Court following notice to the Affected Creditors. For certainty, the Plan Sponsor may increase the consideration payable or otherwise provided under this Plan upon notice to the Applicants and Monitor and without their consent.

(b) Notwithstanding Section 11.3(a), any amendment, restatement, modification or supplement may be made by the Plan Sponsor with the consent of the Applicants and Monitor, without further Court Order or approval, provided that it: (i) concerns a matter which, in the opinion of the Plan Sponsor, acting reasonably, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction Order; (ii) cures any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Creditors; or (iii) increases the consideration payable or otherwise provided to one or more Affected Creditors hereunder and does not decrease any consideration payable or otherwise provided to any Affected Creditor.

(c) Any amended, restated, modified or supplementary plan or plans of compromise or arrangement filed with the Court and, if required by this Section, approved by the Court, shall, for all purposes, be and be deemed to constitute the Plan.

(d) Subject to the terms herein, in the event that this Plan is amended, the Monitor shall post such amended Plan on the Monitor's Website and such posting shall constitute adequate notice of such amendment.

Section 11.4 Paramountcy

From and after the Retail Restructuring Effective Time, any conflict between:

(a) the Plan or any Order in the CCAA Proceeding; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Affected Creditors and the Applicants as at the Retail Implementation Date or the Articles or Bylaws of the applicable Applicant at the Retail Implementation Date,

will be deemed to be governed by the terms, conditions and provisions of the Plan, which shall take precedence and priority, provided that any settlement agreement executed by any applicable Applicant and any Person asserting a Claim that was entered into from and after the Filing Date shall be read and interpreted in a manner that assumes such settlement agreement is intended to operate congruously with, and not in conflict with, the Plan.

Section 11.5 Severability of Plan Provisions

If, prior to the date of the Sanction Order, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Plan Sponsor and Applicants, shall have the power to either: (a) sever such term or provision from the balance of the Plan and provide the Plan Sponsor and the Applicants with the option to proceed with the implementation of the balance of the Plan as of and with effect from the Retail Implementation Date; or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that the Plan Sponsor and the Applicants proceed with the implementation of the Plan, the remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

Section 11.6 Reviewable Transactions

Section 36.1 of the CCAA, Sections 38 and 95 to 101 of the BIA and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to this Plan or to any payments made in connection with transactions entered into by the Applicants or the Plan Sponsor after the Filing Date, including to any and all of the payments and transactions contemplated by and to be implemented pursuant to this Plan.

Section 11.7 Responsibilities of the Monitor

Alvarez & Marsal Canada Inc. is acting in its capacity as Monitor in the CCAA Proceeding with respect to the Applicants, the CCAA Proceeding and this Plan and not in its personal or corporate capacity, and will not be responsible or liable for any obligations of the Applicants or the Plan Sponsor under the Plan or otherwise.

Section 11.8 Different Capacities

Persons who are affected by the Plan may be affected in more than one capacity. Unless expressly provided to the contrary herein, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by the Applicants and the Person in writing or unless its Claims overlap or are otherwise duplicative.

Section 11.9 Notice

(a) Any notice or other communication under this Agreement shall be in writing and may be delivered personally, by courier or by email, addressed:

If to the Applicants:

Delta 9 Cannabis Inc.
PO Box 68096 Osborne Village
Winnipeg, MB R3L 2V9

Attention: John Arbuthnot
Email: john.arbuthnot@delta9.ca

with a copy to:

MLT Aikins LLP
2100 Livingston Place
222 3 Ave SW
Calgary, AB T2P 0B4

Attention: Ryan Zahara / Chris Nyberg
Email: rzahara@mltaikins.com / cnyberg@mltaikins.com

If to the Monitor:

Alvarez & Marsal Canada Inc.
202 6 Ave SW
Calgary, AB T2P 2R9

Attention: Orest Konowalchuk
Email: okonowalchuk@alvarezandmarsal.com

with a copy to:

Burnet, Duckworth & Palmer LLP
525 8 Ave SW #2400
Calgary, AB T2P 1G1

Attention: David LeGeyt / Ryan Algar
Email: dlegeyt@bdplaw.com / ralgar@bdplaw.com

If to the Plan Sponsor:

2759054 Ontario Inc. o/a Fika Herbal Goods
40 King Street West, Suite 3410
Toronto, ON M5H 3Y2

Attention: Mark Vasey
Email: mark.vasey@fikasupply.com

with a copy to:

Miller Thomson LLP
40 King Street West, Suite 5800
Toronto, ON M5H 3S1

Attention: Larry Ellis / Sam Massie
Email: lellis@millerthomson.com / smassie@millerthomson.com

If to an Affected Creditor:

To the mailing address, facsimile address or email address provided on such Affected Creditor's Notice to Known Claimants or Proof of Claim;

or to such other address as any party may from time to time notify the others in accordance with this Section.

(b) Any such notice or other communication, if given by personal delivery or by courier, will be deemed to have been given on the day of actual delivery thereof and, if transmitted by email before 5:00 p.m. (Calgary time) on a Business Day, will be deemed to have been given on such Business Day, and if transmitted by email after 5:00 p.m. (Calgary time) on a Business Day, will be deemed to have been given on the Business Day after the date of the transmission.

(c) Sending a copy of a notice or other communication to a Party's legal counsel as contemplated above is for information purposes only and does not constitute delivery of the notice or other communication to that Party. The failure to send a copy of a notice or other communication to legal counsel does not invalidate delivery of that notice or other communication to a Party.

(d) If, during any period during which notices or other communications are being given pursuant to this Plan, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of the Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or electronic or digital transmission in accordance with this Section.

Section 11.10 Further Assurances

Each of the Persons directly or indirectly named or referred to in, or subject to, this Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 21st day of October, 2024.