COURT FILE NUMBER	2401 - 15969
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 ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
APPLICANT	**ALVAREZ & MARSAL CANADA INC.**, in its capacity as Court-appointed Monitor of ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., WINDRIDGE A2A GP INC., WINDRIDGE A2A DEVELOPMENTS, LLC, FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A DEVELOPMENTS, LLC, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.
DOCUMENT	**BOOK OF AUTHORITIES OF THE MONITOR**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Cassels Brock & Blackwell LLP** 3810, Bankers Hall West 888 3 Street SW Calgary, AB T2P 5C5 **Attention: Jeffrey Oliver / Danielle Marechal** P: 403.351.2921 / 403.351.2922 E: joliver@cassels.com / dmarechal@cassels.com File No.: 57100-4

JUDICIAL CENTRE OF CALGARY
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Feb 24, 2025
12:20 PM
CLERK OF THE COURT

LIST OF AUTHORITIES

STATUTES

Tab **Authority**

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36

JURISPRUDENCE

Tab **Authority**

2. *Angus A2A GP Inc (Re)*, 2025 ABKB 51
3. *Tepper Holdings Inc, Re*, 2011 NBQB 311
4. *Re Canada North Group Inc*, 2017 ABQB 508
5. *9354-9186 Quebec inc v Callidus Capital Corp*, 2020 SCC 10
6. *Canwest Publishing Inc*, 2010 ONSC 222
7. *Winalta Inc. (Re)*, 2011 ABQB 399
8. *Re Nortel Networks Corporation et al*, 2017 ONSC 673
9. *Nortel Networks Inc.*, 2022 ONSC 6680
10. *Redcorp Ventures Ltd. (Re)*, 2016 BCSC 188

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

KeyCite treatment

Most Recently Cited in: Pride Group Holdings Inc. et al. , 2024 ONSC 6425, 2024 CarswellOnt 18032 | (Ont. S.C.J. [Commercial List], Nov 18, 2024)

R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02

11.02(1)Stays, etc. — initial application

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

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

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

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

11.02(2)Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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

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

11.02(3)Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History
2005, c. 47, s. 128; 2019, c. 29, s. 137

Currency
Federal English Statutes reflect amendments current to July 3, 2024
Federal English Regulations Current to Gazette Vol. 158:14 (July 3, 2024)

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

KeyCite treatment
Most Recently Cited in: In the Matter of a Plan of Compromise or Arrangement of Sandvine Corporation et al. , 2024 ONSC 6199, 2024 CarswellOnt 17145 | (Ont. S.C.J. [Commercial List], Nov 7, 2024)

R.S.C. 1985, c. C-36, s. 11.52

s 11.52

Currency

11.52

11.52(1) Court may order security or charge to cover certain costs

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

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority

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

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

Federal English Statutes reflect amendments current to September 25, 2024
Federal English Regulations Current to Gazette Vol. 158:23 (November 6, 2024)

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TAB 2

2025 ABKB 51
Alberta Court of King's Bench

Angus A2A GP Inc (Re)

2025 CarswellAlta 164, 2025 ABKB 51

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 ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

Colin C.J. Feasby J.

Heard: January 17, 2025
Judgment: January 29, 2025
Docket: Calgary 2401-15969

Counsel: Kelsey J. Meyer, Luc Rollingson, for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC
Daniel Jukes, Sammy Lee, Stephen Barbier, for Angus A2A GP Inc., Angus Manor Park A2A GP Inc., Angus Manor Park A2A Capital Corp., Angus Manor Park A2A Developments Inc., Hills of Windridge A2A GP Inc, Fossil Creek A2A GP Inc., A2A Developments Inc., Serene Country Homes (Canada) Inc., A2A Capital Services Canada Inc.
Robyn Gurofsky, Kaitlyn M. G. Wong, for Canadian Investors
Howard A. Gorman, K.C., Daniel L.W. Stethem, for Offshore Investors
Jeffrey Oliver, Danica Jorgenson, for Alvarez & Marsal Canada Inc. (the Monitor)
Kyle Kashuba, for Pillar Capital Corp. (the Interim Lender)

Subject: Insolvency
Headnote
Bankruptcy and insolvency
Table of Authorities
Cases considered by *Colin C.J. Feasby J.*:

Angus A2A GP Inc (Re) (2024), 2024 ABKB 769, 2024 CarswellAlta 3424 (Alta. K.B.) — referred to

Aquino v. Aquino (2021), 2021 ONSC 7797, 2021 CarswellOnt 17491, 96 C.B.R. (6th) 138 (Ont. S.C.J.) — referred to

Aquino v. Bondfield Construction Co. (2024), 2024 SCC 31, 2024 CSC 31, 2024 CarswellOnt 15328, 2024 CarswellOnt 15329, 496 D.L.R. (4th) 613, 54 B.L.R. (6th) 1, 15 C.B.R. (7th) 207 (S.C.C.) — referred to

Arrangement relatif à Bloom Lake General (2021), 2021 QCCS 2946, 2021 CarswellQue 11345, 93 C.B.R. (6th) 285 (C.S. Que.) — referred to

Ashcroft Urban Developments Inc. (Re) (2024), 2024 ONSC 7192, 2024 CarswellOnt 20248 (Ont. S.C.J.) — referred to

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 ABCA 127, 2009 CarswellAlta 469, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 W.A.C. 38, 457 A.R. 38 (Alta. C.A.) — referred to

BZAM Ltd. Plan of Arrangement (2024), 2024 ONSC 1645, 2024 CarswellOnt 3802 (Ont. S.C.J. [Commercial List]) — considered

Canada v. Canada North Group Inc. (2021), 2021 SCC 30, 2021 CSC 30, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 D.T.C. 5080, (sub nom. *La Reine c. Canada North Group Inc.)* 2021 D.T.C. 5081, 91 C.B.R. (6th) 1, [2021] 5 C.T.C. 111, 28 Alta. L.R. (7th) 1, [2021] 10 W.W.R. 1, 460 D.L.R. (4th) 309, 19 B.L.R. (6th) 1, [2021] 2 S.C.R. 571, [2021] 2 R.C.S. 571 (S.C.C.) — considered

Delta 9 Cannabis Inc (Re) (2024), 2024 ABKB 657, 2024 CarswellAlta 2883, 16 C.B.R. (7th) 93 (Alta. K.B.) — referred to

Douez v. Facebook, Inc. (2017), 2017 SCC 33, 2017 CSC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, 1 C.P.C. (8th) 213, 97 B.C.L.R. (5th) 1, [2017] 7 W.W.R. 637, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, 71 B.L.R. (5th) 1, [2017] 1 S.C.R. 751, [2017] 1 R.C.S. 751 (S.C.C.) — referred to

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Industrial Properties Regina Limited v. Copper Sands Land Corp. (2018), 2018 SKCA 36, 2018 CarswellSask 252, 61 C.B.R. (6th) 38, 422 D.L.R. (4th) 749 (Sask. C.A.) — referred to

Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada (2006), 2006 SCC 21, 2006 CarswellOnt 3265, 2006 CarswellOnt 3266, [2006] I.L.R. I-4512, 36 C.C.L.I. (4th) 161, 267 D.L.R. (4th) 1, 348 N.R. 307, 80 O.R. (3d) 557 (note), 211 O.A.C. 363, [2006] 1 S.C.R. 744, [2006] R.R.A. 523 (S.C.C.) — referred to

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23, 19 Admin. L.R. (6th) 1, [2016] 2 R.C.S. 23 (S.C.C.) — referred to

Original Traders Energy Ltd., (Re) (2024), 2024 ONSC 325, 2024 CarswellOnt 574, 11 C.B.R. (7th) 13 (Ont. S.C.J. [Commercial List]) — referred to

Pride Holdings Group Inc. (2024), 2024 ONSC 1830, 2024 CarswellOnt 21022 (Ont. S.C.J.) — considered

Priszm Income Fund, Re (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1, [2020] 1 S.C.R. 521 (S.C.C.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — referred to

s. 2(1) "company" — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 23(1)(c) — referred to

Judicature Act, R.S.A. 2000, c. J-2

Generally — referred to

s. 13(2) — referred to

***Colin C.J. Feasby J.*:**

Reasons for Decision

I. Introduction

1 The matter before the Court raises important questions about the proper use of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("*CCAA*"). The *CCAA* is an insolvency statute that is typically used to restructure a debtor company's affairs. The present application was commenced by creditors and equity investors to preserve assets, unseat management, conduct an investigation, and facilitate and maximize recovery for stakeholders. The *CCAA*'s greatest attribute is its flexibility; the question in the present case is whether it is flexible enough to accommodate the proposed use.

2 A group of Canadian investors (the "Canadian Investors") applied for and were granted an Initial Order pursuant to the *CCAA* on November 14, 2024 in respect of various related entities involved in real estate development ventures in Ontario and Texas. I refer to the entities subject to the Initial Order as the Canadian Respondents and the US LLCs and when referring to them together I call them the Respondents. The Initial Order appointed counsel to represent investors from outside Canada (the "Offshore Investors"). For convenience, I refer to the Canadian Investors and Offshore Investors as the Applicants even though the Offshore Investors are not, strictly speaking, applicants because the two groups are aligned in respect of the Initial Order and ARIO.

3 The Respondents ask the Court to set aside the Initial Order and the Amended and Restated Initial Order ("ARIO") thereby terminating the *CCAA* proceedings. To decide whether the *CCAA* proceedings should continue, I must consider the purpose and reach of the *CCAA*. The Respondents submit that the Applicants are, in essence, equity investors who have misused the *CCAA* to advance what should be conventional civil claims. The Respondents further assert that management is best placed to maximize value for investors through the sale of the real estate projects. The Applicants concede that their use of the *CCAA* is novel but contend that it is consistent with the purposes of the *CCAA* and justified in the circumstances.

4 The US LLCs also assert that the *CCAA* proceedings are destined to fail in relation to the US real estate projects because the Respondents' US real estate assets and bank accounts are beyond the reach of the *CCAA* proceedings. The US LLCs also contend that the Court has no jurisdiction over them because they are not doing business in Canada and thus cannot be "debtor companies" or "affiliated companies" as defined by the *CCAA*. The Applicants respond that the business of the US LLCs is inextricably intertwined with the various Canadian entities such that they are necessary parties to the *CCAA* proceedings regardless of whether they are doing business in Canada.

5 The Applicants submit that if the Respondents are correct that the Court does not have jurisdiction under the *CCAA* or for other reasons the *CCAA* proceedings must be terminated, the Court should appoint a receiver over the Respondents. The Applicants assert that the Respondents are insolvent and have demonstrated an inability or unwillingness to manage their assets to maximize returns to investors. The Respondents submit that it would not be just or convenient to appoint a receiver because the management is in the best position to liquidate the real estate projects and the appointment of a receiver would prevent management from maximizing value.

6 The present matter is a continuation of the Comeback Hearing to confirm the appropriateness of the *CCAA* proceedings and the Respondents' application to set aside the Initial Order and ARIO. I explained in ***A2A GP Inc (Re)***, 2024 ABQB 769 at para 22 the onus remains on the Applicants to show that *CCAA* proceedings are appropriate: see also, ***Target Canada (Re)***, 2015 ONSC 303 at para 84 *per* Morawetz RSJ, as he then was.

II. Procedural Background

A. Initial Order

7 The Initial Order application was made before me on November 14, 2024. The application was presented as a matter of serious urgency because the Applicants feared that conditions on the sale of the Ontario property, Angus Manor Park ("Angus

Manor"), would be waived the following day and the sale would become firm. The Respondents were represented by their corporate counsel who had little more than one day's notice of the application. The Initial Order application was effectively made *ex parte*.

8 The Canadian Investors submitted that even though they did not have the right to vote on any sale of Angus Manor, they had the power to direct the corporate entity that serves as the general partner of the limited partnership that holds the interests in land. The Canadian Investors complained that they had not received notice or details of the pending sale. The Applicants further demonstrated that the corporate entity that was registered on the Angus Manor title had been struck from the Ontario corporate registry. The Applicants submitted that they had learned from a Facebook posting that the sale of Angus Manor was to be effected through a vendor take back (VTB) structure with a $3 million payment at closing with the balance of the $14 million purchase price to be paid in 2029.

9 The Applicants submitted that they had standing to make the application because as trust and limited partnership unitholders, bondholders, and UFI holders they were the key and perhaps only real stakeholders in the Respondent entities. They further submitted that they were creditors or contingent creditors because they had or would have claims against the Respondents.

10 The Applicants argued that the statutory requirements for a *CCAA* initial order were met because the Respondents were insolvent because they were not meeting their obligations as they became due, as evidenced by non-payment of Ontario taxes, and the debt owed by the Respondents exceeded $5 million. Among other debt, the Applicants pointed to a judgment of approximately US $3.8 million that they said was registered on title of the US properties as evidence supporting a finding that the Respondents had at least $5 million in debt.

11 The Initial Order granted the Monitor expanded powers and took control of the Respondent entities away from management. An important consideration in granting the Initial Order pursuant to the *CCAA* rather than a receivership pursuant to the *Judicature Act*, RSA 2000, c J-2 or an injunction was the efficiency in enforcing the order given the seeming urgency. A *CCAA* stay order is immediately enforceable across the country without recognition proceedings in other provinces and it may be recognized and given effect in the US through proceedings under Chapter 15 of the *US Bankruptcy Code*. Both a receivership and an injunction would have required additional proceedings in an Ontario court that may not have been possible within the time available prior to sale of Angus Manor being completed.

B. Amended and Restated Initial Order

12 The Comeback Hearing took place before Justice Simard on November 21, 2024. The Respondents brought a cross-application to set aside the Initial Order. Justice Simard reserved his decision and gave oral reasons on November 25, 2024. Simard J decided some of the issues relevant to the Comeback Hearing and adjourned others to be heard later after the Respondents had provided information to the Monitor and the Monitor had provided a comprehensive report to the Court. He also adjourned the cross-application to set aside the Initial Order.

13 Before me at the continuation of the Comeback Hearing and the set-aside application, the parties adduced new evidence and offered new arguments on some of the issues decided by Justice Simard. I cannot revisit those issues. Though I discuss some of the new evidence and new arguments in these Reasons, I do not vary Justice Simard's decision. Indeed, in my view, the new evidence and arguments reinforce his conclusions.

14 Before Justice Simard, the Respondents were represented by litigation counsel who was retained after the Initial Order was granted. The Respondents submitted that the US LLCs had not been properly served with the Initial Order application. Justice Simard found that the defects in service were excused by the urgency of the application and that all the Respondents had proper notice of the Comeback Hearing. He went on to find at page 8 of the transcript of his November 25, 2024 oral decision:

> The two Texas LLCs are proper respondents because they are inextricably intertwined in the corporate and investment structure of the Windridge and Fossil Creek projects that were marketed to Canadian investors in Canada through Alberta and Ontario corporations, limited partnerships, and trusts.

Despite the deficiencies in service of the application for the initial order, I find that I have jurisdiction over all of the existing respondents, including the two Texas LLCs.

15 Simard J later held at page 9 that, "I am satisfied by the evidence that all of the respondents are affiliated, and their businesses are inextricably intertwined with respect to the three projects. The respondents did not challenge that assertion."

16 The Respondents argued that the Applicants, being equity investors, did not have standing pursuant to the *CCAA* to apply for an Initial Order. Justice Simard dismissed this argument at page 8 saying: "there is no prohibition in the *CCAA* on investors applying for an initial order." He further concluded at page 9 that the "applicant investors are persons interested, as described in Section 11.02(1) of the *Act*; and as a result, I find that the applicant investors had standing to make the initial order application."

17 The Respondents disputed that they were insolvent. After reviewing the evidence concerning the debts of the Respondents and considering the Respondents' submissions, Simard J concluded at page 10 "based on the evidence currently before me, I am satisfied that the respondents are insolvent."

18 The Applicants identified two trusts governed by Texas law that were not covered by the Initial Order (the "Texas Trusts") and requested that Justice Simard extend the ARIO to the Texas Trusts and the trustee, Dirk Foo. Justice Simard denied the Applicants' request because they had insufficient information concerning the Texas Trusts and Mr. Foo, being an individual, cannot be "treated as a debtor company under the CCAA, or an affiliate of a debtor company."

19 Justice Simard directed the Respondents to provide information and records requested by the Monitor so that the Monitor could provide a comprehensive report to the Court. The information to be provided included corporate records, accounting records, investor records, contracts, title documents, other documents related to the real property, records of communications with investors concerning the sale of real property, and other material records. The Respondents were required to produce the requested records by December 6, 2024. The Monitor was directed to provide its comprehensive report by December 13, 2024.

C. US Bankruptcy Code Chapter 15 Recognition Proceedings

20 On December 20, 2024, a US Bankruptcy Judge of the US Bankruptcy Court, Northern District of Texas, Fort Worth Division issued an "Order Granting Recognition of Foreign Main Proceeding and Additional Relief." The US Bankruptcy Judge held that the Chapter 15 proceedings were properly commenced and that the *CCAA* proceeding in the Alberta Court of King's Bench should be recognized as a foreign main proceeding and a stay should extend to the Respondents and their property within the territorial jurisdiction of the US. The US Bankruptcy Judge further held that granting relief was "in the interest of the public and international comity, consistent with the public policy of the United States, and will not cause any hardship to any party in interest that is not outweighed by the benefits of the relief granted."

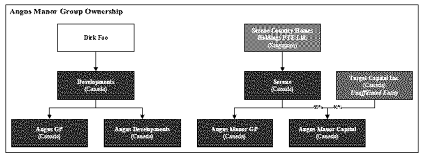
III. The Respondents' Business and the Applicants' Investments

A. The Respondents' Organizational Structure

21 All the relevant corporations are direct or indirect subsidiaries of Serene Country Homes Holdings PTE Ltd ("Serene Country"), a Singapore company, and are controlled by Dirk Foo. Below Serene Country sit three corporate groups that correspond to the three real estate development projects. One project, Angus Manor, is in Ontario and two projects, The Hills of Windridge ("Windridge") and The Trails of Fossil Creek ("Fossil Creek"), are in Texas. Several of the relevant corporations, limited partnerships, and trusts are Alberta entities. There are also Ontario, Texas, and Singapore entities that play important roles. Each of the Respondent corporate entities has different directors. The directors and trustees of the various Respondent entities include Grayson Ambrose, Dirk Foo, Allan Lind, and Joseph Attrux. Mr. Ambrose is a resident of Calgary, Mr. Foo and Mr. Lind reside in Singapore, and Mr. Attrux is identified in corporate filings as a resident of Texas. Justice Simard found, and I agree, that Alberta is an appropriate venue for these proceedings despite there being connections to other jurisdictions.

22 Angus Manor is a 167-acre residential development project located in Essa Township which is just southwest of Barrie, Ontario. The Angus Manor Group ownership is depicted on the chart below taken from the Monitor's Third Report. Angus

Manor Park A2A GP Inc, shown below as Angus GP (Canada), is an Alberta corporation that was struck from the corporate registry on September 2, 2021. Angus GP (Canada) is the general partner of the Angus Manor Park A2A Limited Partnership ("Angus Manor LP") which is an Alberta limited partnership. Angus Manor A2A Capital Corp ("Angus Manor Capital") owned 100% of the units of Angus Manor LP and issued bonds (discussed below) to finance the development of the Angus Manor project. Angus Manor Park A2A Developments Inc, shown below as Angus Developments (Canada), is an Ontario corporation. Angus Developments (Canada) was the company responsible for developing the Angus Manor real estate project.



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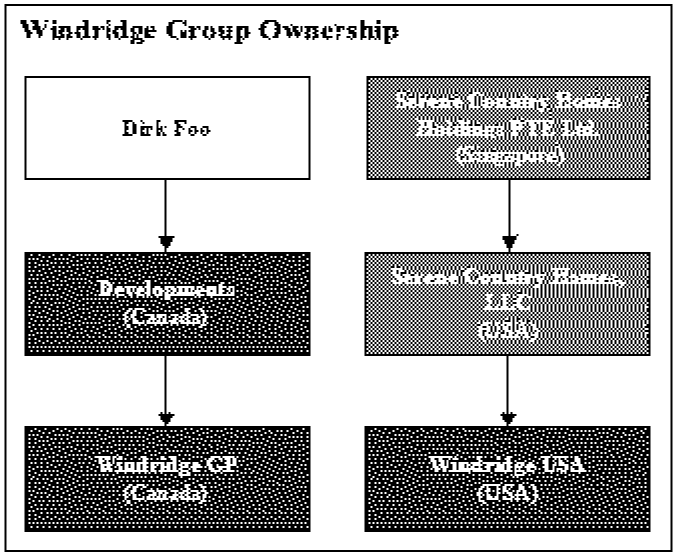
23 The Angus Manor lands were put on the market on August 15, 2024. The best offer was structured as a VTB bearing 3% interest for four years with an initial payment of $3 million and the balance of $11 million due in 2029. The Monitor concluded in its First Supplement to the Third Report that the proposed purchase price for the Angus Manor lands is fair. However, the Respondents proposed to use the whole $3 million initial payment to cover transaction fees and management fees. The Monitor expressed concern that "the VTB structure must be done in a way to protect the interest of the A2A Investors and be done so in a clear and transparent manner."

24 Windridge is a 415-acre residential development in the Dallas/Fort Worth area of Texas. The Windridge Group ownership depicted on the chart below is taken from the Monitor's Third Report. Hills of Windridge A2A GP Inc., shown below as Windridge GP (Canada), is an Ontario corporation. Windridge GP (Canada) is the general partner of Hills of Windridge A2A LP ("Windridge LP"), an Ontario limited partnership which is not shown on the chart. Investors own units in the Hills of Windridge A2A Trust ("Windridge Trust"), an Ontario trust, also not shown on the chart, which, in turn, owns the units of the Windridge LP. Windridge LP owns undivided factional interests ("UFIs") in the Windridge lands.

25 Hills of Windridge A2A Developments LLC ("Windridge LLC") referred to below as Windridge USA is a Texas entity. The Further Amended and Restated Confidential Offering Memorandum provided to investors described the role of Windridge LLC, which it called Windridge Developments, as follows:

> Windridge Developments was established for the sole purpose of acquiring and overseeing all aspects of the development of the Property. It is the vendor of the UFIs under the UFI Purchase Agreement and will have a significant amount of strategic input and operational and administrative responsibilities for the development of the Property, the sales of lots or homes thereon, pursuant to the terms of the Deed of Covenant.

26 Windridge LLC was the original owner of the Windridge lands. Windridge LLC sold UFIs in the Windridge lands to Windridge LP. The units of the Windridge LP are held by the Windridge Trust.



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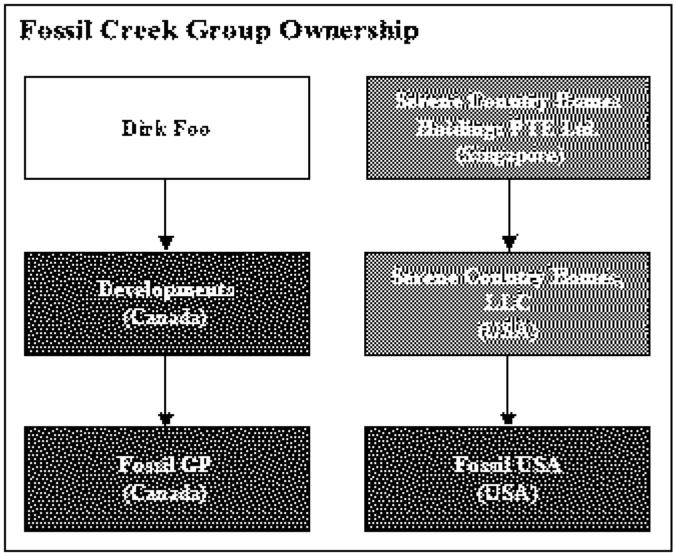
27 Records obtained by the Monitor indicate that Windridge LP transferred the UFIs to a different Windridge Trust, governed by Texas law ("Windridge Texas Trust") which now holds title to the Windridge lands. The trustee of Windridge Texas Trust is Dirk Foo. A small parcel of the Windridge lands was transferred by the Windridge Texas Trust to a new limited partnership, the general partner of which is Windridge LLC, for the purposes of effecting a sale to the Tarrant Regional Water District ("TRWD"). The small parcel was to have been expropriated if Windridge had not agreed to sell. The Monitor applied to extend the *CCAA* proceedings to the Windridge Texas Trust and Dirk Foo on the grounds that they are affiliates of the Respondents but the application was denied by Justice Simard.

28 Fossil Creek is a 93-acre residential development with 487 single detached family homes located in Fort Worth, Texas. The Fossil Creek Group ownership depicted on the chart below is taken from the Monitor's Third Report. Fossil Creek A2A GP Inc., shown below as Fossil GP (Canada), is an Alberta corporation. Fossil GP (Canada) is the general partner of Fossil Creek A2A Limited Partnership ("Fossil Creek LP") which is an Alberta limited partnership. Investors own units in the Fossil Creek A2A Trust (the "Fossil Creek Trust"), an Alberta trust, also not shown on the chart, which, in turn, owns the units of the Fossil Creek LP.

29 Fossil Creek A2A Developments, LLC ("Fossil Creek LLC"), referred to in the chart below as Fossil USA, is a Texas entity. The Amendment to the Offering Memorandum for Fossil Creek Trust units described the role of Fossil Creek LLC, which it called Fossil Creek Developments, as follows:

> Fossil Creek Developments was established for the sole purpose of acquiring and overseeing all aspects of the development of the Property. It is the vendor of the UFIs under the UFI Purchase Agreement and will have a significant amount of strategic input and operational and administrative responsibilities for the development of the Property, the sales of lots or homes thereon, pursuant to the terms of the Deed of Covenant.

30 According to the Amendment to the Offering Memorandum, Fossil Creek LLC sold UFIs in the Fossil Creek lands to Fossil Creek LP.



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31 Records obtained by the Monitor show that Fossil Creek LP transferred its UFIs to Fossil Creek Trust, a Texas trust ("Fossil Creek Texas Trust"). The trustee of Fossil Creek Texas Trust is Dirk Foo. The Fossil Creek Texas Trust transferred its interest in the Fossil Creek Lands to a new Texas limited partnership, the general partner of which was Fossil Creek LLC, in 2024, to facilitate the sale of the Fossil Creek lands to a third party. The Monitor applied to extend the *CCAA* proceedings to the Fossil Creek Texas Trust and Dirk Foo on the grounds that they are affiliates of the Respondents but the application was denied by Justice Simard.

B. The Applicants' Interests and Rights

i. The Securities, the Rights of the Applicants, and the Obligations and Conduct of the Respondents

32 Angus Manor LP sold limited partnership units to investors in 2015. The units were priced at $100 with a minimum investment of $5,000 required. Unitholders have no right to take an active part in the business of Angus Manor LP. Counsel for the Canadian Respondents explained that Angus GP "is vested with the authority to make virtually all decisions on behalf of the investors." He further described the investors as "passive participants." The only right that investors have in relation to the governance of the Angus Manor entities and project is the right to receive an annual report containing financial statements of Angus Manor LP each year. But the Respondents never provided investors with an annual report containing financial statements.

33 Angus Manor Capital sold bonds ("Bonds") in 2016 to investors for $1 each with a minimum investment of $6,300 required. Each bond bears a 5% annual fixed rate of interest. The interest that accrued from the date of purchase to September 30, 2021 was to be paid on September 30, 2021. A2A Capital failed to pay the interest accrued to September 30, 2021 to bondholders. Any interest accrued after September 30, 2021 is to be paid within six months of the Bonds being redeemed in full. The Maturity Date of the Bonds is September 30, 2026. Angus Manor Capital was required to file annual financial statements with securities regulators and make them reasonably available to each bondholder. No financial statements for Angus Manor Capital have been provided by the Respondents to the Monitor despite the Court's direction to do so. The inference that I draw from the non-production of Angus Manor Capital financial statements is that they were never prepared.

34 The Respondents argue that the Bonds are, in effect, equity instruments because the Confidential Offering Memorandum specified that the Bonds are "entitled to share in the Net Profits or Income" of Angus Manor LP and that the Bonds rank *pari passu* with other unsecured obligations of Angus Manor Capital. The peculiar structure of the Bonds was driven by the fact that limited partnership units are not RRSP and TFSA eligible. The Angus Manor group wanted to make investing in Angus Manor RRSP and TFSA eligible so that it was more attractive. The result is an interest-bearing security that Angus Manor Capital marketed as a bond but otherwise has the characteristics of equity. As a matter of consistency and fairness, the Respondents

cannot style a security as a "bond" - a paradigm example of a debt instrument - to obtain certain attributes as a matter of tax law to assist in soliciting investment and then claim in the *CCAA* process that the same security is really equity. Be that as it may, I explain later in these Reasons, whether the bonds are debt instruments or equity is beside the point because Angus Manor Capital failed to make the September 30, 2021 interest payment making the bondholders creditors regardless of the nature of their security.

35 The Offshore Investors hold UFIs in the Angus Manor lands. Angus Manor UFI holders have the right to vote on the sale of all or any part of the Angus Manor lands. Some of the Angus Manor UFI holders were given proxies to vote on the Angus Manor transaction that was halted by the Initial Order.

36 Canadian Investors in Fossil Creek own units in the Fossil Creek Trust. The Fossil Creek A2A Trust Declaration provides that a meeting of Fossil Creek Trust investors is to be called within 18 months of the effective date of Fossil Creek A2A Trust Declaration and then a meeting is to occur at least every 15 months. 21-days prior to each meeting, the administrator of the Fossil Creek Trust is required to provide investors with annual financial statements. No financial statements for the Fossil Creek Trust (or any entities associated with the Fossil Creek project) have been provided to the Monitor despite the direction of the Court. The inference that I draw from non-production is that financial statements were never prepared.

37 Offshore Investors in Fossil Creek own UFIs which are governed by the Fossil Creek Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Fossil Creek lands but the have the right to vote on the sale of all or any part of the Fossil Creek lands. Pursuant to the Fossil Creek Deed of Covenant, Fossil Creek LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Fossil Creek LLC's office in Texas. The Fossil Creek Deed of Covenant provides that a Facilitator other than Fossil Creek LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial records for Fossil Creek were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

38 The Fossil Creek lands were sold in Fall 2024 by Trails of Fossil Creek Properties LP, a new limited partnership created to facilitate the sale. The general partner of Fossil Creek Properties LP is Fossil Creek LLC. The Monitor reports that, as of the date of the Monitor's Third Report, "no Offshore Investor has advised the Monitor or its consultants that it was asked to vote to approve the Fossil Creek Sale." Mr. Lind confirmed on cross-examination that he was unaware of approval for the sale being sought from UFI holders. According to Mr. Lind, the proceeds of the sale of the Fossil Creek lands are being held by a Texas company not party to these *CCAA* proceedings at the direction of Mr. Foo. The funds are apparently deposited at a branch of the Chase bank but Mr. Lind refused an undertaking request to disclose the location of the specific branch where the funds are deposited. The Monitor advised in its First Supplement to the Third Report that the sale of the Fossil Creek lands was made to a *bona fide* third-party purchaser at below the appraised value. The Monitor was "unable to comment on whether the sale was made improvidently."

39 The Canadian Investors in Windridge own units in the Windridge Trust. The Hills of Windridge A2A Trust Declaration provides that a meeting of Windridge Trust investors may be called by investors holding at least 25% of the units. The Windridge Trustees are required to provide investors with annual financial statements from time to time as required by applicable law and to prepare and maintain accounting records. No financial statements for the Windridge Trust (or any entities associated with the Windridge project) have been provided to the Monitor despite the direction of the Court. The inference that I draw from non-production is that financial statements were never prepared.

40 The Offshore Investors in Windridge own UFIs which are governed by the Windridge Deed of Covenant. The UFI holders do not have any rights to participate in the development of the Windridge lands but they have the right to vote on the sale of all or any part of the Windridge lands. Pursuant to the Windridge Deed of Covenant, Windridge LLC as "Facilitator" is required to maintain accurate books and records and make such books and records available for inspection by UFI holders at Windridge LLC's office in Texas. The Windridge Deed of Covenant provides that a Facilitator other than Windridge LLC may be appointed. It is not clear whether a different Facilitator was appointed and, if so, what entity was appointed. No financial

records for Windridge were produced by the Respondents despite the direction of the Court. The inference that I draw from non-production is that financial records were not kept.

41 A small parcel of the Windridge lands was sold to TRWD. The Monitor reports that the Offshore Investors were not aware of the sale and, accordingly, it may be inferred that they did not vote on the sale. The Respondents provided no information to the Monitor concerning the location of the sale proceeds. Mr. Lind refused to answer an undertaking request concerning the location of the sale proceeds.

42 The Respondents submit that the Applicants' real issue is that the Respondents failed to communicate with investors. They contend that this is something that should be dealt with through a normal civil action rather than the *CCAA* process. I will return to this question later in these Reasons, but it is important to note that the Applicants' concerns go beyond the Respondents' poor communications. The Monitor concluded from its investigation, and I accept, that the Respondents are "either incapable of or unwilling to undertake the fiduciary responsibilities to act as a 'Facilitator' or 'Trustee' in the realization and distribution process when A2A Group projects are monetized." The Monitor further concluded that the Respondents have failed to:

(a) comply with basic requirements to keep and maintain accurate books and records;

(b) comply with basic reporting requirements to which the A2A Investors are entitled;

(c) maintain corporate registrations of key entities in the A2A Group; and

(d) fully account for the source and uses of funds of the A2A Group.

43 The evidence of the Applicants, which was not available to the Monitor at the time of the Third Report, shows that the Respondents have paid some Windridge and Fossil Creek investors and not others. The discrepancies cannot be explained on the grounds that the various investors own different classes of securities. All Canadian investors in Windridge own the same class of security but some have received payments and others have not. The same is the case for Fossil Creek. And among those who have received payments, the payments vary in ways that do not appear to be proportionate to the size of investment. The evidence of the Applicants is consistent with the Monitor's conclusion that the Respondents are incapable of meeting their responsibilities to investors. I conclude that the Respondents' dilatory recordkeeping and general disregard for investor rights mean that the Respondents will not be able (even if they were willing) to conduct a realization and distribution process that is fair to all investors.

ii. The (In)significance of Investor Contractual Rights

44 The Canadian Investors are "accredited investors" as that term is used in securities law. Accredited investors are required to have income or financial resources greater than prescribed thresholds. Net worth and income are used by securities law as a proxies for investor sophistication. Because the Applicants are accredited investors, the securities sold by the Respondents were exempt from the prospectus requirements of securities laws in Canada. The securities regulatory regime that applied to the Offshore Investors is not clear to the Court. The securities purchased by the investors were limited partnership units, trust units, bonds, and UFIs, so the Applicants do not enjoy the rights afforded to shareholders in corporate law nor do they have recourse to statutory remedies in corporate or securities law. The terms of the securities and the rights of the Applicants are set out in the offering memoranda for each security and other material agreements relevant to each project.

45 A theme of the Respondents' written and oral submissions was that the Applicants have limited rights pursuant to the terms of their securities and did not bargain for the rights now afforded to them pursuant to the *CCAA*. The Respondents submit that the Applicants should be restricted to their contractual rights and nothing more. The Canadian Respondents assert that the Applicants "are effectively asking the Courts to give them rights they did not bargain for." The US LLCs submit that the "appropriate" thing for the Applicants to do is "commence litigation for breach of contract." There are several flaws in this line of reasoning.

46 The idea that the investors bargained for anything is incorrect even though Courts often speak of securityholders bargaining for rights. The word bargaining suggests that there was a negotiation between parties with the ability to engage in trade-offs. The rights that attached to the LP units, Trust units, Bonds, and UFIs in the present case were determined by the Respondents and then the securities were sold as "financial products" by agents who had no authority to vary their terms. The investors had a choice to buy the securities or not. They did not negotiate the terms of the securities. The legal rights that attach to the securities, in this sense, are no different than the terms any other standard form contract. I discuss this in greater detail in Colin Feasby, "Bondholders and Barbarians: BCE and the Supreme Court's New View on Directors' Duties" in Todd L. Archibald & Randall Scott Echlin, *The Annual Review of Civil Litigation* (Toronto: Carswell, 2009) 83 at 88-89.

47 Whether rights were bargained for or offered on a take it or leave it basis has legal significance in two ways. First, a lack of bargaining or unequal bargaining power affects the approach to contract interpretation: ***Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21** at para 28 and ***Douez v Facebook, Inc*, 2017 SCC 33** at para 173 *per* McLachlin CJC and Côté J dissenting. Second, whether a contract is negotiated or a standard form determines the standard of review of contractual interpretation on appeal: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37** at paras 28 & 46. The Respondents do not point to any language in the documents governing the securities that can be interpreted as preventing securityholders from using the *CCAA*. I reject the suggestion that there was a negotiation between the Applicants and Respondents that somehow prevents them from asserting their rights under a statute of general application like the *CCAA*. Nor does the fact that the Applicants only paid for certain contractual rights mean that statutory rights are not available to them if they satisfy the requirements of the statute.

IV. Are CCAA Proceedings Appropriate?

A. The Solvency of the Respondents

48 Justice Simard concluded that the Respondents were insolvent, but certain additional evidence that has come to light since his decision must be noted. Simard J's decision on the solvency of the Respondents turned, in part, on the fact that there was an unpaid $3.8 million judgment against the US LLCs in Texas. The Respondents submit that the Texas judgment should not be considered a liability because it is a default judgment and does not impede the Windridge and Fossil Creek projects. In addition, whether the Texas judgment can be considered turns on the status of the US LLCs as parties to this proceeding, an issue that will be dealt with in a later section of these Reasons.

49 The fact that the Texas judgment is a default judgment as opposed to a trial judgment is of no consequence. The US LLCs made a conscious decision not to defend the allegations against them. Perhaps that was because they had no money to defend the case, maybe it was because they knew the allegations to be true, or possibly there were other reasons. Whatever the reason, a default judgment is a liability in the same way as any other judgment. The US LLCs also quibbled in oral argument with the characterization of the Texas judgment as a finding of fraud. As I understand the objection, it is because the judgment specifically states that the judgment against other defendants is for fraud and misappropriation of funds but there is no similar statement regarding the US LLCs. To emphasize the fact that other defendants such as Joseph Attrux, a director of some of the Respondent entities, were expressly found liable for fraud whereas the US LLCs were only found jointly and severally liable "on all causes of action in the Plaintiffs' First Amended Petition" is to highlight a distinction without a difference.

50 The Monitor highlighted in its Third Report that Angus Manor had liabilities of $5,560,644 as of December 10, 2018 which is the most recent date for which information was provided by the Respondents. Similarly, Serene Country Homes (Canada) Inc ("Serene Canada") is shown as having $5,329,059 in liabilities as of December 4, 2018, the most recent date for which financial information was provided by the Respondents. Other Respondents are also shown by the Third Report to have liabilities, though less than Angus Manor and Serene Canada. Given that the reason given for not preparing and providing more recent financial information is that the Respondents were facing financial challenges and there is no evidence of Angus Manor or Serene Canada receiving a cash injection since 2018, I infer that the current liabilities of Angus Manor and Serene Canada are equal to or greater than that stated by the Monitor as of December 2018. So even if the Texas judgment is not considered, the Respondents have liabilities of more than $5 million as required by the *CCAA*.

51 There is also considerable evidence that the Respondents cannot meet their liabilities as they come due. Mr. Lind, director and trustee of several of the Respondent entities, explained in his December 31, 2024 affidavit that the Respondents had experienced "financial challenges." He described how these financial challenges caused the Respondents to fail to meet their contractual obligations to the Respondents:

> One impact of these financial challenges was that there were limited funds available to pay accountants, maintain offices, or continue software subscriptions that the companies had utilized. Documents ended up spread over multiple places held by different accountants or law firms that we had not maintained contact with. In some cases, financial statements simply were not prepared, as funds were tight and most of the entities involved did not have operations beyond holding assets.

52 Mr. Lind further advised on cross-examination that records concerning Windridge and Fossil Creek were lost when the Respondents were locked out of their Fort Worth office by their landlord in 2018 and not permitted to retrieve their records. I infer from this evidence that the Respondents were not paying their rent as it came due. Mr. Lind also admitted on cross-examination that the Respondents were unable to produce certain information concerning UFIs because they failed to maintain their subscription to a software service that they used to keep track of land ownership interests because of financial constraints. The failure of the Respondents, a corporate group involved in land development, to maintain a software subscription that was essential to tracking land ownership interests is a further indication of their insolvency.

53 The continuing failure of Angus Manor Capital to pay the bondholders interest that had accrued to September 30, 2021 was not addressed in submissions before Justice Simard and, accordingly, was not noted in his reasons for decision. The failure to pay interest due to bondholders is evidence of insolvency.

54 The evidence that has come to light since Justice Simard's decision or was not brought to his attention supports his conclusion that the Respondents were insolvent. If I were required to consider the question afresh based on the evidence now before me, I would conclude that the Respondents are insolvent.

B. Equity and the Purposes of the CCAA

55 Perhaps the most important question raised by the Respondents is whether the Applicants' use of the *CCAA* is appropriate. The Respondents submit that the Applicants are equity investors who enjoy minimal contractual rights. The Applicants, according to the Respondents, are using the *CCAA* to acquire rights that they did not bargain for. Further, the Respondents submit that the Applicants are using the *CCAA* to obtain injunctive relief and to conduct an investigation rather than restructure or liquidate the Respondent entities.

56 The Respondents submit that Justice Simard agreed with their position. The Respondents place great emphasis on his observation that "there are limits to the [*CCAA*'s] flexibility. As its name suggests, the purpose of the *Act* is to assist insolvent companies in developing and seeking compromises and arrangements with their creditors. The continuation of a stay <u>may</u> not be appropriate <u>if</u> the purpose of the proceedings is not to further that fundamental purpose of the *Act*" [emphasis added]. Justice Simard's comments demonstrate that he recognized that the issue raised by the Respondents must be taken seriously. Indeed, he directed the Respondents to provide additional information to the Monitor so that the issue could be considered with the benefit of a more robust evidential record.

57 The Respondents conducted a survey of all *CCAA* filings since 2009. Their survey revealed that 94.1% of all *CCAA* proceedings were commenced by debtor companies, 4.5% were commenced by secured creditors, 0.5% were commenced by unsecured creditors, 0.5% were commenced by a receiver, 0.2% were commenced by an interim receiver, and 0.2% were commenced by a liquidator/monitor together with a debtor company. The Respondents submit that the absence of any *CCAA* proceedings being commenced by equity investors over the last 15 years is proof that equity investors cannot commence *CCAA* proceedings. The fact that equity investors have not commenced *CCAA* proceedings does not mean that it is impossible for them to do so, but it suggests that when presented with an application by equity investors to commence *CCAA* proceedings a Court should proceed with extra care.

58 The idea that equity investors may never commence *CCAA* proceedings sits uneasily with the fact that equity holders sometimes have significant economic interests in companies that are insolvent. This can be illustrated with the definition of insolvency typically used in the *CCAA* context which is found in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), s 2:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

59 The *BIA* s 2 definition of insolvent person is not cumulative. A person (or company) may be insolvent if any of the three criteria are satisfied. A company may be insolvent where it is unable to meet its obligations as they become due even though the value of its assets exceeds its liabilities - this is sometimes called a liquidity crisis. Where there is a liquidity crisis, it is possible that equity holders will have the most significant economic stake in a debtor company. Normally, the board and management of a debtor company - who directly or indirectly represent the interests of equity (though fiduciary obligations are owed to the corporation as a whole) - will commence *CCAA* proceedings to deal with a liquidity crisis. And, in that sense, it may be said that most *CCAA* proceedings are commenced by representatives of equity. However, it is possible to envision circumstances where a debtor company's board or management fail to act in the face of insolvency as is arguably what has happened in the present case. The strength of the *CCAA* as a statutory framework for managing insolvency problems is its malleability. In my view, it would be unwise to constrain unanticipated future uses of the *CCAA* by stating categorically that equity investors may never commence *CCAA* proceedings.

60 The Respondents, in making the submission that equity investors cannot commence *CCAA* proceedings, also appear to be making a collateral attack on Justice Simard's decision that the Applicants have standing. Justice Simard questioned whether the Applicants were contingent creditors as they claimed without deciding the issue but went on to find that they nevertheless have standing pursuant to *CCAA* s 11 because they are interested persons. The Applicants emphasized in submissions before me (though not before Simard J) that the bondholders are not just equity investors or contingent creditors, they are proper creditors. The bondholders are creditors because the interest that was due to them on September 30, 2021 was not paid and remains outstanding. If the question of standing were presented today, it would not be necessary to determine whether equity investors or contingent creditors have standing because there are actual amounts due and owing to some of the Applicants.

61 Leaving aside that it is now obvious that some of the Applicants are proper creditors, Justice Simard's determination that the Applicants, as equity investors, have standing pursuant to *CCAA* s 11 is not determinative of whether the *CCAA* is being used properly. That is clear from his reasons. The relevant question is not whether, in the abstract, equity investors have standing; rather, it is whether these Applicants are using the *CCAA* consistent with its purposes.

62 So, what are the purposes of the *CCAA*? Chief Justice Wagner and Justice Moldaver, writing for the Court, explained what they considered to be the "overarching remedial objectives" of "Canada's insolvency statutes" in ***9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10** at paras 40-41:

> (a) providing for timely, efficient, and impartial resolution of a debtor's insolvency;
>
> (b) preserving and maximizing the value of a debtor's assets;
>
> (c) ensuring fair and equitable treatment of the claims against a debtor;
>
> (d) protecting the public interest; and

(e) in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

63 Karakatsanis J, concurring, in ***Canada v Canada North Group Inc*, 2021 SCC 30** at para 137 held "the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies" citing ***Century Services Inc v Canada (Attorney General)*, 2010 SCC 60** at paras 15 and 59. Wagner CJC and Moldaver J observed in ***Callidus Capital*** at para 41 that "the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor 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 either through a receivership or under the *BIA* regime." Later at para 42 they noted that "liquidating CCAAs" are "now commonplace."

64 The Applicants submit that the use of the *CCAA* in the present case is consistent with the purposes of the *CCAA*. The Applicants contend that the Monitor is necessary to preserve and maximize any value that remains in the Respondent entities because the Respondents have demonstrated that they are unable or unwilling to do so. They further assert that the Monitor can promote the fair and equitable treatment of investors by, among other things, administering a claims process. Absent the *CCAA* stay and Monitor's involvement there is the prospect of competing investor claims in multiple jurisdictions. I agree that the proposed use of the *CCAA* is the most efficient way to move forward and is the process most likely to result in the best return for stakeholders subject to my concerns about the Monitor's ability to bring the US assets into the *CCAA* process set out below in paras 68 and 88. The safeguard of a court-appointed monitor ensures that stakeholders have a transparent and responsive interlocutor, guarantees that stakeholders will be treated fairly, and will facilitate the administration of a fair claims process.

65 The Respondents submit that the *CCAA* should not be used to obtain injunctive relief or conduct an investigation. The Respondents' submission that the *CCAA* should not be used to obtain injunctive relief is just another way of making their argument that the Applicants should be limited to their contractual rights. I have discussed this argument elsewhere in these Reasons. The contention that a *CCAA* proceeding should not have an investigatory function is incorrect. *CCAA* s 23(1)(c) provides that among the duties and functions of a Monitor is to:

> make, or cause to be made, any appraisal or <u>investigation</u> the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings [emphasis added].

66 Recent cases confirm that it is appropriate for a Monitor to undertake an investigation, especially where there is suspected fraud or where debtor companies or their principals are not forthcoming with information and records to assist the Monitor perform its functions: ***Aquino v Aquino*, 2021 ONSC** at paras 17-18; ***Aquino v Bondfield Construction Co*, 2024 SCC 31** at paras 11-12; ***Arrangement relatif à Bloom Lake General***, 2021 QCCA 2946 at paras 76-85; and ***Original Traders Energy Ltd., (Re)*, 2024 ONSC 325** at para 84.

67 The Respondents submit that the present *CCAA* proceedings cannot achieve the purposes of the *CCAA*, at least with respect to Windridge and Fossil Creek, because the Texas Trusts and the trustee, Dirk Foo, are not subject to the ARIO. According to the Respondents, the *CCAA* proceedings are destined to fail because the Windridge lands and Fossil Creek lands and the bank accounts that contain the proceeds of such of those lands that have already been sold are beyond the reach of this Court. This objection is potentially fatal for the *CCAA* proceedings concerning Windridge and Fossil Creek because without control over the US assets, there is no prospect for recovery for stakeholders through the *CCAA* proceedings. Though the assets may prove to be beyond the reach of the Monitor, in my opinion, it is premature to conclude that the Monitor will fail and the *CCAA* proceedings must be terminated in respect of Windridge and Fossil Creek. Justice Simard's decision that this Court does not have jurisdiction over the Texas Trusts does not prevent the Monitor from taking other steps in Canada or legal action in the US, whether under the rubric of Chapter 15 or otherwise, to achieve its objectives. So far, the Monitor has not articulated a plan for gaining control of the remaining Windridge lands and the bank accounts that hold the proceeds of the sales of the Fossil Creek and Windridge lands. This is a critical point that I will return to in the Conclusion of these Reasons.

68 The Respondents say that neither the Applicants nor the Monitor have put forward a "germ of a plan" and, as such, there is no reasonable possibility of successfully restructuring the debtor companies: ***Re Inducon Development Corp*, 1991 CarswellOnt 219** at para 14; more recently, see ***Industrial Properties Reginal Limited v Copper Sands Land Corp*, 2018 SKCA 36** at para 20 and ***Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657** at para 58. The Respondents are correct that the Applicants and the Monitor have not outlined a plan, but the present circumstances are unusual, and a contextual approach is warranted.

69 First, the Applicants must be held to a different standard than is normally the case when a *CCAA* process is commenced by a debtor company or a sophisticated secured creditor that possesses intimate knowledge of the debtor company. When a *CCAA* proceeding is commenced by a debtor company or sophisticated secured creditor, it follows that the Court expects there to be something of a plan even in the early stages. That cannot be the case where, as here, the Applicants had little knowledge of the inner workings of the Respondents because the Respondents were delinquent in their reporting obligations. For that reason, the Monitor's primary task in the early phase of these proceedings, as reflected in the ARIO, was to gather information from the Respondents. The Monitor was also admonished not to do more work than necessary which, it now says, caused it not to allocate resources to the development of a plan. To defeat the *CCAA* proceedings because the Applicants and the Monitor did not have enough information to articulate a plan at the Initial Order stage would reward the Respondents for their recalcitrance.

70 Second, it does not take much imagination to know what a plan in this case will look like at a high level. The debtor companies control real estate that, following their own business model, must be sold before money is returned to investors. Precisely how that is to be done and what steps must be taken prior to the sales are details that the Applicants and Monitor cannot be expected to know at this stage of the proceedings. The reality is that the Applicants' "germ of a plan" is the same as the Respondents'. The difference between the two is that the Applicants believe that the process of liquidating real estate assets and returning money to investors should be under the control of a professional, neutral, independent, competent ,and trustworthy steward (*i.e.* the Monitor, not management).

C. Do the Applicants Represent the Interests of Investors?

71 The Respondents submit that the Applicants do not represent the interests of most investors and that the *CCAA* proceedings are effectively conscripting the funds of all investors in pursuit of the interests of a minority of the investors. The Respondents are correct that, together, Fasken and Norton Rose do not have the support of the majority of investors. The Respondents ask, in effect, that the Court infer that a silent majority of investors supports management and opposes the *CCAA* proceedings. The Respondents produced many proxies supporting the Angus Manor sale transaction that was halted by the Initial Order. However, I do not consider the Angus Manor proxies to be an indication that investors oppose the *CCAA* proceedings, because they predate the Initial Order. The Respondents have adduced no evidence to show investor support after the Initial Order.

72 Fasken, counsel to the Canadian Investors, has been contacted by 120 investors who represent approximately CAD $2.85 million. Of those 120 Canadian Investors, 114 expressed support for the Monitor, two stated no opinion, and four were unsure or required more information to decide. An obvious difficulty in this case is that many of the investments were made a decade ago and there has been little communication with investors since. Some investors may have lost interest or given up and others may have changed their contact information. The response to Fasken suggests that those of the Canadian Investors who can be contacted and remain interested in their investment overwhelmingly support the *CCAA* proceedings.

73 Norton Rose, counsel to the Offshore Investors, has been contacted by 303 Offshore Investors representing US $8,910,462 and CAD $4,649,021 plus small amounts denominated in other currencies. Of those 303 Offshore Investors, 291 indicated their support for the Monitor and only five opposed the appointment of the Monitor with seven expressing no opinion. The Respondents' submission that Norton Rose does not represent the interests of most Offshore Investors is meritless. Norton Rose requested a list of the Offshore Investors that included contact information. Mr. Lind deposed that the information was controlled by a non-*CCAA* affiliate based in Singapore, not the Respondents, and could not be provided because of Singapore privacy law. Counsel for the Offshore Investors submitted, and I agree, that the Respondents could have requested their Singapore affiliate to notify Offshore Investors of the *CCAA* process and provide them with contact information for Norton Rose and the Monitor but they did not.

74 Of the investors who have made their views known, the vast majority support the *CCAA* process. To the extent that Fasken and Norton Rose are unable to contact investors to solicit their views, that is attributable one way or another to the conduct and choices of the Respondents. The inference that I draw from the facts set forth in this section is not that a silent majority opposes the *CCAA* process; to the contrary, I infer that if it was possible to contact and inform all investors, a strong majority would support the *CCAA* process.

V. Jurisdiction over US LLCs

75 Justice Simard, as noted earlier in these Reasons, concluded that this Court has jurisdiction over the US LLCs. The objection raised by the US LLCs before me is different. The US LLCs submit that because they are not doing business in Canada they do not fit within the *CCAA* s 2(1) definition of "company" and, as such, they cannot be subject to these *CCAA* proceedings. *CCAA* s 2(1) provides that:

> **company** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust . . . [emphasis added]

76 Are the US LLCs doing business in Canada? Counsel conceded in oral argument that the US LLCs had done business in Canada during the capital raising phase when funds were solicited from Canadian investors but submitted that they had ceased to do business in Canada upon transferring the Fossil Creek lands and Windridge lands to the Texas Trusts. I agree that the US LLCs were not doing business in Canada at the time of the Initial Order, but that does not dispose of the issue.

77 The approach taken by leading insolvency judges to the *CCAA* definition of company has been flexible, consistent with the remedial purpose of the statute. Chief Justice Morawetz, citing a long list of authorities, observed in ***Pride Holdings Group Inc*, 2024 ONSC 1830** at para 30: "This Court has found it just and reasonable to extend the protection of the stay of proceedings to non-applicant limited partnerships and non-applicant affiliates where such parties are integrally and closely interrelated to the debtor companies' business in order to ensure that the purposes of the CCAA can be achieved." Morawetz J, as he then was, in ***Priszm Income Fund (Re)*, 2011 ONSC 2061** at paras 10 & 20 extended a *CCAA* stay order to "an unincorporated, limited purpose trust" whose function was to hold limited partnership units on the basis that it could be characterized as an "income trust" which is included in the *CCAA* definition of "company." This approach is very much in evidence in the Initial Order in the present case which applies to the debtor companies and affiliated entities including various limited partnerships and trusts.

78 When a debtor corporation is the applicant, courts have been willing to take jurisdiction over non-applicant affiliated foreign entities and extend a *CCAA* stay to those entities. Justice Osborne in ***BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645** found the applicants to be debtor companies and Ontario was determined to be the proper jurisdiction for the proceedings. Osborne J then considered the extension of the *CCAA* stay to direct and indirect foreign subsidiaries of the applicants based in Germany, the Netherlands, and Delaware. "None [of the non-applicants] carry on active business" (para 43), Justice Osborne observed, and thus cannot be said to have been doing business in Canada. Osborne J explained at para 42 that "[t]he court has authority to extend the stay to non-parties pursuant to ss 11 and 11.02(1) of the CCAA, which permits the court to make an initial order on any terms imposed." He concluded at para 44: "I am satisfied that the stay should be extended to these parties to prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions, all of which would be counterproductive to the maximization and protection of value for stakeholders of the Applicants."

79 Where, as in the present case, the applicants are creditors and equity investors, a court should apply the same principles outlined for debtor corporation applicants by Osborne J in ***BZAM***. The US LLCs are analogous to the BZAM affiliates based in Europe and the US that did not conduct business in Canada. The inclusion of the US LLCs is appropriate and necessary because, as Simard J found, they are intextricably intertwined in the business of the debtor companies. Further, the inclusion of the US LLCs mitigates the risk of uncoordinated realization and enforcement and promotes the maximization and protection of value for stakeholders.

80 I cannot accept the Respondents' submission that there is no purpose in the US LLCs being subject to the *CCAA* process because they are, in effect, inactive. The assertion of inactivity is contrary to the statement in the relevant offering memoranda that the purpose of the US LLCs was "overseeing all aspects of the development of the [Windridge and Fossil Creek lands]." Further, the LLCs were used in 2024 to facilitate sales of Windridge and Fossil Creek lands. The Fossil Creek lands were sold to Bloomfield Homes LP in Fall 2024. Details are sketchy because the Respondents have provided only limited documentation concerning the sale to the Monitor. From the documentation that was provided, it is evident that Fossil Creek LLC was used to facilitate the sale of the Fossil Creek lands. Windridge LLC was also used to facilitate the sale of some of the Windridge lands to TRWD. This recent activity suggests that the Texas LLCs have ongoing relevance to the Respondents' business. Further, since the Texas LLCs are the ones that conducted business with the Texas Trusts, it is prudent to keep them under the *CCAA* umbrella so that the Monitor can use the Texas LLCs to further any legal steps that may be taken in Texas in respect of the Texas Trusts or Mr. Foo.

V. *CCAA* v Receivership

81 The Applicants' alternative remedy is the appointment of a receiver pursuant to *Judicature Act*, RSA 2000, c J-2, s 13(2). The test for the appointment of a receiver is whether it is just and convenient to do so: ***BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127** at para 17. For the same reasons that I have concluded that a *CCAA* proceeding is appropriate, I find that a receivership is just and convenient in the circumstances. The real question is which is the more appropriate procedure in the present circumstances.

82 Where a court is not satisfied that management should be displaced it may opt for *CCAA* proceedings instead of a receivership because in a typical *CCAA* proceeding management remains in control. That was obviously not a relevant consideration in choosing between a receivership and *CCAA* proceedings in the present case as I was satisfied that management should be unseated as reflected in the Initial Order. The Respondents point out that I characterized the effect of the Initial Order differently in my decision denying their request to extend time for seeking leave to appeal the Initial Order: ***A2A GP Inc (Re)*** at para 4. The sentence in my earlier decision about not unseating management was something that I meant to remove from the final version of the decision but failed to do so in my haste to get the parties a prompt answer over the last weekend before the holiday break. The error has now been corrected by way of a corrigendum.

83 Courts faced with the question of choosing between *CCAA* and receivership proceedings in the context of real estate development ventures often opt for a receivership: see, for example, ***Ashcroft Urban Developments Inc. (Re)*, 2024 ONSC 7192** and the discussion in Jeremy Opolsky, Jacob Babad, & Mike Noel, "Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis" (2020) 18 *Annual Review of Insolvency Law* 199. A Court's decision between *CCAA* and receivership proceedings often turns on a weighing of the prejudice and benefits to creditors.

84 The present case is different from the typical real estate development insolvency in an important way. There is no secured creditor that might be prejudiced by *CCAA* proceedings. The absence of a secured creditor also means that there is no party with security that provides the right to appoint a receiver and, accordingly, there is no party with standing to apply for the appointment of a receiver pursuant to the *BIA*. The only alternative in the present case is to apply pursuant to the *Judicature Act* as the Applicants have done.

85 A *BIA* receivership offers many of the same advantages as a *CCAA* proceeding. A *BIA* receiver or *CCAA* Monitor does not need to seek the assistance of courts in other provinces because the *BIA* and *CCAA* are federal statutes. Similarly, a *BIA* receiver and *CCAA* Monitor may be recognized and empowered to act in the US pursuant to Chapter 15 of the *US Bankruptcy Code*. A *Judicature Act* receiver, however, must commence proceedings in other provinces and in the US for recognition and to protect a debtor company's property. A *Judicature Act* receivership is a less efficient and effective tool than a *BIA* receivership or *CCAA* proceeding. And efficiency is an important consideration in the insolvency context where parties are seeking to preserve a diminishing pool of assets.

86 Where national and international coordination is required to preserve a debtor's assets and maximize recovery for creditors, a federal insolvency statute is usually preferable to a provincial statute like Alberta's *Judicature Act*. A *CCCA* proceeding is more appropriate in the present case than a *Judicature Act* receivership.

VI. Conclusion

87 The evidence now before the Court is significantly more robust than was available at the Initial Order application on November 14, 2024 or at the first phase of the Comeback Hearing on November 21, 2024. The additional evidence provided by both parties, together with the Monitor's investigation and analysis, reinforces my view that my decision to grant the Initial Order was correct and that *CCAA* proceedings are appropriate. The Respondents' application to set aside the Initial Order and ARIO is dismissed.

88 Though I have confirmed that the *CCAA* proceedings are appropriate, the evidence is clear that the Windridge lands, the proceeds of the small parcel of the Windridge lands sold to TRWD, and the proceeds of the sale of the Fossil Creek lands remain outside the reach of the *CCAA*. If those lands and proceeds cannot be brought under the control of the Monitor through the Chapter 15 proceedings or otherwise, then the *CCAA* proceedings are destined to fail in respect of the Windridge and Fossil Creek entities, including the US LLCs. The Monitor shall have 21 days from the date of these Reasons to provide a plan for gaining control of the Windridge lands and the proceeds of the sales of the Windridge lands and Fossil Creek lands to the Court. If a reasonable plan is not provided to the Court within 21 days, then the *CCAA* proceedings shall terminate in respect of the Windridge and Fossil Creek entities, including the US LLCs.

End of Document

TAB 3

2011 NBBR 311, 2011 NBQB 311
New Brunswick Trial Division

Tepper Holdings Inc., Re

2011 CarswellNB 592, 2011 CarswellNB 849, 2011 NBBR 311, 2011 NBQB 311, [2011] N.B.J. No. 388, 209 A.C.W.S. (3d) 952, 381 N.B.R. (2d) 1, 82 C.B.R. (5th) 293, 984 A.P.R. 1

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

In the Matter of a Plan of Compromise or Arrangement of the Applicants, Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd.

Lucie A. LaVigne J.

Heard: October 5, 2011
Oral reasons: October 5, 2011
Written reasons: October 18, 2011
Docket: E/M/4/2011

Proceedings: additional reasons to *Tepper Holdings Inc., Re* (2011), 2011 NBQB 211, 2011 CarswellNB 417, 80 C.B.R. (5th) 339 (N.B. Q.B.)

Counsel: Josh J.B. McElman, Rebecca M. Atkinson for Bank of Montreal
R. Gary Faloon, Q.C., James L. Mockler for Gilbert McGloan Gillis
Robert M. Creamer for Applicants
Ronald J. LeBlanc, Q.C. for National Bank of Canada

Subject: Insolvency; Civil Practice and Procedure; Public; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Interim financing
Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.i Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicant companies were involved in legal proceedings — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditor banks, BM and NB, for three weeks — Monitor was appointed — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted; stay was extended for 2.5 months — Initial order was varied to reduce amount of debtor in possession (DIP) financing to amount needed to meet short-term needs — No creditor was prejudiced by change as no DIP financing was in place — DIP financing was fair, reasonable and appropriate — DIP financing was necessary to assist companies in restructuring operations and coming up with plan of arrangement during stay, while continuing as going concern — Total amount of companies' legal accounts was $508,686 — Submissions were made regarding legal accounts of companies; creditors argued that legal fees should be capped or ought not to be compensated at all — Legal accounts of companies reduced — Of 20 different people billed to companies'

account, nine people were not identified as articling students or paralegals; this information was necessary to verify that time recorded was in fact spent by personnel whose experience can reasonably be said to justify rates charged — Nine different lawyers including three senior lawyers worked on this file and had discussions amongst themselves concerning this matter; level of duplication of experienced counsel could not be endorsed without further explanation — Companies applied ex parte for DIP financing alleging that there was urgency as creditor was about to enforce its security — However, creditor had not asked for payment and there was no indication at that time that creditor was about to enforce its security; companies' solicitor did not advise Court of recent amendments to CCAA, which required that proper notice be given to affected secured creditors before approving DIP lender's charge — Legal fees reduced to $150,000.

Civil practice and procedure --- Costs — Scale and quantum of costs — Miscellaneous

Applicant companies were involved in legal proceedings — Companies' liabilities outnumbered companies' assets — Companies obtained initial order pursuant to s. 11 of Companies' Creditors Arrangement Act (CCAA) staying creditor banks, BM and NB, for three weeks — Monitor was appointed — Companies brought motion for extension of stay at comeback hearing — Creditor bank brought motion for termination of stay, or variation of initial order — Motions were granted; stay was extended for 2.5 months — Initial order was varied to reduce amount of debtor in possession (DIP) financing to amount needed to meet short-term needs — No creditor was prejudiced by change as no DIP financing was in place — DIP financing was fair, reasonable and appropriate — DIP financing was necessary to assist companies in restructuring operations and coming up with plan of arrangement during stay, while continuing as going concern — Total amount of companies' legal accounts was $508,686 — Submissions were made regarding legal accounts of companies; creditors argued that legal fees should be capped or ought not to be compensated at all — Legal accounts of companies reduced — Of 20 different people billed to companies' account, nine people were not identified as articling students or paralegals; this information was necessary to verify that time recorded was in fact spent by personnel whose experience can reasonably be said to justify rates charged — Nine different lawyers including three senior lawyers worked on this file and had discussions amongst themselves concerning this matter; level of duplication of experienced counsel could not be endorsed without further explanation — Companies applied ex parte for DIP financing alleging that there was urgency as creditor was about to enforce its security — However, creditor had not asked for payment and there was no indication at that time that creditor was about to enforce its security; companies' solicitor did not advise Court of recent amendments to CCAA, which required that proper notice be given to affected secured creditors before approving DIP lender's charge — Legal fees reduced to $150,000.

Table of Authorities

Cases considered by *Lucie A. LaVigne J.*:

Bolands Ltd. v. 052897 N.B. Ltd. (1994), 144 N.B.R. (2d) 9, 368 A.P.R. 9, 1994 CarswellNB 250 (N.B. Q.B.) — referred to

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Denecky v. Butkiewicz (1993), 16 Alta. L.R. (3d) 356, (sub nom. *Stringam Denecky v. Butkiewicz)* 147 A.R. 321, 1993 CarswellAlta 244 (Alta. Q.B.) — referred to

Heinrichs Estate v. Baker, Zivot & Co. (1996), 108 Man. R. (2d) 47, 1996 CarswellMan 2 (Man. Q.B.) — referred to

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s. 11 — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1)(b) [en. 2005, c. 47, s. 128] — considered
Farm Debt Mediation Act, S.C. 1997, c. 21
Generally — referred to
Rules considered:
Rules of Court, N.B. Reg. 82-73
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ADDITIONAL REASONS to judgment reported at *Tepper Holdings Inc., Re* (2011), 2011 NBQB 211, 2011 CarswellNB 417, 80 C.B.R. (5th) 339 (N.B. Q.B.), regarding quantum of legal costs.

***Lucie A. LaVigne J.*, (orally):**

I. Introduction

1 This motion, brought within CCAA proceedings, concerns the capping and/or taxation of insolvent Corporations', namely Tepper Holdings Inc., Tobique Farms Ltd., Tobique Farms Operating Limited, Tobique International Inc., 637454 N.B. Ltd., New Denmark Farms Ltd., Tilley Farms Ltd. and Agri-Tepper & Sons Ltd., legal accounts. The Initial Order under the CCAA was issued on June 27, 2011. The total amount of the Corporations' legal fees, as billed by its solicitors, the law firm of Gilbert McGloan Gillis ("GMG"), inclusive of disbursements and taxes, up to and including September 30, 2011, is $508,686.06 ("Legal Accounts"). The Bank of Montreal submits that the Legal Accounts should be reduced to $60,000 or less, while the National Bank argues that when considering the results achieved and counsel's behavior throughout these proceedings, GMG ought not to be compensated at all for their efforts.

2 GMG no longer represents the Corporations for the purpose of the CCAA proceedings and therefore I am of the view that this is the proper time to proceed with the taxation of the Legal Accounts. In retrospect, limiting the fees may have been a wise thing to do at the beginning of these proceedings; however, I am afraid that capping the fees at this time will not put an end to the question of GMG's Legal Accounts.

3 I did consider referring the question of the Legal Accounts to the Registrar for assessment. However, this would increase costs for all and would cause additional delay. Since I am the judge who has managed this file from the beginning and has heard the different proceedings with the exception of one motion, I've concluded that it was best that I determine the appropriate *quantum* for legal fees and that it be done immediately so that the professionals would have this information in mind while trying to put a viable plan of arrangement in place. Even if at times I use the words "legal fees", of course I am referring to fees inclusive of disbursements and taxes.

II. The Issue

4 The Court will determine what the appropriate *quantum* of legal fees is by answering the following question: What is a fair, just, and reasonable amount for the Corporations' legal fees in the circumstances of these CCAA proceedings?

III. Background

5 As previously mentioned, the Initial Order was issued on June 27, 2011. At the comeback hearing heard July 18, 2011 ("Comeback Hearing"), the Bank of Montreal and the National Bank, the two major creditors, objected to any extension of the Order, and in the alternative argued that the Court should revisit the Initial Order in order to vary several of its provisions. On July 22, 2011, this Court rendered an oral decision. This decision can now be found at [2011] N.B.J. No. 265. I refer the reader to this decision for additional details concerning this matter. Suffice it to say for the purposes of this motion that the Stay was extended until September 30, 2011, but several provisions of the Initial Order were varied, such as: the DIP Lender's Charge was reduced from $1,000,000 to $300,000; the Administrative Charge was reduced from $500,000 to $250,000; and the Retainer was reduced from $200,000 to $90,000.

6 It took some time for the parties to agree on the wording of the order incorporating the Court's decision. Finally on August 19, 2011, the Extension Order was signed. Since that date various other motions were forwarded to the clerk's office.

7 On August 30, the Corporations forwarded a motion dealing with the DIP financing. This motion was withdrawn before it was served on any party.

8 On August 31, the Corporations filed another motion dealing with the DIP financing. BMO consented to the relief requested and was involved in drafting the materials for the motion. The purpose of this motion was to obtain from the Court confirmation of the corporate authority of Mr. Berend Tepper. This would have allowed the Corporations to obtain DIP financing without its solicitors having to provide the opinion that they had undertaken to give to the DIP lender, BMO; i.e. an opinion confirming the corporate capacity of the borrowers and the validity and enforceability of the DIP facility documents. The Court heard this motion on September 1, 2011, but refused to grant the relief requested. It was suggested that the Corporations proceed to get the proper minutes, authorizations, or documents signed by their directors or shareholders so that GMG could sign the letter of opinion previously agreed to. The Corporations were able to do this, and therefore their counsel provided the opinion and the motion was withdrawn on September 7.

9 On September 13, BMO filed the present motion asking the Court to limit the Corporations' legal fees. This matter was scheduled for September 30, 2011, since I was out of the office from September 12 to September 26, inclusively.

10 On September 20, the Corporations filed a motion soliciting an order directing payment of their legal counsel's accounts and allowing the Corporations to draw upon all of the available DIP financing. As counsel knew that I was absent, they also requested that the motion proceed in the Judicial District of Saint John alleging that it had to be heard forthwith due to the urgency of the matter. It was agreed that Justice Glennie would, the following day, hear the only part of the motion that seemed to be urgent, namely the immediate financial needs of the Corporations to meet their payroll obligations so that the harvesting activities could continue. Justice Glennie refused to grant an order as no urgency existed since the Corporations had sufficient cash in their bank account to pay their employees. The motion was adjourned to September 30, 2011, to be heard at the same time as the BMO motion already scheduled for that day. This motion was withdrawn on September 30 after the Court, at the request of the Monitor, gave directions concerning the DIP financing and the payment of professional fees including a payment of $32,000 to GMG.

11 On September 23, the Corporations filed a motion requesting a further extension of the stay period. This motion was also scheduled to be heard on September 30, 2011.

12 On September 28, BMO filed a motion soliciting an order requiring GMG to personally pay all or part of the legal accounts of BMO and any other party entitled to be compensated. This motion was also originally scheduled to be heard on September 30, 2011, however, by consent on September 29, this motion was adjourned *sine die* since the various parties had not received proper notice. This motion is scheduled to be heard on Friday, October 21, 2011.

13 On September 30, 2011, the Court dealt with the extension motion, as well as a request from the Monitor asking for directions as to the withdrawals to be made from the DIP financing account. The Court settled the question of the DIP financing, but had to adjourn the motion dealing with the extension.

14 BMO, the National Bank, and the Monitor were willing to consent to an automatic extension of the stay period until October 31, 2011, provided that GMG cease to represent the Corporations in this matter. Since GMG would not agree to terminate its representation of the Corporations in this matter unless some sort of arrangement could be arrived at concerning their Legal Accounts, the various parties would not consent to an automatic extension of the Stay. The Corporations' representatives were not in court and it was not possible to ascertain if they had been informed of the offer or whether they were in agreement with the position of their solicitors. At this point, the Court decided that the Corporations needed independent legal advice in relation to these proceedings and specifically to consider the extension offer. The matter was adjourned to October 6.

15 Mr. Joshua J.B. McElman, the solicitor for the Bank of Montreal, then asked the Court if BMO's motion dealing with the capping of GMG's legal fees could be dealt with during the week of October 11 as it was important for the parties to know the amount to be considered for this item in the restructuring plan. The parties were advised that the Court was not available during the week of October 11, but was available the week of October 3 since a matter scheduled for that week would not be proceeding. Mr. Rodney Gillis and Mr. Gary Faloon were in court from GMG. There were some discussions as to whether the Court should also be dealing with the taxation of GMG's fees at the same time as the motion for capping, since it seemed that GMG's role as counsel representing the Corporations in the CCAA proceedings was about to come to an end.

16 Mr. Rodney J. Gillis, Q.C., who is the senior partner at GMG, asked, or at the very least agreed, that we should proceed with BMO's motion and the taxation at the same time, but requested to proceed either October 4 or October 5 as he was not available on Thursday, October 6. It was expected that someone else from his office would be in court on Thursday for the continuation of the motion requesting an extension but he would be present for the motion dealing with the capping of the fees and the taxation on Tuesday or Wednesday. With the parties consent, the motion and the taxation was scheduled to be heard Wednesday, October 5, 2011, at 9:30.

17 On Tuesday, October 4, BMO, through abundance of caution, filed an amended Notice of Motion which now specifically requested that the Court proceed with a taxation as well as a capping of the fees on October 5.

18 On October 4, BMO also filed a motion for an order removing the law firm of GMG as solicitors of record for the Corporations in these CCAA proceedings. It was not necessary to proceed with this motion as a Notice of Change of Solicitors was filed by the Corporations at the beginning of the hearing on October 5.

IV. Request for an Adjournment

19 On Wednesday, October 5, Mr. Gillis was not in court. Mr. Faloon and Mr. James Mockler appeared in court. Before commencing the hearing of the motion, the Corporations filed with the court the Notice of Change of Solicitors, stating that they were now represented by Robert M. Creamer from the law firm of Lawson Creamer concerning the proceedings under the CCAA. Mr. Creamer was in court. For the record, Mr. Creamer and Mr. Faloon acknowledged that Mr. Creamer would only be representing the Corporations in the proceedings concerning the CCAA, and that the law firm of GMG would continue to represent the Tepper family concerning the repatriation of Mr. Hendrick Tepper.

20 Mr. Faloon then asked the Court to adjourn the motion for an extra 10 days. Three arguments were put forward in support of his request; namely, they had not received proper or adequate notice of the Amended Notice of Motion; secondly, if they had more time, it was hoped that they could arrive at a settlement concerning their fees; and thirdly, they wanted more time to consider whether GMG should obtain independent legal advice.

21 The Bank of Montreal, the National Bank, the Monitor, and the Corporations strongly objected to the adjournment since it was very important to have the amount of legal fees attributable to the CCAA proceedings ascertained as soon as possible as this information was necessary to prepare the restructuring plan which the parties hope to present to the Court on or before October 31, 2011. The evidence was that the extraordinary cost of these CCAA proceedings was impairing the Corporations' ability to develop a workable plan.

22 I was of the view that proper and adequate notice was given as the Motion for capping had been served on September 14. GMG knew from that day that their fees were being questioned. Furthermore, Mr. Gillis had specifically agreed to deal with the capping and the taxation on October 5 and I concluded that counsel had to be held to his word.

23 As to the possibility of settlement, all parties except for Mr. Faloon were of the opinion that if a settlement was to be reached, it would be reached immediately or not at all since the parties had all necessary information to make an informed decision.

24 The Court concluded that legal counsel had had sufficient time to consider and decide whether they should obtain independent legal advice concerning their fees since they knew as of September 14 that their invoices were being seriously questioned, and they knew since September 30 that the taxation would proceed on October 5, 2011.

25 The Legal Accounts are signed by Rodney J. Gillis, Q.C., on behalf of GMG. Furthermore, two senior solicitors from GMG, namely R. Gary Faloon, Q.C., and James L. Mockler were in court and they were certainly capable of dealing with this question, since they, along with Mr. Gillis, were the senior solicitors representing the Corporations in this file. They are the ones with the information concerning this issue and they are the ones best suited to justify their fees or answer questions concerning their fees and disbursements. It is not unusual in CCAA proceedings for a legal firm to be represented by one of its own solicitors when their legal accounts are being taxed. I note as an example that Mr. Mockler represented GMG in a taxation within another CCAA proceeding that I had referred to Registrar Bray in the matter of *Long Potato Growers Ltd., Re*, 2009 NBQB 349, 351 N.B.R. (2d) 376 (N.B. Q.B.).

26 The question before the Court is not substantially different from the original motion, that is, the Court, in its supervisory role, is asked to look at the Corporations' Legal Accounts and make a finding as to what is fair, just, and reasonable in the circumstances, to be charged in these CCAA proceedings.

27 Tight timing is critical in CCAA proceedings. A "hands-on" approach of the court in CCAA matters is recommended. In several Canadian jurisdictions, a commercial list is identified, which means that CCAA files are case managed and assigned to justices with commercial expertise. This is not the case in New Brunswick. Judicial specialization in this province could be very difficult due to the relatively small pool of justices, the distances between the different communities, and the language issue. Nevertheless, parties involved in these matters recognize the need for expeditious treatment of these proceedings. The ability of parties to seek direction or have disputes resolved expeditiously ensures that the process of negotiations continues on a timely basis. In the present file, the parties have suggested and adhered to fairly rigorous time requirements. Parties were permitted to file documents that did not comply with the time requirements contained in the *Rules of Court*. Parties were permitted to proceed with motions in considerably less time than what is required by the *Rules of Court*.

28 The court must supervise proceedings and make rulings that keep the process moving towards an expeditious solution when parties hit a particular impasse. Business and financial constraints involved in CCAA proceedings require that we proceed on a timely basis. The adjournment requested would have unduly hindered the progress of the restructuring plan. The Court was of the opinion that failure to proceed at this time and render a timely decision created a serious risk of failure as it would be difficult for the parties to arrive at a viable plan of restructure without knowing the Corporations' legal fees.

29 In the circumstances of this proceeding, the Court refused to adjourn the matter.

V. The Court's Jurisdiction to Review Professional Fees Within Ccaa Proceedings

30 The CCAA does not specifically provide for the review of remuneration claimed by professionals. However, the court is granted a broad discretion under section 11 of the CCAA to make any order it considers appropriate. Proceedings under the CCAA primarily engage the court's supervisory powers. The court, in its supervisory role, has the inherent jurisdiction to approve or disapprove of any account during CCAA proceedings if it concludes that it is just and equitable to do so (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42 (N.B. C.A.) at paragraph 24, and also *Bolands Ltd. v. 052897 N.B. Ltd.* (1994), 144 N.B.R. (2d) 9 (N.B. Q.B.)).

31 The court's jurisdiction to approve or disapprove legal fees is also addressed by Stephanie Ben-Ishai and Virginia Torrie in "*A 'Cost'-Benefit Analysis: Examining Professional Fees in CCAA Proceedings*", (2009) Ann. Rev. Insol. L. 5. (edited by Janis P. Sarra), as follows:

> In Canada, insolvency professionals' fees are also subject to court approval. Due to the brevity of the governing legislation, the *Corporations Creditors' Arrangement Act, (CCAA)*, which does not specifically touch on court approval of professsional fees, the supervisory role of the court is held to confer jurisdiction to authorize the payment of legal

fees and disbursements incurred in the course of a restructuring. Where necessary, the court may also rely on its inherent jurisdiction or applicable provincial laws to approve payment of insolvency professionals' fees in *CCAA* proceedingss. Under the *CCAA*, legal professionals are entitled to recover fees and expenses for authorized restructuring work provided that the court considers these amounts to be just and reasonable.

32 Furthermore, section 11.52 of the CCAA now provides statutory jurisdiction to grant an administrative charge for professional fees in a CCAA matter.

33 Although the court's jurisdiction extends to capping legal fees in appropriate circumstances, as previously mentioned, I find that in the present case it is more appropriate to determine the legal fees to which GMG is entitled rather than just capping their fees since their services have now been terminated.

34 At this stage of the proceedings, the Court must consider what is just, fair, and reasonable in the circumstances, including a balancing of the interests of, and prejudice to, the different stakeholders who have an interest in the financially distressed Corporations.

VI. Factors to Be Considered

35 The Court was referred to several cases dealing with different factors to be considered when assessing the remuneration of professionals within different contexts: see *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), *Randle, Re* (1995), 13 B.C.L.R. (3d) 237 (B.C. S.C.), *Long Potato Growers Ltd., Re*, *Heinrichs Estate v. Baker, Zivot & Co.* (1996), 108 Man. R. (2d) 47 (Man. Q.B.), and *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]).

36 In my view, the following factors are to be considered when the court is considering the legal fees charged within a CCAA context:

• The time expended by counsel;

• The degree of skill and competence demonstrated by counsel;

• The general conduct and costs of the proceedings;

• The result of counsel's effort and extent to which success was achieved;

• The nature, importance and urgency of the matters involved;

• The size and complexity of the business being restructured;

• The reasonable expectation of various parties including any estimates given to the court or other stakeholders;

• The fund out of which the fees are to be paid;

• The circumstances and interest of the company;

• The company's ability to pay; and,

• The views of the monitor, the major creditors and the insolvent company.

37 The following should *prima facie* be disallowed: services not authorized by law, services not connected to the CCAA, unproductive or unnecessary services, irresponsible decisions producing no positive results, charging for services not clearly performed, unwarranted duplication of efforts, and charging at an unjustified excessive rate for services and disbursements.

38 These factors are neither exhaustive nor of universal application.

VII. The Legal Accounts Of GMG

39 GMG issued four invoices with respect to services provided to the Corporations in connection with the CCAA proceedings; namely the first one dated July 7, covering the period from June 13 to June 30 in the amount of $184,294.88; the second one, dated July 29 covering the period from July 1 to July 25 in the amount of $136,430.21; the third one, dated September 19 covering the period from July 26 th to September 15 th in the amount of $111,289.88; and the fourth and final invoice, dated September 30 covering the period from September 16 to September 30 in the amount of $76,671.09; for a grand total amounting to $508,686.06.

40 These invoices consist of 40 pages of what I understand are computer generated detailed time billing records.

41 Twenty different persons billed time to this account. Nine of which I recognize as being solicitors including the senior partner, Mr. Gillis, and at least two other senior solicitors, Mr. Faloon and Mr. Mockler. Rates for the different solicitors range from $100 to $400 per hour. The hourly rates of the other 11 individuals who billed time to this account range from $50 to $75. I can see from different Affidavits of Service filed in the Records on Motion, that at least one is a student-at-law and one is identified as a paralegal. I do not know who the other nine individuals are: articling students, paralegals, legal assistants, or something else? This information is necessary to verify that the time recorded was in fact spent by personnel whose talents and experience can reasonably be said to justify the rates charged.

42 In the context of a CCAA matter, it is not unusual for professionals to be called upon to prove their entitlement to the fees charged since any money in their pocket is money not available for the Corporations, its creditors, or other stakeholders. It is therefore expected that various affected parties will be examining these carefully.

43 In the case of *Heinrichs Estate v. Baker, Zivot & Co.*, the Court was reviewing an assessment of a solicitor's account. The solicitor argued that the onus was on the client to object to the legal accounts and supporting time record information. At paragraph 11, Hamilton J. rejected that argument in these words:

> 11. (...) I do not accept the respondents' argument that, in assessing a lawyer's account, the onus is on the client. If a client proceeds with an assessment of a lawyer's account it is the lawyer's responsibility to justify the account. If time records are the basis of an account, the lawyer must satisfy the court that the time spent was appropriate in the circumstances.

44 I adopt these comments. The onus is upon GMG to satisfy the court that the Legal Accounts are appropriate in the circumstances and that they are entitled to the fees charged.

45 The Monitor supports this motion. In his affidavit dated September 28, he makes the following comments pursuant to his analysis of GMG's first and second invoice:

> (i) GMG's first invoice dated July 7, 2011 for the 18 day period of June 13 to June 30, 2011, totaled $184,294.88 (including disbursements and taxes);
>
> (ii) Based on A.C. Poirier's analysis of the first GMG invoice dated July 7, 2011, approximately $134,000.00 in fees charged was for the 15 day period of June 13 to June 27, 2011, when the initial order was issued.
>
> (iii) On the first GMG invoice dated July 7, 2011, a total of 651.5 hours was billed for the 18 day period of June 13 to June 30, 2011 by 14 separate timekeepers, including a total of 333.9 hours by the 3 principal counsel involved in these CCAA proceedings, namely, Rod Gillis, Gary Faloon and James Mockler, with fees for these 3 counsel alone totaling $108,654.00.
>
> (iv) Included in the first invoice dated July 7, 2011 were disbursements totaling $16,148.82, among which included $4,099.00 for photocopies, $1,474.02 for travel-mileage expense, $970.00 for fax and $6,478.94 for travel-miscellaneous.

(v) GMG's second invoice dated July 29, 2011 for the 25 day period of July 1 to July 25, 2011, totaled $136,430.21 (including disbursements and taxes);

(vi) On the second GMG invoice dated July 29, 2011, a total of 569 hours was billed for the 25 day period of July 1 to July 25, 2011 by 12 separate timekeepers, including a total of 258 hours by the same 3 principal counsel, Rod Gillis, Gary Faloon and James Mockler, with fees for these 3 counsel alone totaling $78,498.00.

(vii) Included in the second GMG invoice dated July 29, 2011 were disbursement (sic) totaling $11,675.70 among which included $2,873.50 for photocopies, $1,14.00 (sic) for travel-mileage expense, $1,550 for fax and $4,821.44 for travel-miscellaneous.

(viii) Both the first and second GMG invoices were stamped "Private and Confidential not to be shared with anyone without the Consent of GMG". As such, I was forced to file the two GMG invoices with the Court in sealed envelopes and I had to refuse a request from counsel for Bank of Montreal for a copy of the invoices.

(ix) Notwithstanding that the Court order dated August 22, 2011, provided for legal counsel to bill on a bi-weekly basis, GMG did not render any further accounts subsequent to the second invoice dated July 29, 2011. On September 19, 2011, in response to the request of my office for details of GMG's unbilled work in progress, A.C. Poirier received a summary statement of account from GMG from July 26, 2011 to September 15, 2011 totalling (sic) $111,289.88. A.C. Poirier requested a breakdown of this summary statement, but to date, none has been received.

46 No affidavit evidence was filed to respond to the concerns raised by the Monitor in his affidavit.

47 Before asking Mr. Faloon to justify the Legal Accounts, the Court invited Mr. McElman to summarize some of his concerns with the Legal Accounts. His comments, in great part, echoed the Monitor's concerns and the Court's concerns. Here are parts of Mr. McElman's comments:

... we have the concerns with respect to the issues that we raised this morning, the nine separate issues related to waste; unnecessary applications; services that were as a result of irresponsible decision or producing no positive results; what we would submit is attempt to take advantage of the estate by performing unproductive or unnecessary services; overcharging for routine services; charges for services not clearly performed; unjustifiable amounts that would be to the detriment of the creditors; charging at an excessive rate for professional services and for non-professional services; [...] errors of judgment; any matter that was not required by law to be done that adversely affected the parties; [...]

48 Then Mr. McElman submits that the accounts themselves are wholly inadequate and goes on to mention:

[...] Insufficient detail; clumping (...) it's hard to determine, as the Court pointed out. There's a lot of consultations between three or four solicitors. To know exactly how much time was spent on that is very difficult for this Court to determine if it's appropriate. (...) And we submit that Gilbert McGloan Gillis has not established that those consultation times are fair and reasonable in the circumstances because they haven't provided the detail related to how much time that was.

The same would (...) be applicable to each other category of work performed. There's no detail breakdown on the time spent on research. There's no detail breakdown of the time spent on the preparation of documents. We have days where you have multiple parties working on the same sets of documents, but we have no idea what they're doing.

Further, the number (...) of senior solicitors working on [the] file is of concern. Not only do we have the three that we know, have been in court, but there's also John Gillis, there's Mr. Bujold, we have what I understand to be assistants of Gilbert McGloan Gillis that charge out at 50 dollars an hour.

[...]

> And the detail that isn't there is we don't know what kind of training does this assistant have? Do they qualify as a paralegal? Should they be charging out rates? (...) Is it appropriate to be charging for booking hotels and booking flights?

49 Mr. McElman then focuses on the disbursements and continues:

> ... there's not sufficient detail with respect to the photocopies. There's not a perphotocopy rate. We're unsure of the charges that related to each photocopy.
>
> With respect to the binding: What does that involve? How much binding was involved? Is that a charge in addition to a paralegal's time while they're standing there binding? (...) Are they charging $264 for coils that go on the binding? What are they doing?
>
> [...]
>
> Travel miscellaneous: [$6,478.94], and that was on July 7th. Where did they go?
>
> Travel miscellaneous: You know, what does that relate to? (...) Where does miscellaneous money go?
>
> There's also travel parking: There's parking expense on September 19th of $676.95.
>
> [...]

50 He then questions the fees charged for appearances at the *ex parte* hearing of June 27, 2011 and the Comeback Hearing of July 18, 2011, and says:

> ...the initial order, the attendees were Mr. Falloon, Mr. Gillis and Miss Toner, I'm not sure, she may be an articling clerk. And the total for that day, for the attendance in court of an *ex parte* application, $11,628.83.
>
> [...]
>
> And then the July 18th hearing, we had Mr. Stoyanov, Mr. Faloon and Mr. Mockler and that day we had $12,000 for attending that hearing. But the beauty of their account is it's just not the hearing dates that everybody's working on the same thing, it's every single day. (...) We've seen how over the first 18 days, there's an average of $10,000 a day. Those are the items we'd like them to address in their submissions. (...)

51 No *viva voce* evidence was heard during this motion. No one was called to answer these concerns. No affidavit evidence was presented to justify or explain the accounts.

52 Mr. Faloon explained to the Court that he did not have the information to respond to the different concerns raised, and that he would be relying on Mr. Mockler's affidavit and the accounts annexed thereto. As we all know, the time records of GMG is just one factor in determining an appropriate fee that is just, fair, and reasonable.

53 Mr. Creamer was also troubled by the Legal Accounts and argued that the questions raised by the various parties begged answers and needed to be explained. He added that he had discussed the Legal Accounts with Berend Tepper, and that generally speaking, the Corporations were in agreement with the submissions of BMO and the Monitor.

VIII. Applicability of the Different Factors to the Present Matter

54 Although I have no intention of dealing individually with each factor listed above, I will deal specifically with certain of them and determine how they apply to the present matter.

A. Information Contained in Cash Flow Statements of July 11, 2011

55 The CCAA required the debtor to table detailed projected cash flow statements for the Comeback Hearing. Cash flow statements and the notes thereto are essential to the restructuring process and essential for the court to make an informed decision.

56 At the Comeback Hearing, in support of the request for an extension of the Stay Period, the Corporations presented cash flow statements that were prepared on July 11, 2011 ("Cash Flow Statements"). This Court's decision of July 22, 2011, relied on the accuracy of those statements and the notes thereto.

57 The cash flow statements indicate a total of $130,000 in legal fees to the end of September, 2011, to cover the Corporations' legal fees and the Monitor's legal fees. The information before the Court was that from this amount, approximately $30,000 would go towards the payment of the Monitor's legal fees, and the difference would be for the Corporations' legal fees. As of September 28, the Monitor's legal fees were $ 87,430.80.

58 BMO submits that the Legal Accounts should not be endorsed as presented and should be reduced to what is fair and reasonable in the circumstances, namely, the amount set out in the July 11, 2011 cash flow statements which GMG presented to this Court at the Comeback Hearing of July 18.

59 During the Comeback Hearing, the parties spent considerable time discussing the cash flow statements in relation to legal fees and the various court ordered charges against the Corporations' assets, and also during argument on the erosion of BMO's security, prejudice to the stakeholders under the CCAA and/or costs under CCAA compared to those under the *Farm Debt Mediation Act*. BMO did not support the extension. It was very concerned with the Corporations' ability to afford the costs associated with these CCAA proceedings. It was concerned that their secured position would erode and become unsecured, and that the amount of DIP financing or other priority charges such as the Administrative Charge would place its interests under water.

60 GMG's invoice dated July 7 indicates legal fees in the amount of $184,294.88 for the period ending June 30. As of July 25, that is seven days after the Comeback Hearing, GMG's total legal fees, which do not account for the Monitor's legal fees, were $320,725.09.

61 Although GMG's first invoice is dated July 7, 2011, it would seem that it was not forwarded to the Monitor or any other party before the end of July or early August, definitely not prior to the Comeback Hearing. In the Monitor's first report dated July 13, 2011, he states on page 7, that:

> With respect to the legal fees of $130,000, the Monitor has retained Stewart McKelvey as counsel to the Monitor and the figure of $130,000 is assumed to include these fees.

62 At the Comeback Hearing, the Court was not told of any error in the cash flow statements prepared by the Corporations or of any error in the Monitor's first report concerning his assumptions regarding legal fees. It should have been apparent to counsel at that time that the figures for its legal fees contained in the cash flow statements and being discussed was grossly inaccurate. GMG knew, or ought to have known, that their accrued fees and disbursements to date at the Comeback Hearing were far in excess of the amount submitted to the Court on that day.

63 A solicitor should advise his client without delay of any developments that are likely to increase the fee far beyond the estimate. When GMG realized that there would be a huge variance between the projections presented at the Comeback Hearing and the actual legal fees, the Monitor should have been advised forthwith as to the magnitude and the escalation of the fees. GMG were the only ones with this information until late July or early August. They should have promptly sought adjustments to their estimate or the cash flow projections.

64 An estimate given by a lawyer in any proceeding is not a binding contract; however, it is a relevant consideration when the court is called upon to assess that lawyer's legal fees. A reasonable difference between a solicitor's estimate and his actual fees can be justified if, for example, he or she does work outside its mandate at the request of the client, or if unforeseen circumstances add a new and unexpected dimension to the work (see *Denecky v. Butkiewicz* (1993), 16 Alta. L.R. (3d) 356

(Alta. Q.B.)). However, there is no evidence that there was anything unusual or unexpected in these proceedings that would justify such a variance between the projections and the actual fees.

65 No explanation was provided to explain the increase in the legal fees' magnitude or the escalation of the fees during the process

66 If the amount of legal fees incurred by the Corporations up to the Comeback Hearing had been disclosed or if the cash flow projections had revealed an amount for the Corporations' legal fees to the end of September exceeding $500,000, the Court's decision on the extension may have been different.

67 BMO argues that if the legal fees are not limited to the amounts presented to the Court on July 18, 2011, as per the cash flow statements of July 11, it will bring into question the integrity of these proceedings and the judicial system.

B. Complexity of the Matter

68 Granted, proceedings under the CCAA are more complex in their nature than many other procedures before the courts. However, there is no evidence that these CCAA proceedings are more complicated or difficult than the average CCAA proceeding. Basically, we are dealing with a family farming operation in Northwestern New Brunswick, with assets as per book value of approximately 8 million dollars, and liabilities in the vicinity of 11 million dollars, and one major secured creditor, BMO, that is owed in excess of 8 million dollars.

C. Results Achieved

69 Counsel for the Corporations did achieve certain results. No applicant for relief under the CCAA is guaranteed that the court will grant the relief even if proceeding *ex parte*. Success is very much dependent upon the quality of the application itself. The pre-filing preparatory stages of a CCAA application is a generally very intense time for counsel involved. Of course, counsel would know this ahead of time. Counsel for the Corporations was successful in obtaining the Initial Order with a Stay Period up to July 18, 2011, and the extension up to September 30, 2011.

70 However, as of September 30, there had been little or no progress towards the production of a plan of arrangement and restructuring.

71 Additional legal fees will have to be incurred by the Corporations in order to complete the process.

72 There must be an overriding principle of reasonableness. While it is appropriate to look at time spent and hourly rates, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable.

D. The Initial Ex Parte Order and Its Overreach

73 The Corporations applied *ex parte* for the Initial Order including DIP financing alleging that there was an urgency as its major creditor, the Bank of Montreal, was about to make a move. Preventing a race to the assets is in part what the legislation is aimed at remedying. However, as per the evidence that has been put before the Court since the Initial Hearing, I have to conclude that the Bank had not asked for payment and there was no indication at that time that the Bank of Montreal was about to enforce its security. Notwithstanding this Court's hesitancy to proceed *ex parte* and questions raised by the Court at the initial hearing, the Corporations' solicitors did not advise the Court of recent amendments to the CCAA, which required that proper notice be given to affected secured creditors before approving a DIP Lender's Charge or an Administration Charge. At the Comeback Hearing, after hearing from the various parties, the Court did substantially reduce these charges and varied other provisions as well.

74 The overreach of the Initial Order which was obtained *ex parte* created a particular dynamic between the various parties. While parties could seek to set aside or vary particular provisions, as was done in the present case, it is time consuming and costly to appear before the court more than necessary. In the present matter, I find that proceeding *ex parte* contrary to the CCAA amendments and the overreach of the Initial Order set the ground for distrust amongst the insolvent Corporations, its counsel,

and the major creditors, which ended with the Corporations having to retain different counsel in order for these proceedings to continue.

E. Superfluous Procedures and Wasted Time

75 The CCAA is an instrument for the restructuring of insolvent Corporations. Counsel is expected to prosecute these matters in a reasonably cost-effective manner consistent with the probability of success and avoid superfluous procedures or an excess of caution.

76 Additional motions were filed or at least prepared by the Corporations between the signing of the extension order on August 19 and September 30. I find that at least three of these should not have been brought; that is the one of August 30 that was never proceeded with, the one of September 1 where the Court refused the remedy being sought, and the allegedly urgent motion heard by Justice Glennie on September 21 that was also refused.

77 I also find that some time was wasted due to actions of counsel such as GMG's refusal to remove themselves from the file unless some sort of agreement could be concluded concerning their Legal Accounts, and trying to repudiate an agreement reached with all parties concerning the taxation to be heard of October 5.

F. Unwarranted Duplication of Efforts

78 From the Legal Accounts, I can conclude that nine different lawyers, including three senior lawyers, worked in this file and had discussions amongst themselves concerning this matter. This by itself is cause for concern, as it no doubt takes considerable time just to keep the different lawyers informed of the progress of the file. Furthermore, there were at least two of the senior solicitors present during most of the court appearances.

79 In *Long Potato Growers Ltd., Re*, Registrar Bray considered whether the services of Gilbert McGloan Gillis, who acted as counsel for the debtor corporations, were consistent with properly advancing the clients' position while respecting the spirit of the CCAA. Mr. Mockler was the solicitor of record for that taxation. Registrar Bray stated at paragraph 30:

> 30 Concerning the suggestion that there was unnecessary caution in having two senior counsel prepare for the hearing of a motion, the argument has merit. Should a litigant wish to have the comfort of two highly experienced lawyers present before the court, this is understandable. The cost of such comfort, however, is not visited upon other parties at an assessment. I believe that the assessing officer may take notice that although Mr. Mockler may see his expertise to be primarily in corporate and commercial matters; in previous appearances before the courts in this province he has shown himself to be a competent litigator with skills more than adequate to such a representation.

80 In the present case, the Legal Accounts are replete with entries by multiple experienced solicitors working on the same material or issues. Although I realize that there is always some degree of professional overlap in the sense that less senior professionals are reporting to and discussing their findings with more senior professionals, solicitors with hourly rates of $250, $340, and $400 per hour should not require constant directions from each other. The level of duplication of experienced counsel set out in the Legal Accounts cannot be endorsed by this Court without additional explanation.

G. Were the Fees and Disbursments Incurred for the Purpose of Proceedings Under the CCAA?

81 When dealing with the Administrative Charge for legal fees, subsection 11.52(b) of the CCAA explains that this charge is in respect of remuneration and expenses for legal experts engaged by the company *for the purpose of proceedings under this Act*.

82 The court, in its supervisory role, must ensure that the Legal Accounts are reasonable in amount and incurred fairly. It must also ensure that they were incurred for the purpose of proceedings under the CCAA; namely, efforts to restructure the insolvent Corporations by attempting to negotiate a compromised plan of arrangement that will enable the Corporations to emerge and continue as a viable economic entity.

83 Counsel is entitled to payment of fees and disbursements that relate to the fair and reasonable legal services rendered in connection with the restructuring work within the CCAA proceedings.

84 In his affidavit of October 4, 2011, Mr. Mockler declares that 50 % of Rodney J. Gillis's time billed in this file, and 60 % of his own time, relates to efforts to repatriate Mr. Hendrick Tepper.

85 Although the time, effort, and disbursements dedicated to the repatriation of Hendrick Tepper is laudable, I cannot find that it is a matter related to the CCAA proceedings. I have no reason to doubt that the solicitors worked very hard on trying to bring Mr. Tepper back home, and I realize that Mr. Mockler's going to Lebanon was anything but a holiday. However, GMG's role as counsel for the purpose of the CCAA was to represent the Corporations in its efforts to restructure. The supervisory role of the court is held to confer jurisdiction to authorize the payment of legal fees and disbursements incurred in the course of a restructuring.

86 From the evidence, and from the comments of Mr. Faloon, and the comments of Mr. Creamer who is now representing the Corporations, I conclude that approximately 50 % of the Legal Accounts relate to efforts to repatriate Mr. Tepper.

87 I conclude that it would not be just, fair, and reasonable to include in the Corporations' legal fees for the purpose of the CCAA the amount related to the repatriation of Mr. Tepper, and therefore Legal Accounts must be reduced accordingly.

H. The Corporations' Capacity to Pay

88 The parties think that they may now arrive at a plan of arrangement that could have the general agreement of the major secured creditors; however, the large legal fees may be the straw that breaks the camel's back. The Corporations have no capacity to pay the Legal Accounts. They cannot afford these. If these fees are made payable in their entirety they may sink the debtor Corporations. They definitely threaten the viability of any proposal.

89 The object of the restructuring process is to reorganize the insolvent debtor so that it can present a plan to its creditors that will be accepted and will allow it to continue as a going concern. Huge professional fees on an already insolvent company can make this reorganization impossible.

I. Opposition to the Legal Accounts

90 The Monitor and primary secured creditors oppose the accounts of GMG as presented. The Court also heard from Mr. Creamer that the Corporations also support BMO's motion and agree with the position that it takes concerning the legal fees related to the CCAA proceedings.

91 The court must consider and give proper weight to the views of the primary secured creditors and the monitor. These individuals are involved with the Corporations and its solicitors on a regular basis.

92 Courts consider with great deference and weight the views and recommendations of the court appointed monitor. The Monitor, due to his ongoing supervision, is in a strong position to evaluate whether the work done and the results achieved merit the compensation claimed.

IX. Conclusion

93 The CCAA is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the corporation to carry on business for the benefit of the company, its creditors, and shareholders in a manner that causes the least possible harm to employees and the communities in which it operates.

94 The court must exercise its discretion judicially to ensure fairness to counsel, the Corporations, the secured creditors, and all other stakeholders.

95 Counsel is to be allowed a compensation that is just, fair, and reasonable for the time spent in the CCAA proceedings.

96 My examination of the Legal Accounts and the evidence submitted does not satisfy me that the Corporations' Legal Accounts are just, fair, and reasonable having regards to all the relevant factors, the material facts, and circumstances of this particular matter. Even if I was to subtract 50 % from the legal fees to account for the efforts connected to Mr. Tepper's repatriation, I still find the charges too high for these CCAA proceedings.

X. Disposition

97 I reduce the Corporations' legal fees to $150,000, inclusive of disbursements and taxes. On September 30, I authorized a first payment of $32,000 to GMG, and therefore there is an outstanding account payable of $118,000.

98 Having taken into consideration all of the relevant factors as explained up above, I am of the opinion that this amount represents fair, just, and reasonable compensation in the circumstances.

99 The goal of the CCAA stay period is to provide the insolvent corporation with access to the time and expertise needed to develop a plan of arrangement and to restructure its business. Therefore, there has to be some assurance and money available to pay the professionals to do this work. However, these professional fees should not bankrupt the corporation. If at the end of the day, the professional fees are what threatens the viability of any proposal and sinks the debtor corporation, the integrity of these proceedings and the judicial system will be brought into question.

Order accordingly.

End of Document

TAB 4

2017 ABQB 508
Alberta Court of Queen's Bench

Re Canada North Group Inc

2017 CarswellAlta 1609, 2017 ABQB 508, [2017] A.W.L.D. 5084,
2017 D.T.C. 5110, 283 A.C.W.S. (3d) 255, 51 C.B.R. (6th) 282

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended

And In the Matter of a Plan of Arrangement of Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd.

S.D. Hillier J.

Heard: July 27, 2017
Judgment: August 17, 2017
Docket: Edmonton 1703-12327

Counsel: S.A. Wanke, S. Norris, for Applicants / Cross-Respondents
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H.M.B. Ferris, for First Island Financial Services Ltd.
G.F. Body, for Canada Revenue Agency

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.a Grant and length of stay

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Debtors were group of companies involved in work camps in natural resource sector, modular construction manufacturing, camp land rentals, and real estate holdings including golf course — Debtors had used services of secured creditor for significant period of time — Debtors' operations and profitability were significantly impacted by downturn in economy — Debtors issued notices of intention to make proposals under Bankruptcy and Insolvency Act and obtained initial stay of proceedings under s. 11.02(1) of Companies' Creditors Arrangement Act (CCAA) — Debtors brought application for extension of stay under s. 11.02(2) of CCAA, and for ancillary relief — Creditor brought cross-application for order lifting stay and appointing either full or interim receiver — Application granted; cross-application dismissed — Stay was extended with date for review being set; debtor-in-possession (DIP) financing was increased; affiliated company was added as debtor; monitor's first report was approved; and stay was expanded to included third parties involved in debtors' projects — Chief restructuring officer had begun consultations with unsolicited parties who had expressed interest, and structure for plan of arrangement was now important priority — It was not shown that debtors had failed to act in good faith to extent of disentitling extension sought, and extension of stay was in best interest subject to further vigorous review within reasonable period of time — Increase in DIP financing was required to address anticipated cash flow shortage resulting from welcome work during what was typically slower season for debtors — Operations of affiliated company were inextricably linked to those of debtors.

Table of Authorities

Cases considered by *S.D. Hillier J.*:

Alberta Treasury Branches v. Tallgrass Energy Corp (2013), 2013 ABQB 432, 2013 CarswellAlta 1496, 8 C.B.R. (6th) 161 (Alta. Q.B.) — considered

Alexis Paragon Limited Partnership, Re (2014), 2014 ABQB 65, 2014 CarswellAlta 165, 9 C.B.R. (6th) 43 (Alta. Q.B.) — referred to

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — considered

GuestLogix Inc., Re (2016), 2016 ONSC 1348, 2016 CarswellOnt 3323 (Ont. S.C.J.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 ABQB 1094, 2001 CarswellAlta 1636, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — referred to

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 720, 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) — considered

North American Tungsten Corp., Re (2015), 2015 BCSC 1376, 2015 CarswellBC 2232 (B.C. S.C.) — referred to

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

San Francisco Gifts Ltd., Re (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

U.S. Steel Canada Inc., Re (2014), 2014 ONSC 6145, 2014 CarswellOnt 16465, 20 C.B.R. (6th) 116 (Ont. S.C.J.) — considered

4519922 Canada Inc., Re (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 47 — referred to

s. 243 — referred to

s. 244 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

s. 99(a) — referred to

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

Generally — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 36.1(2) [en. 2007, c. 36, s. 78] — considered

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 65(7) — referred to

APPLICATION by debtors for extension of stay under s. 11.02(2) of *Companies' Creditors Arrangement Act*, and for ancillary relief; CROSS-APPLICATION by creditor for order lifting stay and appointing either full or interim receiver.

***S.D. Hillier J.*:**

I Introduction

1 Canada North Camps Inc. (CNC), Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (collectively, the Group) request extension of a Stay under s. 11.02(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) until November 3, 2017 and ancillary orders.

2 The Canadian Western Bank (CWB) cross-applies for an order lifting the Stay and appointing either a full or interim Receiver pursuant to s. 243 (or ss. 47 and 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*)), s. 13(2) of the *Judicature Act*, RSA 2000, c J-2, s. 99(a) of the *Business Corporations Act*, RSA 2000, c B-9, and s. 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7.

II History

3 The Group operates or provides a number of services including work camps in the natural resource sector, modular construction manufacturing, camp land rentals as well as real estate holdings including a golf course. CWB has been the Group's major secured creditor for a significant period of time.

4 1919209 Alberta Ltd. (1919) is an insolvent affiliated debtor holding company of two of the companies in the Group. It was incorporated to lease camp equipment from Weslease Income Growth Fund LP (Weslease) and provide that camp equipment to Canada North Camps Inc. for its use. 1919's operations are integrated with those of the other applicants.

5 CNC entered into an agreement to construct a camp on Wandering River. 1371047, and Wandering River Properties Ltd. (owned 2/3 by 1371047) subsequently purchased a parcel for that purpose. CNC joined with the local Heart Lake First Nation and formed Heart Lake CNC LP, Heart Lake Canada North Group GP Ltd., Wandering River Properties Ltd., and Canada North Group LP Holdings Ltd.

6 An action by Max Fuel Distributors Ltd. as against Shayne McCracken arises from the operation of the camp business. The other creditors of the Group are stayed from enforcing collateral claims against Shayne McCracken.

7 The Group's operations and profitability have been significantly impacted since 2014 by the downturn in the economy. Earlier attempts by the Group and CWB to deal with the debt and cash flow issues proved to be unsuccessful.

8 In March 2017, the parties signed a Forbearance Agreement but problems continued. When they were unable to reach a new resolution in a full meeting on June 21, 2017, the Group issued Notices of Intention to make proposals under the *BIA* effective June 26, 2017.

9 On July 5, 2017, Nielsen J. granted an initial Stay under s. 11.02(1) of the *CCAA*. He imposed numerous terms, including that:

• Ernst & Young be appointed as Monitor;

• R. e. I. Group Inc. be appointed as Chief Restructuring Officer (CRO);

• the Stay continue until August 3, 2017, subject to review;

• Debtor in Possession (DIP) financing from the Business Development Bank of Canada (BDC) be made available, not to exceed $1M;

• Notice of Intention proceedings under the *BIA* be "taken up" and continued under the *CCAA*.

10 On July 27, 2017, the Group applied under s. 11.02(2) of the *CCAA* for an extension of the Stay to November 3, 2017. It also applied to add 1919 as an applicant in these proceedings.

11 As well, it applied to expand the Stay to apply to proceedings against the entities involved in the Wandering River contract, and against Shayne McCracken.

12 Finally, the Group applied for an increase in the DIP financing to a maximum of $2,500,000 and an interim lender's charge up to the same amount due to elevated costs associated with a significant short-term increase in work under a camps contract with the British Columbia provincial government for workers on the wildfires.

13 The CWB cross-applied for an order lifting the Stay and appointing a full or interim Receiver.

14 The Monitor sought approval of his First Report and activities, a suspension of limitation periods on claims, and the power to examine the parties regarding questioned transactions on lot sales prior to the *CCAA* Order (preferences) under s. 36.2 of the *CCAA*. Other interested parties also made submissions as affecting their interests.

15 In an oral decision, this Court extended the Stay to September 29, 2017 with a review to be held on September 26, 2017. The cross-application was dismissed. The Court also issued a series of ancillary directions. The parties were advised that written reasons would be issued dealing with the main issue as to extension of the Stay or appointment of a Receiver. These are the written reasons.

III Affidavit Evidence

16 The Group's stated preliminary plan is to return operations to profitability as demand increases, consider sale of some of its assets, and seek new financing or equity investment as required in order to provide a viable Plan of Arrangement.

17 The Group has presented extensive affidavits from Ms. Shayne McCracken, Director and Secretary of the applicants, in support of the various applications, containing the following key assertions:

• the Group has acted in good faith and with due diligence, working closely with the CRO and cooperating with the Monitor as they gain an understanding of the business and structure;

• the Group has specifically worked with the CRO and Monitor to improve financial reporting and accounting processes;

• together they have taken initial steps to develop a Plan of Arrangement to present to creditors, including a detailed overview of assets and liabilities;

- the Group has been the subject of unsolicited investment and purchase interest, which the Group, Monitor and CRO are pursuing;

- meetings have taken place with interested parties as well as arrangements related to drawdowns on DIP financing;

- work has included contracts with the Province of British Columbia to address efforts in consequence of raging wildfires in that province.

18 Ms. McCracken's affidavits purport to meet head on the concerns of CWB with the accounting treatment of certain accounts receivable, particularly in relation to the Grand Rapids Pipeline Project and the margining of custom negotiated deferred revenue. In late 2016, cost estimates were prepared for demobilization of the Grand Rapids camp, including removal of the camp for just over $2M and reclamation work estimated at roughly $5.36M based on detailed costing. Ms. McCracken asserted that the practice of clients assuming the costs of setting up and removing camps by advance invoicing is used by others in the camp industry.

19 The margining of custom negotiated deferred revenue allows the Group access to necessary financing to commence work prior to being paid. Ms. McCracken found support for the accounting practice in question in the custom negotiated deferred revenue term of the margining requirement that was part of the credit agreement with CWB.

20 Two significant receivables were placed on the books between March and May 2017 (it is unclear when they were actually posted and sent to the client) on Grand Rapids. This ostensibly led to a claim against the financing and increased CWB's exposure significantly at a time when the parties were trying to sort things out following the Forbearance Agreement in mid-March.

21 Ms. McCracken specifically denied CWB's allegation that these invoices were provided in bad faith to artificially inflate the amount available on the operating line. She deposed that the invoicing for this work was reviewed by the Group's corporate counsel. As well, it was part of the financial reporting to CWB and there were regular conversations with account managers at CWB who were aware of the origin and nature of all significant receivables, including the Grand Rapid receivables. Ms. McCracken maintained the view that the receivables were appropriately margined as deferred revenue.

22 Ms. McCracken noted that Grand Rapids has now raised issues with respect to payment of some of the invoices and a meeting is scheduled with it in Calgary in early August to discuss payment of those invoices.

23 Ms. Jessica Taha filed extensive material for CWB challenging the Stay, and supporting the appointment of a Receiver. The following assertions are germane, particularly as concerns margining of receivables:

- the Group had been margining receivables for which work had not yet been done (citing Grand Rapids);

- as a result, the operating line was overdrawn by over $3.8M for work not yet done which only came to light at the June 21, 2017 meeting; subsequent information reflects that it is overdrawn by $8M;

- the Group had only performed 10% of required work on one contract and only 40% for another, and none of this was consistent with the margining as represented by the Group, and arranged between the parties dating back to 2012;

- despite representations to the contrary before Nielsen J., CWB was not aware of this prior to the June 21, 2017 meeting.

24 Ms. Taha attested to her belief that as the level of work dropped dramatically in the economic downturn, the Group changed its approach without advising CWB, and started to render invoices for work which had not yet been done, categorizing those invoices as deferred revenue capable of margining.

25 In response, Ms. McCracken maintained her position that the Grand Rapids deferred revenue was properly included in the financial statements. She deposed that Ms. Taha's position that deferred revenue was only permitted to be used for margining based on the percentage of the work performed is inconsistent with the supporting material provided by Ms. Taha. The Group

kept their branch representatives apprised of the status of the deferred revenue inclusions in the margining calculations and none raised a concern.

26 In counter response, CWB prepared three affidavits of senior officers at the Edmonton Main Branch deposing that they were unaware of the material amounts that were being margined without the work having been done, and each was unaware of anyone else at CWB having had such knowledge until the meeting on June 21, 2017.

27 Glenn MacDougall, Manager of ECN Capital Corp. (ECN), also filed an affidavit. ECN is an equipment lessor and creditor of the Group. In short, he opines that the work resulting from the BC wildfires is a temporary salve on the Group's financial circumstances, and it is unlikely that the Group will be able to make a viable Plan of Arrangement. He deposed that ECN would be materially prejudiced by the continuation of the Stay, as it will erode the value of ECN's security.

28 With respect to expanding the Stay, Ms. McCracken deposed that direct claims against affiliates have been reviewed. The Group now seeks to expand the stay to specific affiliates where those affiliates are facing claims directly connected to the overall camp operations, in order to preserve the *status quo*, prevent unnecessary expenditures of effort on litigation, maximize recovery for all parties, and allow for an orderly determination of priority and claims.

29 Regarding inclusion of 1919, Ms. McCracken deposed that 1919 has no revenue other than lease income from Canada North and is completely dependent on such payments to fulfill its obligations under the leases. It is included in the consolidated cash flow projections and financial statements for the Group, as it is treated as a flow through entity. The equipment it leases is essential to the uninterrupted operations of the Group.

30 Finally, Ms. McCracken explained that the increased work for the B.C. government, although welcome, creates a cash flow issue as the work is invoiced approximately a week after completion and receipt of payment typically takes approximately four weeks from invoicing. Consequently, the Group anticipates a cash flow shortage in August 2017 that will not be met by the present DIP facility. On July 21, 2017, the interim lender approved an increase to the DIP financing to a maximum of $2,500,000.

IV Monitor's First Report

31 The Monitor has provided a First Report, advising of various steps taken in conjunction with the CRO, highlights of which include:

General

• a new cash management procedure has been initiated to ensure efficient control of cash and cash reporting, with a review of cash flow projections;

• the Group's management and staff have been making significant efforts in all respects and are cooperating fully with the efforts of the CRO;

• based on the Monitor's own work with Group management, the Group appears to have acted in good faith and with due diligence;

• the actual end cash balance for the two weeks ending July 15, 2017 was higher than projected by over $400K and collections higher than projected by nearly $350K;

• while cash disbursements were lower, this was largely due to temporary deferrals;

• the contracts relating to the B.C. wildfires will have a significant positive impact on future cash inflows and receivables.

Accounts Receivable

• the Group has used atypical accounting practices as reflected in four areas;

• the steps being adopted in response to CWB's concerns include removing Grand Rapids and Heart Lake related receivables as a conservative strategy while quantum is reviewed;

• some but not all of the room guarantees or reservations have been reversed out.

Status of Restructuring Efforts and Related Plan

• the Group's business and operations are very complex;

• the CRO believes, based on preliminary work to date and co-operation of the management team, that there is certainly potential for a going concern plan that could provide significantly greater value to stakeholders as compared to a liquidation;

• the CRO is of the initial view that several profit and gross margin improvements have been realized by the Group due to changes to operations, staffing and other operational matters.

1919

• the leasing arrangement with Weslease has been extended for use by the Group valued at approximately $6M and listed as: three Jack+Jill dorms, two power distribution centres and one waste water treatment plant;

• expansion of the Stay to include 1919 is reasonable.

32 As well, the Monitor and the Group have been in contact with various parties who have expressed interest in participating in a restructuring through refinancing, purchasing assets or investing in the Group.

V Law

33 An initial Stay under s. 11.02(1) of the *CCAA* may be imposed for a maximum period of 30 days. The role of this Court on a subsequent application under s. 11.02(2) is not to re-evaluate the initial decision, but rather to consider whether the applicant has established that the current circumstances support an extension as being appropriate and that the applicant has acted, and is acting, in good faith and with due diligence, as required under s. 11.02(3).

34 The purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Appropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at paras 15, 70, 71, [2010] 3 S.C.R. 379 (S.C.C.).

35 In applying for an extension, the applicant must provide evidence of at least "a kernel of a plan" which will advance the *CCAA* objectives: *North American Tungsten Corp., Re*, 2015 BCSC 1376, 2015 CarswellBC 2232 (B.C. S.C.) at para 26, citing *Azure Dynamics Corp., Re*, 2012 BCSC 781, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]).

36 Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Honesty is at the core of "good faith": *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.) at para16, (2005), 10 C.B.R. (5th) 275 (Alta. Q.B.).

37 Section 11.02(3) refers to consideration of good faith and due diligence in both the past and present tense. Romaine J. in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 13, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) confirmed the language of s. 11.02(3), to the effect that the court needs to be satisfied that the applicant has acted in the past, and is acting, in good faith. See also *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) at para 16, (2014), 9 C.B.R. (6th) 43 (Alta. Q.B.).

38 By contrast, in *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 462 (Ont. S.C.J. [Commercial List]) at para 4, (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]), Farley J. held that the question of good faith relates to how the parties are conducting themselves in the context of the *CCAA* proceedings. Courts in subsequent cases adopted this view: *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]) at para 31-32, [2011] B.C.J. No. 2482 (B.C. S.C. [In Chambers]), and *4519922 Canada Inc., Re*, 2015 ONSC 124 (Ont. S.C.J. [Commercial List]) in paras 44-46, (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]).

39 In *GuestLogix Inc., Re*, 2016 ONSC 1348, [2016] O.J. No. 1129 (Ont. S.C.J.), the Court expanded the stay to proceedings against a guarantor, noting that it was insolvent and in default of its obligations, highly integrated with the debtor company, and the debtor company would be able to include all the assets of the guarantor in a potential transaction if the guarantor were added.

40 The Court has broad equitable jurisdiction to determine appropriate allocation among assets of administration, interim financing and directors' charges: *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206 (Alta. Q.B.). The Court in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para 54, (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) set out factors to be considered in determining priority of charges under s. 11.52 of the *CCAA* which are critical to the successful restructuring of the business:

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

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

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

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

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

(f) the position of the Monitor.

41 Section 11.2(4) of the *CCAA* provides that in deciding whether to make an order allowing DIP financing, the Court must consider:

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

(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.

42 In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.) at paras 12-18, (2014), 20 C.B.R. (6th) 116 (Ont. S.C.J.) the Court discussed the authority under s. 11.2 to grant priority to the DIP lender's charge to secure the DIP loan. In addition to the factors set out in s. 11.2(4), it considered the following in granting priority:

(a) notice had been given to all of the secured parties likely to be affected and broadly to all *PPSA* registrants, and other interested entities;

(b) the maximum amount of the DIP loan was appropriate based on the anticipated cash flow requirements of the applicant as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period;

(c) the cash flows were the subject of a favourable report of the Monitor in its First Report;

(d) the Applicant's business would continue to be managed by the applicant's management with the assistance of the CRO during the restructuring period;

(e) the existing operational relationships between the applicant and its largest creditor would continue; and

(f) the DIP loan would assist in, and enhance, the restructuring process.

VI Analysis

Extension of Order

43 Various factors were profiled by Ms. Wanke before Nielsen J. to support the Group's position that a restructuring under the *CCAA* is possible; if the objective is liquidation, then appointment of a Receiver is appropriate. Nielsen J. recognized the possibility of a successful restructuring in rejecting the application to appoint a Receiver and granting the application to impose a Stay under the *CCAA* with a Monitor and CRO. In recognizing that a lot of work had been done, he found that those supporting the steps to restructure should be given that opportunity in the collective best interest despite the prejudice of deferral and risk as regards repayment of CWB and other creditors.

44 I now have the responsibility to measure the progress in the period leading up to expiry of the initial Stay. Without second-guessing the initial decision, I must assess the current circumstances, including the good faith and due diligence of the parties in light of steps taken to date.

45 The legislative objective of a *CCAA* order is to provide the Court considerable scope to maintain the *status quo* for a company to make proposal arrangements to facilitate remaining in operation for a collective benefit. One may have preferred to see some further advancement on the "germ of a Plan" but I am satisfied that the CRO has begun consultations with unsolicited parties who have expressed an interest and that a structure for such a Plan is now an important priority.

46 I am mindful that the Monitor was obliged to report on just under three weeks of activity in rendering a First Report by July 24, 2017. Various factors have impacted the lack of concrete progress on a Plan at this point, including the value of the Group as a going concern estimated at $97M (equipment, manufacturing and real estate) with diverse activities, assets and work product, the complexity of restructuring, and the need to modernize the sophistication of a family operation that is unable to operate as it has done historically.

47 Professional advisors are now in place assisting in this required modernization. Potential investors have and continue to express interest in the Group. It appears that DIP funding has been used prudently to cover operational expenses including higher than expected professional expenses. Cash flows are quite healthy and the Group owns a number of assets of marketable value.

48 CWB notes that Nielsen J. indicated on the initial Stay application that the Group would have to show more than a germ of a plan at the next hearing. It is not entirely surprising that three weeks did not prove long enough to complete the steps necessary to create a Plan of Arrangement. There is no allegation of delay or inertia by the Monitor or the CRO in performance of significant responsibilities undertaken since confirmation of their appointment July 5, 2017. The Monitor reported that the Group has been working with due diligence and in full cooperation. A number of competing interests require the attention of the Monitor. Having considered all of the circumstances before the Court, I am satisfied that the Group has established due diligence.

49 It bears noting that CWB is not the only party who would be affected by receivership. Employees, other creditors, clients, and the public would also be affected. Changes have already been implemented by the CRO, as observed and reported by the Monitor.

50 The Group has had the recent opportunity to enter into contracts with the Province of B.C. in relation to the wildfires. It appears that despite the Group's liquidity crisis — impacted by various factors, including market conditions — the business of the Group may well be salvageable. This assessment appears to be supported by: the cash flow projections, recoveries on receivables, and changes begun by the CRO in consultation with the Monitor with particular regard to increased work potential and to increase the sophistication of accounting.

51 However, CWB takes the position that the Group has been in default of its obligations to CWB for many months. CWB extended time for the Group to find refinancing and continued to make available to the Group the operating line facility in the amount of $12,000,000, margined on accounts receivable of the Group. CWB asserts that the Group took advantage of CWB by falsely including one or more multi-million dollar accounts receivable for which the work had not yet been done.

52 The parties disagree as to whether the law supports serious consideration of past bad faith if it is relevant to the viability of the *CCAA* proposal or its continuation.

53 The language of s. 11.02(3) of the *CCAA* does not temporally restrict the consideration of bad faith. The wording of that provision is captured broadly in *Tallgrass*. It would appear that *Muscletech* and the cases which followed it stand for the proposition that courts should look only to conduct in the context of the *CCAA* process. This represents a restrictive reading of s. 11.02(3) and the purpose of such a narrow interpretation is unclear.

54 It is logical that past due diligence will usually have minimal relevance as a factor. However, past bad faith illuminated after *CCAA* proceedings have been initiated may undermine the confidence of creditors and the Court in the viability of *CCAA* proceedings. In my view, past bad faith may well be a relevant factor in the Court's assessment under s. 11.02(3). This is in keeping with the approach taken in *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) at paras 37-38.

55 I note that the facts in this case are distinguishable from those in *San Francisco* where the alleged deception appeared to be aimed at deriving an advantage from customers through knock off products and counterfeit safety labels, rather than deriving an advantage from a financing secured creditor through accounting practices as alleged here by CWB.

56 Again, the major issue in this regard is, and has been profiled as, the status of accounts receivable in terms of the margining of contracts for work not yet performed or not fully performed.

57 CWB takes the position that, upon consultation with her client and corporate counsel, Ms. Wanke misrepresented the situation to Nielsen J. in her oral submissions on July 5, 2017. While this Court is not reviewing the basis for Nielsen J.'s order, the issue of margining was raised at that time and the allegation of bad faith remains a live issue. I understand the interpretation placed by CWB on the representations made in front of Nielsen J. both from Affidavits and then information provided to legal counsel. Ms. Wanke summarized her understanding as being that this was part of the camp business on the books of the Group and not a lack of good faith. I accept her expression on this review to the effect that she would have preferred to have been more familiar with the Grand Rapids contract at the time but that this issue only surfaced latterly. She said she would have stated the client's position somewhat differently, but that the net effect remains that the margining was consistent with the Group's understanding of its entitlement.

58 CWB's concerns regarding the margining are understandable. It takes the position that while margining on deferred revenue was permissible, the Grand Rapids contracts do not qualify for that treatment according to the terms as agreed to between the parties notwithstanding the assertions advanced by the Group. CWB says there was an understanding as relates to the formula to be applied to these receivables that was violated, especially as to the two major Grand Rapids accounts issued between the end of March 2017 and beginning of May 2017. Counsel for CWB took the Court through a number of documents relating to

the credit agreement between CWB and the Group to explain what the Group's reasonable understanding should have been in relation to contracts qualifying for special treatment of the accounts receivable for margining purposes.

59 The Monitor has reviewed and discounted a number of entries as inappropriate; it will likely have to further endorse commitment to revise other receivables. The Court agrees that a commitment to revise other receivables may be appropriate. However, there are a number of priorities competing for the attention of the CRO. It is difficult to measure whether any breaches of the protocol were intentionally deceptive as distinct from aggressive and misguided. That distinction is harder to make based on duelling affidavits as distinct from oral testimony, questioning or at minimum some objective detailed analysis by the Monitor to assist the Court's interpretation of events.

60 I have struggled to understand the treatment of invoicing as to the records of accounts receivable, particularly as the idea of charging for work not done is rather foreign to my experience as to the entitlement to collect. So too, the deferral of the time for payment extending from 45 days to 120 days obfuscates the idea of entitlement. The matter is complicated by the risk and relative reliability of these receivables as assets, distinct from a bad or at least tainted debt that needs to be monitored for collection procedures. All of these aspects appear to arise in far greater sums for 2016 than in any previous year which, understandably, is further troubling to principals at CWB.

61 I endorse the concerns of CWB as legitimate. Even in the absence of a finding of bad faith, the practice employed as reflected in treatment of the Grand Rapids receivables raises legitimate concerns regarding the future viability of the Group. I accept that the practice in question has resulted in margining which has led to overall debt to CWB which is incongruent with the Group's receivables as they would be represented in the normal course, as confirmed in the Monitor's First Report.

62 I also note CWB's concern that the cash flow projection relied on by the Monitor did not take into account unpaid professional fees relating to the work toward reorganization, and the projected loss to the end of October 2017 is considerably offset only by the fortuitous and uncertain wildfire camp work. CWB's receivables, to the extent they are collectible, are being used up by payment of the professional fees and interim financing.

63 Nevertheless, I am not prepared to conclude on the basis of the material as presented to me that the Group has failed to act in good faith to the extent of disentitling the extension sought.

64 Clearly, the parties now disagree on the interpretation of the arrangement between them as regards margining based on deferred revenue. The issue before this Court is not the correct interpretation of the various document referred to by CWB's counsel, but rather whether the Group's reliance on its understanding amounted to bad faith. There has been no trial of the latter issue. While raising questions, the evidence adduced on this application falls short of supporting a finding of bad faith in the sense of knowing reliance on an unsupportable interpretation of the documents, or intentional concealing of the practice or any relevant financial information. This is particularly so in light of the evidence of the Group's understanding that the arrangement between CWB and the Group expressly contemplated that the Group was permitted to margin deferred revenue when no work had been done.

65 If the CWB was not aware of the effect or extent of this type of margining, it is not clear from the evidence that the Group understood it was acting other than consistently with the intention of the parties in this regard. This view of the matter is generally supported by the Monitor's information that the sophistication of all facets of the accounting system in place has not kept up with the sophistication of its business. The CRO is working to address accounting practices which require improvement.

66 There is undeniably a considerable difference in the parties' interpretations of the conduct and reporting. Obviously, a debtor may be motivated to maximize access to funding. The past practice here is somewhat unclear, but even if the Group exceeded the terms or protocol as generally agreed, I do not ascribe bad faith to its actions.

67 Overall, I find that extension of the Stay is in the best interest. However, a further vigorous review must take place within a reasonable period of time.

68 The November 3, 2017 date targeted by the Group is not reasonable in the circumstances.

69 As such, the next hearing is set for September 26, 2017. The Court will require a Report from the Monitor at least 7 business days prior to that date.

Increase in DIP Financing

70 Ms. McCracken suggests in her affidavit that they only need a small increase in the DIP loan to cover operations in light of healthy cash flows and significant assets.

71 While the creditors may rightly take issue with the characterization of the increase as "small", I approve the request to increase the DIP financing from $1M to $2.5M in the form of order proposed by counsel for the Group to address the anticipated cash flow shortage resulting from welcome work during what is typically a slower season for the Group. Counsel for CWB took no issue with the form of order.

72 At the close of submissions, counsel for CRA alerted the Court, as well as BDC in particular, that it took issue with the increase in DIP financing and that it would be applying for priority with respect to $1.14M owing to the Minister by the Group for unremitted source deductions and GST. It was seeking an order to vary so as to put the administrative charge, director's charge and interim lender charges in second place behind the CRA. In light of that information, BDC counsel indicated that the CRA's position would not impair BDC's ability to advance the DIP financing, noting that the matter would be argued at a later date.

1919

73 The application to add 1919 was not opposed. As was the case in *Guestlogix*, the operations of 1919 are inextricably linked to those of the Group, as it leases important equipment and provides it Canada North.

74 I order that 1919 be added as a party included in the Group. Counsel for the Group agreed to include in the order a clause restating the allocation provision in the initial Stay Order to recognize that Welease has made this concern known at this point. Counsel for CWB did not take issue with such a provision in the order.

Approval of Monitor's First Report

75 And at the request of the Monitor, I approve:

• his First Report and activities;

• suspend the limitation periods on claims;

• confer power to examine parties on questioned transactions regarding lot sales prior to *CCAA*.

76 The further Report of the Monitor is required at least 7 days before the next hearing.

Expansion of Stay

77 The Stay is expanded to apply to proceedings against Heart Lake and associated parties involved in the Grand Rapids contracts, and proceedings by Max Fuel against Ms. McCracken. Counsel for CWB did not take issue with this. In the result, the applications for appointment of a Receiver, interim or otherwise, are dismissed.

Sealing of Confidential Information

78 I order that the confidential information identified as such on the Court file be sealed.

Service Protocol to Reduce Costs

79 The Monitor is to maintain a service list of parties who provide the Monitor with email addresses. Those parties may be served by email effective the date of the email. All others are to be served by the Monitor posting its and others' materials on its website, effective as at the date of posting.

VII Conclusion

80 I have determined that it is in the collective interest to extend the *CCAA* Stay to September 29, 2017. The Order will be subject to review by me on September 26, 2017 in usual consultation with the Court Coordinator.

Application granted; cross-application dismissed.

End of Document

TAB 5

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Arrangement relatif à Chrono Aviation inc. | 2024 QCCA 1710, 2024 CarswellQue 15598, EYB 2024-560472 | (C.A. Que, Dec 19, 2024)

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and 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)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. 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. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the 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. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. 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. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

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. 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. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, 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. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. 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. 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. It was apparent that the supervising judge was focused 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. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu 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'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. 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. 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.

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. 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. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie 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. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. 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 mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était 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. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

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APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

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 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 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.

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 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 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. 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 (C.S. Que.)) (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). 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 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 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], 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 or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), 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 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), 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 (Ont. S.C.J.), 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.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (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 *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), 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 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.

(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 (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), 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).

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 Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), 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 (Ont. C.A.), at para. 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 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), 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.

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., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), 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).

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 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 (S.C.C.), 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, 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 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 position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), 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 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), 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).

(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 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), 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 (B.C. C.A.), 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 *Edgewater Casino Inc., Re*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (B.C. C.A.) ("*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.

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 (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is 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 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. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), 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*; *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). 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 & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, 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.

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*, 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 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 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., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia 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 (Ont. C.A.), 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., Re*, 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 Computer Services Inc.* — 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 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 .... <u>If the *CCAA* is to be interpreted in a purposive way, the</u> <u>courts must be able to recognize when people have conflicting interests and</u> <u>are working actively against the goals of the statute</u>.
>
> ("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.

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 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 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 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. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, 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 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".

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. 228-229 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. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* 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 (*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 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

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 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* (1885), 7 O.R. 644 (Ont. Div. Ct.), 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 c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), 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.

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.

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.

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, 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 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 C*rystallex* 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.
>
> (*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), 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 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. 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 *Musicians' Pension Fund of Canada (Trustee of)*, 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 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 (at 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" (at 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. 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.

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.

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).

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.

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 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 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . . . .
>
> ... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New 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 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.

Appeal allowed.

Pourvoi accueilli.

Footnotes

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

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.

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.

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.

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.

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 *Pole Lite ltée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); 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).

TAB 6

KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Pride Holdings Group Inc. | 2024 ONSC 1830, 2024 CarswellOnt 21022, 2024 A.C.W.S. 5427 | (Ont. S.C.J., Mar 27, 2024)

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly

insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been

seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which

would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re* [5] . On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent

jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re* [6] and *Lehndorff General Partner Ltd., Re* [7] .

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re* [8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups." [9] Similarly, in *Anvil Range Mining Corp., Re* [10] , the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors." [11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re* [12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to

rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re* [14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re* [15], I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re* [16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

End of Document

TAB 7

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system — Appropriate remedy was to reduce fees by amount associated with preparation of report.
Table of Authorities
Cases considered by *J.E. Topolniski J.*:

Afton Food Group Ltd., Re (2006), 18 B.L.R. (4th) 34, 2006 CarswellOnt 3002, 21 C.B.R. (5th) 102 (Ont. S.C.J.) — followed

Agristar Inc., Re (2005), 2005 ABQB 431, 2005 CarswellAlta 841, 12 C.B.R. (5th) 1 (Alta. Q.B.) — considered

Bank of Montreal v. Nican Trading Co. (1990), 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397, 43 B.C.L.R. (2d) 315 (B.C. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

Columbia Trust Co. v. Coopers & Lybrand Ltd. (1986), 76 A.R. 303, 49 Alta. L.R. (2d) 93, 1986 CarswellAlta 259 (Alta. C.A.) — followed

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 8 C.B.R. (5th) 34, 2005 SKQB 24, 2005 CarswellSask 22 (Sask. Q.B.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 68, 2005 SKQB 252, 2005 CarswellSask 410 (Sask. Q.B.) — referred to

Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd. (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — considered

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — considered

Hess, Re (1977), 23 C.B.R. (N.S.) 215, 1977 CarswellOnt 68 (Ont. S.C.) — followed

Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — considered

Nelson, Re (2006), 2006 CarswellOnt 4198, 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — referred to

Northland Bank v. G.I.C. Industries Ltd. (1986), 1986 CarswellAlta 426, 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, 73 A.R. 372, [1986] 4 W.W.R. 482 (Alta. Master) — considered

Peat Marwick Ltd. v. Farmstart (1983), 1983 CarswellSask 66, [1984] 1 W.W.R. 665, 30 Sask. R. 31, 51 C.B.R. (N.S.) 127 (Sask. Q.B.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1980), 1980 CarswellSask 25, 35 C.B.R. (N.S.) 312 (Sask. Q.B.) — referred to

Sally Creek Environs Corp., Re (2010), (sub nom. *Sally Creek Environs Corp. (Bankrupt), Re)* 261 O.A.C. 199, 2010 CarswellOnt 2634, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) — distinguished

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42 (N.B. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

843504 Alberta Ltd., Re (2003), 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306, 351 A.R. 222, 2003 CarswellAlta 1786, 2003 ABQB 1015 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 13.5 [en. 1992, c. 27, s. 9(1)] — considered

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

Generally — referred to

s. 23 — considered

s. 23(1)(h) — considered

s. 23(1)(i) — considered

s. 25 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 34 — considered

R. 35-53 — referred to

R. 39 — considered

R. 44 — considered

Regulations considered:

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

Companies' Creditors Arrangement Regulations, SOR/2009-219

s. 7 — referred to

APPLICATION by monitor for approval of fees.

***J.E. Topolniski J.*:**

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three

million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...
>
> ...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat*, *Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices

for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances

in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

65 The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

66 At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

> (1) the bank appoints a receiver for all companies on September 7, 2010;
>
> (2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's

duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

(a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

(b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

> 25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

> ... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:

(d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.

[Emphasis added.]

88 Clause 30 of the Initial Order states:

The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender 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 the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

(i) assume that the parties carefully drafted the terms of the order;

(ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and

(iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with

the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

> Today there is only one principle or approach, namely, the 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.

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed *CCAA* monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

127 In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

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(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.

TAB 8

2017 ONSC 673
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2017 CarswellOnt 1122, 2017 ONSC 673, 275 A.C.W.S. (3d) 696, 44 C.B.R. (6th) 289

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

Newbould J.

Heard: January 12, 2017
Judgment: January 27, 2017
Docket: 09-CL-7950

Counsel: Jessica A. Kimmel for Monitor
Susan Philpott for Former Nortel employees
Lily Harmer for Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Byron Shaw for Administrator of the Nortel Networks Managerial and NonNegotiated Pension Plan and Nortel Networks Negotiated Pension Plan
Thomas McRae for Nortel Canadian continuing employees
Michael E. Barrack, D.J Miller for Nortel Networks UK Pension Trust Limited and Board of the Pension Protection Fund
Adam Slavens for Nortel Networks Inc.
Michael Wunder for Unsecured Creditors Committee
Gavin H. Finlayson, Amanda C. McLachlan for Ad Hoc Group of Bondholders
Matthew-Milne Smith for EMEA Debtors
John Salmas for Indenture Trustee, Wilmington Trust, N.A.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
Passing accounts — Telecommunications company N, which had over 140 corporate entities in 60 jurisdictions, became insolvent — Canadian N debtors filed for Companies' Creditors Arrangement Act (CCAA) protection in 2009 — Monitor was twice granted extraordinary expanded powers, resulting in Monitor and its counsel undertaking significantly greater scope of work than in typical CCAA case — In 2017, Monitor of Canadian debtors brought motion for order passing its accounts in amount of CA$122,972,821.96, accounts of its Canadian legal counsel in amount of CA$99,994,744.85, and accounts of its U.S. legal counsel in amount of $31,352,136.73, incurred between 2009 to 2016 — Motion granted — Accounts approved — Monitor's duties were far more complex than normal due to matrix way in which N's business was operated — Extensive joint discovery process to resolve claims played large role in costs getting out of hand, and was not fault of Monitor — Monitor and counsel tried to be as efficient as possible in difficult circumstances and overall achieved very favourable outcomes for Canadian

creditors — Proceedings were unprecedented in terms of size, complexity, international aspects and vast number of competing interests — Nature, extent and value of assets realized for creditors was significant — Billings over relevant period comprised combined total of 384,652.6 professional hours — Monitor and counsel's professional rates and disbursements were reasonable.

Table of Authorities

Cases considered by *Newbould J.*:

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — followed

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed

Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — referred to

Tepper Holdings Inc., Re (2011), 2011 NBQB 311, 2011 CarswellNB 592, 82 C.B.R. (5th) 293, 984 A.P.R. 1, 381 N.B.R. (2d) 1, 2011 CarswellNB 849, 2011 NBBR 311 (N.B. T.D.) — referred to

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — referred to

Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

Pensions Act, 1995, c. 26

s. 75 — considered

Pensions Act 2004, 2004, c. 35

Generally — referred to

MOTION by monitor of insolvent company for passing of accounts of monitor and its counsel incurred during *Companies' Creditors Arrangement Act* proceedings.

***Newbould J.*:**

Introduction

1 Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the "Canadian Debtors"), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

2 The background to this sorry saga has been described in a number of decisions. [1]

3 At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA [2] region, as well as the Caribbean and

Latin America and Asia. NNC, the Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

4 On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the UK Insolvency Act, 1986. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

5 The Monitor was appointed in the Initial Order of January 14, 2009 which directed that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice." It is normal in CCAA proceedings for the Monitor to pass its accounts periodically. This was no normal CCAA proceeding and the Monitor chose not to pass its accounts periodically but rather wait until the end of the proceedings. One advantage in having all of the accounts passed at this stage is that up to date information as to the level of success achieved by the Monitor, one of the key factors to be considered, is now available as a result of the settlement recently achieved in the allocation dispute.

6 Normally a Monitor performs a neutral role as a court officer in a CCAA proceeding. However in this case there were two orders giving the Monitor extraordinary powers. On August 10, 2009, Nortel announced the departure of its then CEO, Mike Zafirovski, and on the same day five members of NNC's and NNL's boards of directors resigned. As a result of this change in circumstances, on August 14, 2009, this Court granted an Order that expanded the Monitor's role and powers to include, *inter alia*, the ability:

(a) to conduct, supervise and direct the sales processes for the Canadian Debtors' property or business and any procedure regarding the allocation and/or distribution of proceeds of any sales;

(b) to cause the Canadian Debtors to exercise the various restructuring powers authorized under paragraph 11 of the Initial Order and to cause the Canadian Debtors to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Canadian Debtors in dealing with their property, operations, restructuring, wind-down, liquidation or other activities; and

(c) to administer the claims process established pursuant to the Claims Procedure Order dated July 30, 2009 and any other claims bar and/or claims resolution process or protocol approved by the Court.

7 Following the resignation of the Canadian Debtors' remaining directors and officers in October 2012, the Monitor's role and powers were further expanded by order dated October 3, 2012, to authorize and empower the Monitor to, amongst other things, exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors.

8 The changing circumstances of the CCAA proceedings and the resulting expansion of the Monitor's powers have resulted in the Monitor and its counsel undertaking a scope of work that is beyond the typical role of a monitor in a CCAA proceeding. Indeed, since October 2012 substantially all activities undertaken by or on behalf of the Canadian Estate, including the massive litigation, have been undertaken by the Monitor's professionals with the assistance of the Monitor's counsel. It has been the Monitor that has been the effective defendant in the claims made against the Canadian Debtors and the effective plaintiff in the allocation trial seeking a portion of the $7.3 billion of the escrowed sale proceeds.

9 The provision in the Initial Order that the Monitor pass its accounts from time to time was not changed with these orders enhancing the Monitor's powers and so what is included in the accounts to be passed is far more and different than what would ordinarily be included in a Monitor's accounts to be passed.

10 Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the $7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

11 The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

12 The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel.[3] It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

13 There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 (Alta. Q.B.) that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

> 30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.
>
> 32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

14 So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.) at para. 51 ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 5, aff'd, (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

> 33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:
>
> • the nature, extent and value of the assets;
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> • the complications and difficulties encountered;
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> • the degree of assistance provided by the debtor;
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> • the time spent;
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> • the receiver's knowledge, experience and skill;
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> • the diligence and thoroughness displayed;
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> • the responsibilities assumed;
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> • the results of the receiver's efforts; and
>
> • the cost of comparable services when performed in a prudent and economical manner.
>
> These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

15 Justice Pepall further stated:

> 45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

16 As stated, The Bank of New York Mellon, as Indenture Trustee took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts. It offered a suggestion that a practical solution is to refer the matter to a Master, an Assessment Officer or an outside expert. I do not agree with this suggestion. In my view there is sufficient evidence to undertake a proper consideration of the accounts of the Monitor taking into account the factors to be considered in arriving at a fair and reasonable result.

17 The time and expense of referring the accounts to someone else would be very time consuming, create further expense and delay completion of this matter that has gone on far too long. The Initial Order directed the accounts to be passed by this Court. That makes sense, particularly as no other person has the familiarity of what has gone on in the Nortel insolvency as the Court has. These considerations have led other courts to decline to send the accounts out for review by others. See *Tepper Holdings Inc., Re* (2011), 381 N.B.R. (2d) 1 (N.B. T.D.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83.

18 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund has been involved in these proceedings from the outset in January, 2009 and has been a member of the Canadian Only Creditors Committee (the "CCC"). The Superintendent supports the motion for an order passing the accounts of the Monitor and opposes the appointment of a special fee examiner to review the Monitor's accounts. It takes the position that his would create unnecessary and unwarranted additional expense and potential delay by virtue of the need to educate the examiner with respect to these hugely complex proceedings, particularly if the examiner was independent of the court with additional professional costs. The

Superintendent further states that it is satisfied with a high level assessment of the Monitor's accounts in this case by this Court, given this Court's familiarity with many of the complexities of the proceedings, and by reference to the significantly higher costs incurred by the other Estates.

19 Morneau Shepell Ltd., was appointed the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan in October 2010 and has been actively involved in the CCAA restructuring process. It is one of the largest creditors of the Canadian Debtors. It takes the same position as the Superintendent regarding any attempt to have the accounts of the Monitor examined by some other party. It states that more litigation or court process in relation to the Monitor's accounts should be strongly discouraged and avoided. Far too much time and too much of the Canadian estate's resources have been consumed with seemingly endless litigation. More court process only delays, and may diminish, the distribution of assets available to creditors.

20 Michel E. Campbell is a former engineer employed by Nortel. Since the January 2009 CCAA filing, he has been heavily involved in the proceedings as a court-appointed representative of approximately 21,000 Nortel former employees, as an active member of the Nortel Retirees and Former Employees Protection Canada ("NRPC"), and as a claimant against the Nortel estate for the loss of severance and termination pay. He estimates that he has spent over 4,000 hours on issues in the proceedings relating to employee issues. As one of the former employees and as a court-appointed Representative, he has a financial stake in these proceedings. He too supports the passing of the Monitor's accounts and does not think a referral of the accounts to some third party is desirable. He states in his affidavit:

> 44. Moreover, given the volume and nature of the information provided in the Monitor's materials filed for this motion, and the fact that the fees as disclosed are subject to this Court's approval, I see no reason for another third party review or assessment. In any event, such a third party review would create more expense and delay in these proceedings, and would likely further postpone approval of the Plan of Arrangement and distributions on claims, which is far from desirable. The Former Employees have been waiting now for almost eight years to receive some payment for their losses. Further, it would be difficult for a third party who lacks background knowledge of this case to conduct a reliable, meaningful or accurate assessment of the Monitor's fees without the expenditure of considerable additional time and resources of the Monitor to provide information to the third party reviewer. This Court is by far the more appropriate arbiter of the Monitor's fees.

21 This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose.

Consideration of the Monitor's accounts

22 The Monitor engaged Goodmans LLP ("Goodmans") as its Canadian legal counsel, Allen & Overy LLP ("A&O") as its U.S. legal counsel and Buchanan Ingersoll & Rooney PC ("BIR") as its Delaware local legal counsel. A large number of professionals from the Monitor's firm E & Y, from Goodmans and from A&O were involved throughout these proceedings. The accounts from each of those firms are included in the passing of accounts with affidavits supporting the accounts.

23 The Monitor seeks approval of its accounts in the amount of CA$122,972,821.96, inclusive of applicable taxes. This amount includes billings for 200,065.4 professional hours at an average hourly rate of CA$540.

24 The Monitor also seeks to pass the accounts of Goodmans in the amount of CA$99,994,744.85, inclusive of applicable taxes. This amount includes billings for 134,562.4 professional hours at an average hourly rate of CA$643.

25 The Monitor also seeks to pass the accounts of A&O in the amount of $31,352,136.73, inclusive of applicable taxes. This amount includes billings for 46,448.4 professional hours at an average hourly rate of $639.

26 These amounts are enormous by any measure, even taking into account that they cover eight years of work. However, when one understands the enormity of the work that had to be done by the Monitor and its counsel to regularize the insolvency proceedings, to gather in the assets and to protect the interests of the Canadian creditors against the relentless attacks made by the other estates, these amounts become more understandable. It is unquestionable that the work of the Monitor added value to the assets.

27 In this case, the Monitor has delivered its 132nd Report in which the services performed over the last 8 years have been extensively discussed in some 113 pages plus a number of attachments. Throughout the entire matter what has taken place has been described in the Monitor's previous 131 Reports.

28 I do not intend to discuss at length what all the Monitor has done. Suffice it to say, the job the Monitor has performed has been massive in a case that knows no equal.

29 The normal things required of a Monitor in any CCAA case, such as cash flow forecasting, were far more complex than normal in light of the matrix way in which the business was operated by Nortel. Prior to the CCAA filing, Nortel had no cash flow forecasting model or cash flow reporting process that allowed for weekly cash flow forecasting and reporting on an entity level. One of the earliest activities (and focuses) of the Monitor was assisting the Canadian Debtors in preparing both a consolidated and unconsolidated global weekly cash flow forecasting and reporting process for Nortel's global operations so Nortel could understand its entity-level cash position in "real time". These and subsequent cash flow forecasting efforts by the Monitor have included: creating cash flow templates for approximately 60 Nortel entities (including joint venture entities) in North America, APAC, CALA and EMEA; creating a global process to retrieve cash flow data on a weekly basis, reviewing and analyzing variances, discussion with management from all regions, preparing consolidated, regional and entity cash flows, and reporting on cash flows and related analysis to stakeholders on a weekly basis from January 14, 2009, until Estate separation in 2011; after the Estate separations until the end of 2012, preparing and reporting on the Canadian Debtors and APAC entities cash flows to stakeholders, initially on a weekly basis and subsequently on a bi-weekly basis; continuing to prepare cash flow forecasts for the Canadian Debtors on a bi-weekly basis and reporting thereon to stakeholders; and preparing and filing cash flow forecasts and reconciliations in connection with stay extension motions in the CCAA proceedings.

30 One issue that was central to the CCAA proceedings in the first six months was a means of addressing the significant cash burn being experienced by NNL as a result of it continuing to incur significant corporate overhead and R&D costs to preserve the enterprise value of the LOBs and coordinate global restructuring efforts notwithstanding the post-filing cessation of ordinary course payments to NNL under Nortel's transfer pricing system. The Monitor recognized these issues, in particular NNL's funding crisis and the risk it posed to both stabilizing Nortel's business and achieving either a successful restructuring or a coordinated going-concern sale of the Nortel LOBs. Accordingly, the Monitor engaged with representatives of the other Estates and key stakeholders in an attempt to address these matters.

31 On June 9, 2009, NNL, NNI, NNUK and the Joint Administrators (among other parties) entered into an Interim Funding and Settlement Agreement (the "IFSA") that assisted in addressing these issues. First, pursuant to the IFSA, NNI agreed to pay $157 million to the Canadian Debtors which, together with a $30 million payment made in January 2009, was in satisfaction of any claims of NNL for corporate overhead and research and development costs incurred by NNL for the benefit of the U.S. Debtors for the period from the Filing Date to September 30, 2009. Second, NNL agreed to pay NNUK $20 million on a deferred basis (secured by a Court-ordered charge) and the EMEA Debtors, on the one hand, and the Canadian Debtors and U.S. Debtors, on the other, agreed to the settlement of any transfer pricing obligations between them for the period from the Filing Date to December 31, 2009. Third, pursuant to the IFSA, the Estates reached certain agreements that facilitated the LOB transactions that would be entered into in the coming months, including an agreement that the execution of sale documentation or closing of a transaction of material assets would not be conditioned upon reaching agreement on either allocation of the sale proceeds of such sale or a binding procedure for the allocation of such sale proceeds and that all sale proceeds would be deposited in escrow pending resolution of their allocation.

32 On December 23, 2009, the Canadian Debtors, the Monitor and the U.S. Debtors entered into a Final Canadian Funding and Settlement Agreement (the "CFSA") pursuant to which NNI agreed to make a payment of approximately $190 million to NNL in full satisfaction of its reimbursement obligations in respect of corporate overhead, R&D, and other costs incurred by any of the Canadian Debtors for the benefit of the U.S. Debtors for the period October 1, 2009, through the end of the CCAA proceedings. In addition, pursuant to the CFSA NNL agreed to admit a $2.0627 billion claim by NNI (the "NNI Claim") in settlement of, among other things, any transfer pricing overpayments made by NNI to NNL for the period 2001 through 2005 and an outstanding revolving loan.

33 Over the period March 2009 through March 2011, Nortel entered into and closed nine Lines of Business transactions involving businesses carried out by Nortel entities around the world. They were as follows:

LOB	***Sale Process Approval Date***	***Initial (Stalking Horse) Sale Price***	***Final Sale Price***	***% Increase in Sale Price***	***Closing Date***
Layer 4-7	2/27/2009	$17,650,000	$17,650,000	-	3/31/2009
CDMA/LTE	6/29/2009	$650,000,000	$1,130,000,000	74%	11/13/2009
NGPC	9/29/2009	n/a	$10.000.000	n/a	12/8/2009
Enterprise	8/4/2009	$475,000,000	$900.000.000	89%	12/19/2009
MEN	10/15/2009	$390,000,000	$769,000,000	97%	3/19/2010
GSM/GSM-R	10/15/2009	n/a	$103.000.000	n/a	3/31/2010
CVAS	1/6/2010	$282,000,000	$282,000,000	-	5/28/2010
GSM Retained Contracts	n/a	n/a	$2,000,000	n/a	6/4/2010
MSS	9/1/2010	$39.000.000	$65,000,000	67%	3/11/2011
TOTAL			*$3,278,650,000*		

34 To be noted, the final sale price for these LOB sales was far in excess of the initial stalking horse sale prices.

35 During that period the Monitor also oversaw the sale of significant Canadian assets, including various businesses and real estate assets.

36 Once the LOB sales had been completed a process in conjunction with the other Estates was undertaken to sell the Residual IP used by various Nortel entities around the world. This was preceded by a consideration of the potential ways to monetize NNL's portfolio of approximately 7,000 patents and patent applications that remained following the conclusion of the LOB sales including considering both a potential sale of the Residual IP and the possibility of establishing an "IP Co." Eventually it was decided after much work to sell the Residual IP.

37 The sale of the Residual IP was by way of an auction after a stalking-horse bid from Google of $900 million was approved. The auction brought in $4.5 billion. During the auction the Monitor and its counsel vigorously negotiated with representatives of the other Estates and their stakeholders to ensure the auction continued when certain Estate representatives indicated they were satisfied with the bid price achieved at that point and wanted to terminate the auction. The continuation of the auction resulted in numerous additional rounds of bidding and a further $1.3 billion being paid for the Residual IP.

38 The claims process in this case was enormous. A total of 1,146 claims have been filed in the CCAA Claims Process totalling approximately CA$39.9 billion. Of the 1,146 claims filed in the CCAA Claims Process, 1,012 claims with a claim value of approximately CA$2.9 billion (original filed claim amount of approximately CA$12.5 billion) were classified by the Monitor as "Accepted or Reviewed and unadjusted" as at May 31, 2016. Accordingly, with respect to claims resolved through the Period, the Monitor reduced the value of those claims by approximately CA$9.6 billion, or approximately 77%.

39 The development of the compensation claims process was complicated by a number of factors:

(a) Nortel's employment records were incomplete, out of date and resided in various physical locations. This required that the Monitor spend considerable time and resources to consolidate the information, validate the data and organize it a manner that would allow for the automation of the compensation claims process. In addition, given the uncertainty over the accuracy of the data, the process had to provide employees with the opportunity to review the information and allow for the correction of data that may have been inaccurate.

(b) The process identified approximately 20 different claim types that could be held by any particular employee. The potential combinations of such claims complicated the creation of a single claim form and necessitated extensive consultations between the representatives and the Monitor.

(c) Each of the approximately 20 different types of claims included a number of variables and formulas that were negotiated between the Monitor and the representatives. These variables and formulas had to be explained to the claimants in a manner that could be understood. The Monitor worked closely with the representatives to develop a user guide and glossary of terms that simplified this process.

40 Two significant claims were made against the Canadian Debtors by the EMEA estates and by the UKPC. They were eventually litigated at enormous expense. At the outset, both EMEA and UKPC took the position that their claims should be arbitrated because of the terms of the IFSA. This issue was litigated in both this Court and in the Delaware Bankruptcy Court. Both Courts held that there was no binding agreement to arbitrate and that EMEA and UKPC had attorned to the jurisdiction of the courts. Appeals by EMEA and UKPC to the Ontario Court of Appeal and to the U.S. Third Circuit Court of Appeals were dismissed. There followed very expensive litigation of these claims.

41 With respect to the claims made against the Canadian Debtors by the EMEA estates, although they were not capable of precise quantification, the total amount of quantified claims against NNL alone exceeded CA$9.8 billion. In addition to unsecured claims, EMEA also asserted trust and/or proprietary claims against the Canadian Debtors' assets that could have resulted in effective priority treatment for such claims. Certain of the EMEA claims were also asserted against the Nortel directors and officers. Following completion of a lengthy and costly discovery process and several months of negotiation between the Monitor and the Joint Administrators, the EMEA Claims were settled on the eve of the commencement of the EMEA and UKPC Claims trial for a maximum admitted general unsecured claim against NNL of $125 million. This represented very little to EMEA because Nortel's books and records indicated that the consolidated intercompany book debt payable from the Canadian Debtors to the EMEA debtors as at January 14, 2009, was approximately $203 million. When netted against pre-filing intercompany amounts shown in Nortel's books and records to be payable by the EMEA debtors to the Canadian Debtors, there was a net $101 million payable to the EMEA Debtors. Accordingly, the EMEA claims were settled for an amount only slightly in excess of the net consolidated pre-filing debt shown as being payable by the Canadian Debtors to the EMEA debtors in Nortel's books and records.

42 With respect to the claim against the Canadian Debtors made by the Board of Trustees of NNUK's U.K. Pension Plan and the Pension Protection Fund (the "UKPC"), although a total liquidated claim amount was not specified, the UKPC Proofs of Claim filed by the Trustee against NNL included: (i) £495.25 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee dated November 21, 2006; (ii) $150 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee; and (iii) an unspecified claim in respect of liability owing pursuant to the FSD regime under the *U.K. Pensions Act 2004*. Although no liquidated claim amount was specified with respect to the alleged FSD liability, the claim noted that the section 75 debt of NNUK had been estimated to be £2.1 billion as at January 13, 2009, and that the Joint Administrators had stated that an informal estimate of the section 75 debt of NNUK was $3,055 billion. Accordingly, the FSD claim raised the possibility of a claim in excess of $3 billion against NNL. The same FSD liability was claimed against each of the other Canadian Debtors. Accordingly, the UKPC claims contemplated aggregate claims against the Canadian Debtors of nearly $20 billion. The FSD claims before the U.K. regulatory body were contrary to the stay imposed in the Initial Order and appropriate orders were made in this Court and upheld by the Ontario Court of Appeal. An amended UKPC claim in this CCAA proceeding asserted an FSD related claim of up to £2.1 billion against each of NNC and NNL.

43 The UKPC claim went to trial. The issues were extremely complex and the trial lasted 15 days based on a shortened trial procedure ordered by the Court. The reasons for decision of this Court were 127 pages. All of the claims against Nortel were dismissed except for a claim for of £339.75 million, which was approximately £152 million less than the amount sought by the UKPC on account of such claim. [4]

44 The allocation dispute was a heavily contested matter involving the issue of which Nortel Estates were entitled to the $7.3 billion proceeds from the asset sales being held in escrow. A joint trial was held by this Court with Judge Gross of the U.S. Bankruptcy Court in Delaware that lasted for 24 days. It was a very complicated matter. The trial decision in this Court numbered some 115 pages. Reconsideration motions were brought in each Court, largely unsuccessful. Leave to appeal to the Ontario Court of Appeal was refused. The matter was appealed in the U.S. to the District Court. A lengthy mediation process took place with retired Judge Farnan in the U.S. and a settlement was reached in October 2016.

45 Relative to the claims asserted by the other estates, the Canadian Estates were successful. The position of the U.S. interests at the trial of the allocation dispute was that the Canadian Debtors were entitled to only approximately $770 million of the $7.3 billion, or approximately 10.6% of the total sale proceeds. The position of the EMEA debtors at trial was that the Canadian Debtors were entitled to receive either $836 million or $2.3 billion, depending on the theory the Courts adopted. Based on the settlement of the allocation dispute reflected in the settlement, the Canadian estates will receive an allocation in excess of $4.1 billion, or approximately 57.1% of the total sale proceeds.

46 One other large issue that had to be dealt with was a claim by the bondholders to post-filing interest on their bonds which had the covenants of both the Canadian Debtor NNC or NNL and the U.S. Debtor NNI. At the time the matter was litigated, this claim for interest was in excess of $1.6 billion. The Monitor successfully took the position that the bondholders were not entitled to any post-filing interest. A decision of this Court denying the bondholders any post-filing interest was upheld by the Ontario Court of Appeal and leave to the Supreme Court of Canada was denied. In the U.S. the matter was settled but in the end, no post-filing interest was obtained by the bondholders because the U.S. Estate was not solvent as a result of the allocation of the $7.3 billion.

47 Given the overlap between the $7.3 billion allocation dispute and the EMEA and UKPC claims, an Allocation Protocol proposed by the Canadian Debtors and the Monitor (and ultimately approved by the Courts) contemplated a joint discovery and litigation process to resolve the three claims. Unfortunately the discovery process got out of hand.

48 The Monitor proposed certain proportionate limitations on discovery, including that each core party be restricted to identifying 10 fact witnesses and that documentary discovery be restricted to electronic documents and indices of boxes of hard copy documents. Various core parties opposed the Monitor's proposal and advocated for a discovery plan that imposed no restrictions on the number of depositions or discovery generally. Ultimately because of the need to accommodate the U.S. parties' broader discovery rights, the litigation timetable and discovery plan proposed by the U.S. debtors that imposed no restrictions on the number of depositions or on discovery generally had to be adopted.

49 Ultimately, more than 3 million documents were produced and approximately 140 fact and expert witness depositions were conducted in, among other cities, Toronto, Montreal, Ottawa, New York, Boston, Chicago, Washington, London, Paris, Brussels and Hong Kong. In addition, the start date for the hearings contemplated by the Allocation Protocol was extended from January 6, 2014, to March 31, 2014, and subsequently to May 12, 2014, to allow for further time for the litigation and discovery process to be completed.

50 As the custodian of the largest number of documents, the Canadian Debtors (and, by extension, the Monitor and its counsel) bore a substantially higher burden than other parties in the document review and production process. The scope of the document requests and interrogatories received by the Canadian Debtors was wide ranging and related to documents going back to the 1980s, and in some cases earlier. Given the scope and overlap of the document requests and interrogatories served by the core parties, they worked together to develop an agreed set of consolidated document requests and interrogatories, itself a significant undertaking. The consolidated document requests contained 140 total document requests grouped into 26 broad

categories with more than 85 sub-categories of documents identified. Similarly, the consolidated interrogatories contained 54 individual requests spanning some 25 pages.

51 Before the broad discovery that took place, there were several mediations. One was with a mediator in New York in which the parties tried to come to some agreement on a protocol for resolving disputes concerning the allocation of sale proceeds from sale transactions governed by the IFSA. The mediation took place in November 2010 and April 2011. The work involved on behalf of the Monitor was extensive, including having to review 43,000 documents posted in the mediation data room and other information exchanged by the Estates in advance of the mediation.

52 There were two unsuccessful mediations in the U.S. with a retired judge to try to settle the allocation dispute. There was later a mediation with then Chief Justice Winkler in an attempt to settle the allocation dispute. The mediation was ordered in June 2011. Mediation briefs were eventually filed and mediation took place from April, 2012 until discontinued on January, 2013. There was then the final mediation in New York with retired U.S. Judge Farnan that took several months and was eventually successful.

53 Overall, the Monitor and its Canadian counsel estimate that approximately 40% of their total fees in these proceedings relate to work done in connection with the allocation dispute, the EMEA claims and the UKPC claims, including the allocation and claims litigation and the various mediation and settlement efforts directed at resolving those disputes. The extensive discovery process, which was not the fault of the Monitor, played a large role in the costs getting out of hand.

54 In his affidavit, Mr. Campbell described his view of the efforts of the Monitor regarding the litigation. I view his evidence as being particularly relevant and helpful. Mr. Campbell is independent of the Monitor and the Monitor's counsel and has been involved throughout the process. Mr. Campbell stated:

> 40. The Canadian Estate was the main target of claims globally because Nortel's head office and parent corporation were located in Canada. From early in the CCAA proceedings, the Monitor was forced to deal with massive claims and persistent attacks on Canadian assets. Even then, the Monitor was consistently the voice of reason in what were often fractious and unnecessarily litigious cross-border proceedings. The Monitor advocated for limits on the scope of the allocation litigation process, which was rejected in favour of the more expansive American style with the hugely expensive document and deposition discovery process. The Monitor spearheaded a coordinated approach with the Canadian creditors in the mediations and Allocation Litigation which had the effect of consolidating and rationalizing resources and containing costs.

55 Morneau Shepell Ltd., the Administrator of the Nortel pension plans has also commented positively on the actions of the Monitor and its counsel. It stated in its brief:

> The Canadian estate has faced a multitude of claims asserted by the other estates and by creditors more closely aligned with the other estates. In addition, the Nortel estates and the key creditors worldwide have been engaged in a long-running allocation dispute that included a series of intense mediation efforts and a complex and hard fought cross-border trial, with subsequent appeals. On behalf of the Canadian estate, the Monitor has had to respond to and participate in all of these matters for the benefit of Canadian stakeholders. Without the extensive effort, dedication and leadership of the Monitor and its counsel, the Canadian estate would not have achieved the favourable outcomes accomplished in the claims litigation and allocation trial, nor would it have achieved the favourable resolution of the outstanding litigation by way of the settlement.
>
> Because of its active involvement in the case and firsthand dealings with the Monitor, the Administrator observed directly the efforts of the Monitor to be mindful of costs and to seek efficiency wherever possible. As one of many examples, the Monitor was instrumental in organizing and coordinating the trial effort with creditors (where coordination was feasible) to avoid duplication of effort. Even though different positions were advanced, the Monitor did not allow that to preclude coordination to achieve efficiency. In addition, in respect of the design of the very complex trial process, the Monitor took positions directed at reducing complexity throughout the trial process.

56 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund spoke of the claims by the U.S. and UK/EMEA estates and bondholders to enhance their recoveries at the expense of the Canadian creditors. The Superintendent stated:

> The amount of the Monitor's time and effort required to protect the Canadian Estate and its creditors by resisting all these attacks was an enormous undertaking. Because the Monitor worked cooperatively with the CCC on these issues, duplication of many costs was avoided.
>
> The cost savings to the Canadian Estate and the Superintendent regarding the allocation trial are significant. The Superintendent's costs and that of the CCC could have been significantly (possibly as much as 50%) higher, or more, if we did not work cooperatively with the Monitor.

57 These comments by interested, knowledgeable but independent parties are strong evidence that the Monitor and its counsel tried to be as efficient as possible in very difficult circumstances and that overall they achieved very favourable outcomes for the Canadian creditors.

58 There were a number of other matters that the Monitor and its counsel had to deal with during the 8 years from the time of the CCAA filing. Some included (i) dealing with and settling a large dispute with Flextronics, Nortel's largest contract manufacturer, including a $7 billion claim; (ii) developing an employee hardship process which has provided for interim relief for employees; (iii) restructuring eleven Nortel entities in the APAC region; (iv) negotiating an employee settlement agreement covering a number of issues; (v) developing a Health & Welfare Trust allocation methodology and distribution to those entitled; (vi) estate separation and wind- down activities to enable them to become stand-alone entities; (vii) dealing with French employee claims brought by NNSA employees in the Versailles Employment Tribunal in France; (viii) selling residual IP owned by the Canadian Estate, consisting of 17 million internet protocol; (ix) dealing with environmental issues arising from several Nortel properties in Ontario and claims by the MOE; (x) settling a number of transfer pricing issues amongst the various estates; (xi) dealing with a claim by the French liquidator of NNSA brought in the Versailles Commercial Court; (xii) financial reporting and tax issues; (xiii) dealing with claims by Frank Dunn, a former CEO of Nortel, and by 110 Calgary employees; (xiv) dealing with a class action brought in New York against a number of former officers and directors of NNC under the Securities and Exchange Act; (xv) dealing with a claim brought by SNMPRI in this Court and in the U.S. In most of these issues, court proceedings were taken, often with appeals to the Ontario Court of Appeal and to the Supreme Court of Canada.

59 SNMPRI asserted claims against the Canadian Debtors alleging unauthorized use and transfer of SNMPRI's software and claimed damages of $200 million. It unsuccessfully sought to lift the stay to permit the case to be tried in the U.S. before a jury. In April, 2016 this Court on a summary judgment motion dismissed the bulk of the claim. Leave to appeal to the Ontario Court of Appeal was dismissed.

60 The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund strongly supports the efforts made by the Monitor. It states:

> The Monitor's motion materials reflect an enormous amount of work over many years, all ultimately in aid of maximizing recoveries in the Canadian estate. The stakes being so high; the huge number of interested and well funded parties and the lengths to which they have been prepared to go given the amounts at issue, and the global nature of Nortel, are unprecedented.
>
> The Monitor's fee, absent context, is quite large. However, in context, from the perspective of the Superintendent, who paid its way and did not receive funding from the Estate, the fee appears fair and reasonable. The Monitor's strong, fair, balanced and practical approach to this file, from the perspective of the Superintendent, likely saved the Estate millions to tens of millions of dollars.

61 I will deal briefly with the *Belyea* factors to be taken into account.

1. Nature, extent and value of the assets being handled

62 There can be no question about the significant nature, extent and value of the assets that were realized upon so that they could be available to creditors.

2. Complications and difficulties encountered

63 These proceedings are unprecedented in terms of their size, complexity, international aspects and the vast number of competing interests. It was in part due to these unprecedented complications and difficulties that the Monitor's role and powers had to be twice expanded, first in August 2009 and again in October 2012.

64 The Monitor, with the involvement of its counsel, has delivered 132 reports, participated in more than 200 motions and hearings before this Court and 23 leave to appeal applications and appeals before the Ontario Court of Appeal or Supreme Court of Canada, and been integrally involved in the 10 cross-border sales processes and transactions for the LOBs and residual intellectual property as well as a further 18 transactions through the relevant period in respect of other assets of the Canadian Debtors. The allocation dispute and the EMEA and UKPC Claims were hotly contested and complex.

3. Degree of assistance provided by the company, its officers or its employees

65 The Monitor was granted enhanced powers in mid-2009 and authorized to exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors since October 2012. This has resulted from the liquidating nature of this case, including the transfer or termination of most employees by early 2010 and the ultimate resignation of the few remaining officers and directors of the Canadian Debtors in October 2012. Substantially all activities undertaken by or on behalf of the Canadian Estate have been undertaken by the Monitor's professionals with the assistance of Monitor's counsel. This expanded role has resulted in the Monitor and its counsel undertaking a significantly greater scope of work than in a typical CCAA case.

4. Time spent

66 The billings over the relevant period comprise a combined 384,652.6 professional hours by the Monitor and its counsel. Throughout, the professional fees and disbursements of the Monitor, its counsel and other professionals being funded by the Canadian Debtors have been disclosed in Monitor's reports along with forecasts of expected fees and disbursements which were part of the restructuring costs. Starting in April 2013, the Monitor provided in its relevant reports detailed breakdowns of the Canadian Debtors' restructuring costs, including total fees for advisors as well as an aggregate total of the fees and disbursements of the Monitor, Goodmans and A&O. In sum, there has been full disclosure throughout the period of the activities of the Monitor and its counsel, including the estimated and resulting fees and disbursements.

5. Knowledge, experience and skill

67 To ask the question is to answer it. The professionals in this case from the Monitor and its counsel are the cream of the crop.

6 Diligence and thoroughness displayed

68 The same applies to this question. The 132 reports of the Monitor make clear that these qualities were brought to bear.

7. Responsibilities assumed

69 In this case, particularly with the two orders granting the Monitor extraordinary powers, the responsibilities assumed were enormous.

8. Results Achieved

70 I have dealt with this at some length. The results achieved were commendable.

9. The cost of comparable services when performed in a prudent and economical manner

71 I am quite satisfied that the Monitor's professional rates and disbursements, as well as those of its counsel, are comparable to the rates charged by other professional firms in the Toronto, New York or Wilmington market for the provision of similar services regarding significant complex commercial restructuring matters.

72 Indeed, the professional fees and disbursements of the Monitor and its counsel, together with the fees and disbursements of the Canadian Debtors' main advisors, are less, and in some cases significantly less, than the fees and disbursements of the main advisors to the other Estates. The fees and disbursements of the main advisors to the Canadian Estate for the period January 14, 2009, through December 31, 2015, are approximately 76% of the fees and disbursements of the main advisors to the U.S. Estate, and approximately 51% of the fees and disbursements of the EMEA Estate advisors, as detailed in the following chart [5] :

Nortel Estate Main Advisors
Professional Fees
For the period January 14, 2009 - December 31, 2015
(in USD millions)

	Fees	*Disburse- ments*	*Total Fees & Disburse- ments*
Ernst & Young Inc.{1,2}	100.1	2.9	103.0
Goodmans LLP{1,2}	77.8	2.4	80.2
Norton Rose Fulbright Canada LLP{1,2}	63.3	1.6	64.9
Gowling Lafleur Henderson LLP{2}	9.0	0.2	9.2
Fresbfields Bruckhaus Deringer LLP{3}	7.3	1.7	9.0
Total	*257.5*	*8.8*	*266.3*
Allen & Overy LLP	28.5	1.6	30.1
Buchanan Insersoll & Rooney PC	1.1	0.4	1.5
Total Professional Fees	*287.1*	*10.8*	*297.9*
Fees and Expenses of Main Advisors of:			
US Debtors{4}			389.9
EMEA Debtors{5}			581.9

Notes: 1 Fees exclude undrawn retainer2 Foreign exchange rates used based on Bank of Canada Monthly Average Noon-Exchange Rates3 Foreign exchange rates used based on Federal Reserve Monthly Average Noon-Exchange Rates4 US Debtors professionals included are Cleary Gottlieb Steen & Hamilton LLP, Emst & Young LLP (US), Huron Consulting Group, John Ray, Torys LLP, Chillmark Partners, LLC and Morris, Nichols, Arsht & Tunnell LLP, based on monthly fee applications filed in the United States Bankruptcy Court for the District of Delaware5 Based on Joint Administrators' Abstract of Receipts and Payments from January 14, 2009 to January 13, 2016

73 The comparison is all the remarkable when one considers the extra work that the Monitor had to do because the head office of Nortel was in Canada and the fact that the Monitor had to respond to the many issues raised in the foreign proceedings as those issues had the potential to affect the recovery by the Canadian creditors.

74 I could be somewhat critical regarding the number of counsel in the courtroom during the allocation trial. At the outset, there were four or five lawyers in court for the Monitor. When a witness was giving evidence in Delaware, counsel for the Monitor doing the cross-examination attended in the Delaware courtroom with fewer lawyers in the Toronto courtroom. However, it was quite obvious that the Monitor risked being outmatched. The U.S. debtors had five lawyers in the courtroom throughout the trial, as well as many in the Delaware courtroom, the EMEA debtors had two or three each day, the UKPC had usually two lawyers each day, the UCC had two and the bondholders usually had two. All of these other parties were lined up against the Monitor. After a while, the Monitor began sending fewer lawyers to court. In a case of this size and complexity, I am not in a position to know exactly what role each of the Monitor's lawyers had played in preparation for the trial or to say that they should not have been there.

75 My general impression was that there were far too many lawyers in the courtrooms in Toronto and in Delaware, some of whom (not the Monitor's counsel) spent much time on their blackberries. The accounts of all of these other parties are not before this Court for approval.

76 It is fair to say that each of the *Belyea* factors supports the accounts of the Monitor and its counsel being passed and I approve them.

Insolvency culture

77 I cannot leave this passing of accounts without some discussion of what is becoming prevalent in insolvency cases in Toronto.

78 My comments are restricted to the trial procedures. Prior to the litigation becoming the focus of the work, the parties worked very cooperatively to achieve an asset realization that was remarkable and much more than forecasted.

79 Justice Pepall dealt recently with a receiver's costs in *Diemer*. The concerns she raised are no different than in a CCAA or BIA case. One concern is the extent of "over lawyering" a file.

80 In my early days in this Nortel matter, Judge Gross and I faced shortly before trial a large number of "pre-trial" motions, consisting largely of motions to strike various parts of expert reports as being outside the expertise of the particular expert. There were very thick briefs, responding briefs and reply briefs with lengthy facta. Motions of this kind are routinely made during the course of a trial without all of the briefs and facta. The motions were dismissed and the parties were left free to make such arguments during the trial. Needless to say, the issues evaporated.

81 We were also faced with arguments over the length of affidavits that could be filed and the time available to the various parties during the trial. The debate seemed endless and Judge Gross and I had to settle the issues. In the end, the time allotted was more than necessary and it too never became an issue during the trial

82 These sorts of things should not have occurred. The Nortel case was unique in that there were no significant secured creditors who had an interest in controlling costs. That is, there was no typical client whose own money was at stake, such as a bank, which normally would put a brake on excess lawyering taking place.

83 There are too many occasions when a large number of lawyers will attend at court on a matter that is on consent or knowingly without opposition, usually conducted in chambers because of those circumstances. Usually there is no need for most of the lawyers to attend and no need for senior lawyers at all. Courts must be mindful when this occurs to register a concern and, if costs are in the discretion of the court, to refuse to provide costs to those who need not have attended.

84 In Nortel, during the allocation trial, there were far too many lawyers in Court in both Toronto and Delaware. Five lawyers for a party, such as was the case invariably with the U.S. debtors, were likely not needed. That situation breeds disrespect for the legal system in general and particularly so in a case in which thousands of pensioners and disability claimants have had to wait far too long for this proceeding to end. I realize that a judge does not know what all goes on in terms of preparation, and it may be that there is a need for several counsel during a particular witness, but in the Nortel case there had been extensive discovery and all of the evidence of the witnesses was known before the trial began and contained in affidavits or expert reports that were used as their evidence in chief.

85 Some have criticized the Courts in this case for letting things get out of hand. It may be that the criticism is merited, but in my view there is not so much in the point. What got out of hand was the extensive discovery process that ensued once the size of the value of the residual patents at $4.5 billion was known. The U.S. Debtors and the EMEA Debtors changed their initial position from the Canadian Debtors owning the residual patents to the U.S. Debtors taking the position that they owned all of the interests in the patents in their market and the EMEA debtors saying that the patents were jointly owned. In the allocation decision I referred to this and said:

> In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation.

86 Professor Janis Serra wrote an article in the Globe & Mail shortly after the allocation decision was made. The headline was "The Nortel judgments were fair. Uncontrolled legal costs are not". In her article, Professor Serra said:

> While parties should be able to assert their claims, the disproportionate negative effects of protracted litigation on smaller creditors are tremendous.
>
> Few people dispute that professionals need to be paid for their services and that parties need lawyers and financial professionals to help guide them through complex insolvency cases. However, the Nortel case represents the extreme in the amount of fees directed away from creditors to professionals, with more than $1-billion already paid to the experts, illustrating the problem of uncontrolled costs.

87 Against the wishes of the Monitor, a broader discovery process was permitted because of the rights under U.S. law permitting wide-ranging depositions. To have ignored those rights in this innovative cross-border proceeding would likely have led to reversible error of any decision made contrary to those parties who had such rights. However, what should have happened is that the parties should have engaged in meaningful negotiations far sooner and settled the matter for the benefit of those who have lost so much in the Nortel insolvency.

88 While there are some who would like to see the Court "punish" the lawyers in this case, it should be recognized that the only party that is subject to the Court's jurisdiction over its costs is the Monitor. For the reasons already given, it would be unjust to center out the Monitor or its counsel for the blame.

89 What Nortel teaches us is that the gatekeepers of expenses in insolvency cases must exercise as much vigilance as possible to see that costs are maintained at a proper level. Nortel was unusually complex, to be sure, but lessons learned can be useful for less complex insolvencies.

Conclusion

90 The Monitor's accounts and those of its counsel including the respective fees and disbursements incurred during the period January 14, 2009, through to and including May 31, 2016, are approved, being:

> (a) for the Monitor, CA$122,972,821.96, inclusive of applicable taxes;
>
> (b) for Goodmans, CA$99,994,744.85, inclusive of applicable taxes;
>
> (c) for A&O, US$31,352,136.73, inclusive of applicable taxes; and
>
> (d) for BIR, US$1,476,489.87.

Motion granted.

Footnotes

1 See the decision regarding the allocation of the $7.3 billion escrowed sales proceeds: *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]).

2 EMEA is an acronym for 19 Nortel subsidiaries in Europe, the Middle East and Africa

3 A majority but not all of the bondholders under the particular Indenture Trust are a party to the Settlement Agreement.

4 See *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]).

5 It is apparently unclear from the information available to the Monitor whether the expenses of the EMEA Debtors include disbursements for experts. If they do, a comparison would require those expert fees to be deducted. The Canadian and US Debtors' experts' fees are not included in the chart. The chart goes to the end of December, 2015, which does not include work done since then, and so should be taken as a guide rather than as amounts fixed in stone.

TAB 9

2022 ONSC 6680
Ontario Superior Court of Justice

Nortel Networks Inc.

2022 CarswellOnt 17173, 2022 ONSC 6680

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

G.B. Morawetz C.J. Ont. S.C.J.

Heard: November 28, 2022
Judgment: November 28, 2022
Docket: CV-09-0007950-00CL

Counsel: Joseph Pasquariello, Christopher G. Armstrong, for Monitor, Ernst & Young Inc.

Subject: Estates and Trusts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
Table of Authorities
Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:
Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — referred to

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 Ernst and Young Inc., in its capacity as Monitor of the Canadian Debtors (the "Monitor") brings this motion for approval of the fees and disbursements of the Monitor and its counsel incurred during the period of November 1, 2021, through to and including October 31, 2022 (the "Period").

2 Although these proceedings are in their wind-down phase, the Monitor, with the assistance of counsel, continues to undertake efforts to advance the administration of the Canadian Estate. During the Period, these efforts included completing the Fourth Distribution pursuant to the Plan of approximately $38 million, completing final distributions from the Health and Welfare Trust ("HWT"), and recovering a further $21 million for the benefit of the Canadian Estate's creditors.

3 The Monitor submits that the fees and disbursements for the Period are fair and reasonable in the circumstances of these proceedings.

4 The motion was not opposed.

5 In support of the motion, the Monitor delivered the One Hundred Sixty First Report dated November 17, 2022 (the "161 st Report"), which provides a detailed summary of the activities of the Monitor and its counsel throughout the Period together with a detailed breakdown of the Monitor's and its counsel's fees and disbursements. The 161 st Report supplements the other Reports that were filed during the Period that detailed the activities of the Monitor. In addition, affidavits from representatives of the Monitor and each of its counsel provide a listing of the accounts sought to be passed, including each account date and amount, along with summary tables identifying the individual professionals who have worked on the matter and each of their ranks, average hourly billing rates, total number of hours worked and total associated professional fees, among other information.

6 The accounts of the Monitor and its counsel for the Period total approximately CA$3 million, inclusive of applicable taxes, the details of which are as follows:

7 The Monitor and its counsel billed amounts at standard hourly rates consistent with the relevant market and that they, in their professional judgment, considered fair and reasonable in the circumstances of these proceedings.

8 The efforts of the Monitor and (as applicable) its counsel during the Period have achieved significant results for the Canadian Estate and its creditors. These efforts included:

(a) completing the Fourth Distribution, which saw approximately $38 million distributed to more than 15,000 creditors, bringing cumulative distributions under the Plan to approximately $4.5 billion;

(b) continuing to administer the Initial, Second, Third and Fourth Distributions, which included following-up on uncashed cheques and the re-issuance of over 510 cheques totaling approximately $1 million;

(c) carrying out the steps contemplated by the Final HWT Distribution Order;

(d) continuing to progress the wind-up and repatriation of funds from NNI and the Canadian Debtors' foreign controlled subsidiaries, recovering approximately $9.4 million during the Period;

(e) entering into an assignment agreement with NNI pursuant to which certain of NNI's residual assets were assigned to NNL; and

(f) working with the Trustee of the Nortel D&O Trust regarding its wind-up and the return of trust funds to the Canadian Estate as residual beneficiary.

9 The issue on this motion is whether the Court should approve the fees and disbursements of the Monitor and its counsel for the Period.

10 The test on a motion to pass accounts is to consider the "overriding principle of reasonableness", with the predominant consideration in such assessment being the overall value contributed by the Monitor and its counsel. As stated in *Laurentian University of Sudbury*, 2022 ONSC 2927 at para. 9 ("*Laurentian*"), the Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation. See also *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 (Ont. C.A.) at para *45*.

11 The following non-exhaustive factors assist courts in evaluating the fairness and reasonableness of a court-appointed officer's fees:

(a) the nature, extent and value of the assets being handled;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the company, its officers or its employees;

(d) the time spent;

(e) the Monitor's knowledge, experience and skill;

(f) the diligence and thoroughness displayed;

(g) the responsibilities assumed;

(h) the results achieved; and

(i) the cost of comparable services when performed in a prudent and economical manner.

Laurentian, supra at para 10.

12 Applying these factors to the present case, the Monitor submits that the accounts of the Monitor and its counsel during the Period are fair reasonable and should be approved, specifically noting that:

(a) the Monitor continues to oversee the administration of an estate of significant residual value and deliver results for creditors, with a further $38 million being distributed pursuant to the Plan and approximately $21 million in additional funds being recovered during the Period.

(b) the Monitor, with the assistance of its counsel, has undertaken a scope of work that is well beyond the typical role of a Monitor in a CCAA proceeding, overseeing the entire administration of the Canadian Estate for the benefit of creditors.

While the Monitor anticipates the ongoing administration of the Canadian Estate for a further period of time pending the wind-up of foreign affiliates and potential further distributions to creditors, the Monitor has worked to diligently "close out" matters during the Period where possible.

13 The Monitor requests an order passing its accounts and those of its counsel and approving its fees and disbursements and those of its counsel incurred during the Period, being:

(a) for the Monitor, CA$2,691,582.77, inclusive of applicable taxes;

(b) for Goodmans, CA$259,043.52, inclusive of applicable taxes;

(c) for A&O, US$73,748.60, inclusive of applicable taxes; and

(d) for PSZJ, US$3,755.82, inclusive of applicable taxes.

14 Having reviewed the 161st Report and hearing submissions, I am satisfied that the accounts of the Monitor and its counsel should be passed and approved.

15 The motion is granted and the Order has been signed in the form presented.

TAB 10

2016 BCSC 188
British Columbia Supreme Court

Redcorp Ventures Ltd., Re

2016 CarswellBC 290, 2016 BCSC 188, [2016] B.C.W.L.D. 1714, [2016] B.C.W.L.D. 1715, [2016] B.C.W.L.D. 1716, 263 A.C.W.S. (3d) 646, 33 C.B.R. (6th) 239

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

In the matter of the Canada Business Corporations Act, R.S. 1985 c. C-44

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

In the Matter of Redcorp Ventures Ltd. and Redfern Resources Ltd.

Burnyeat J., In Chambers

Heard: December 14, 2015
Judgment: February 9, 2016
Docket: Vancouver S091670

Counsel: H.L. Williams, for Alvarez & Marsal Canada Inc., Receiver of Redcorp Ventures Ltd. and Redfern Resources Ltd.
N. Renner, for Secured Noteholders Whitebox Advisors LLC, GMP Investment Management LP, Sandleman Partners LP and VR Global Partners LP

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Bankruptcy and insolvency
IV Receivers
IV.4 Miscellaneous

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Court appointed receiver of assets, undertakings and properties of companies — Appointment order provided that receiver would incur no personal liability or obligation as result of its appointment or carrying out of order except for any gross negligence or wilful misconduct — Receiver applied for relief, including approval of its actions and conduct and its release and discharge — Application dismissed — Effect of release and discharge sought by receiver went beyond what was set out in initial order and amounted to attempt to protect itself from any and all liability, but gross negligence or wilful misconduct were not released or discharged — Court did not have inherent jurisdiction to exempt its own officer from general operation of statutes or to excuse liability for gross negligence or wilful misconduct — Receiver was court-appointed officer and court must exercise reasonable review of receiver's actions and of seriousness of any omissions relating to actions that receiver failed to take — It was also not appropriate for receiver to request release and discharge from any future acts or omissions — Once outstanding matters had been completed, receiver could reapply for discharge.

Bankruptcy and insolvency --- Receivers — Fees and expenses

Court appointed receiver of assets, undertakings and properties of companies — Appointment order provided that expenditures or liability properly made or incurred by receiver, including fees of receiver and fees and disbursements of counsel, would be allowed in passing accounts — Receiver and counsel were ordered to pass accounts from time to time — Receiver applied for relief, including approval of its accounts and those of counsel — Application dismissed — Accounts of receiver were not verified by affidavit — There was no information about what done by personnel who worked on file or about standard rates and charges — It was not possible to ascertain whether liability for fees of receiver were expenditures or liabilities that were properly made or incurred — Appropriate passing of accounts could not be interpreted as being once in six years and receiver should not have waited so long to pass accounts — Accounts of legal counsel were not verified by affidavit and it could not be concluded that what was incurred for legal services was at standard rates and charges — There was no description of services rendered, so it was impossible to determine whether liability for legal fees was properly made or incurred — Assessment of fees was not just calculating number of hours spent multiplied by hourly rate, and there must be some correlation of cost to benefits derived — Legal counsel should have presented what it would have presented to registrar on assessment of account rendered to client — Both receiver and legal counsel could reapply to pass accounts — Supreme Court Civil Rules and appointment order allowed for summary determination by court rather than reference to registrar.

Bankruptcy and insolvency --- Receivers — Miscellaneous

Court appointed receiver of assets, undertakings and properties of companies — Receiver applied for relief, including authorizing it to destroy records of companies — Application dismissed — Request was contrary to requirements set out in legislation regarding retention of records — If, in future, party obtained approval to proceed against receiver, destruction of records meant that discovery process would be meaningless — In absence of expiry of limitation period, claims bar process or court orders, records should be retained in accordance with legislation.

Table of Authorities

Cases considered by *Burnyeat J., In Chambers*:

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered

Bank of Montreal v. Nican Trading Co. (1990), 43 B.C.L.R. (2d) 315, 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397 (B.C. C.A.) — considered

Bank of Nova Scotia v. Diemer (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.) — considered

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc. (2009), 2009 CarswellOnt 6167 (Ont. S.C.J. [Commercial List]) — followed

Gichuru v. Smith (2014), 2014 BCCA 414, 2014 CarswellBC 3169, 60 C.P.C. (7th) 1, [2014] 12 W.W.R. 423, 65 B.C.L.R. (5th) 17, 362 B.C.A.C. 271, 622 W.A.C. 271, 2015 C.L.L.C. 210-005 (B.C. C.A.) — followed

Graham v. Moore Estate (2003), 2003 BCCA 497, 2003 CarswellBC 2272, 186 B.C.A.C. 303, 306 W.A.C. 303 (B.C. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

Trustee Act, R.S.B.C. 1996, c. 464

s. 99(1) — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

Generally — referred to

R. 14-1(15) — considered

R. 14-1(31) — considered

APPLICATION by receiver for order approving its actions and conduct and ordering release and discharge; approving its accounts and those of counsel; and authorizing it to destroy records of companies.

***Burnyeat J., In Chambers*:**

1 Alvarez & Marsal Canada Inc. ("Alvarez") in its capacity as a Court appointed Interim Receiver and Receiver ("Receiver") of the assets, undertakings and properties of Redcorp Ventures Ltd. ("Redcorp") and Redfern Resources Ltd. ("Redfern") applies for a number of Orders including that:

(a) The reports of the Receiver filed in these proceedings, including the Tenth Report of the Receiver dated December 8, 2015 ("Tenth Report"), and the actions and conduct of the Receiver as particularized therein be approved;

(b) The fees and disbursements of the Receiver and its counsel as set out in the Tenth Report, be approved;

(c) The Receiver be authorized to destroy any and all records of the Companies.

(d) Upon the filing of a Receiver's Discharge Certificate, the Receiver shall be discharged as Receiver of the assets, undertaking and property of the Companies, provided that notwithstanding its discharge herein: (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein; and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Alvarez in its capacity as Receiver.

(e) Alvarez be hereby released and discharged from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, Alvarez be hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

(f) Notwithstanding any provision herein, this Order shall not affect any person to whom notice of these proceedings was not delivered as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and regulations thereto, any other applicable enactment or any other Order of this Court.

Background

2 Redcorp and Redfern made a filing under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *British Columbia Business Corporations Act*, R.S.B.C. 2002, c. 57. An Order was made on March 4, 2009 in response to the filing ("Initial Order").

3 On May 29, 2009, Alvarez was appointed Receiver, without security, of the current and future personal assets, undertakings and properties of Redcorp and Redfern ("Appointment Order"). Under the Appointment Order, the sum of $1,000,000 (exclusive of any interest earned thereon) as secured by the Administration Charge set out in the Initial Order was to be held and administered by the Receiver. The sum of $5,000,000 (exclusive of any interest earned thereon) as secured by the Directors' Charge set out in the Initial Order was also to be held and administered by the Receiver.

4 The Appointment Order contained the following provision limiting the liability of Alvarez as Receiver:

THIS COURT ORDERS that the Receiver shall incur no personal 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 Receiver by Section 14.06 of the B.I.A. [*Bankruptcy and Insolvency Act*, R.S.C, 1985, c. B-3] or by any other applicable legislation.

Discussion, Case Authorities and Decision

(a) Approval of the "Actions and Conduct of the Receiver" and the Release and Discharge of the Receiver

5 What is requested in (a) and (e) above amounts to insurance for the Receiver in addition to any liability insurance that may be available to Alvarez. Not only are the "actions and conduct" of the Receiver as "particularized" in all of the ten Reports of the Receiver approved but also the Receiver is to be released and discharged from "any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions..."whether or not the "actions and conduct" are particularized in any of the ten Reports filed with the Court by the Receiver.

6 While the personal liability and obligation of the Receiver is protected in the Initial Order save and except for gross negligence or wilful misconduct, the effect of the release and discharge sought in (e) above goes beyond what is set out in the Initial Order and does not make it clear that "gross negligence or wilful misconduct" are not released or discharged. The effect of (e) is that the Receiver is to be released from personal liability or obligations arising as a result of its appointment including any liability for gross negligence or wilful misconduct. Pepall J. in *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, [2009] O.J. No. 4265 (Ont. S.C.J. [Commercial List]) made this statement in that regard:

> It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions.
>
> (at para. 14)

7 The combined effect of what is sought in (a) and in (e) above is so broad as to attempt to protect the Receiver from any and all liability. There is no obvious inherent jurisdiction to exempt even its own officer from the general operation of statutes or to excuse liability for negligence or willful misconduct. That is why the standard appointment order excludes "gross negligence or wilful misconduct" from the exclusion given to a receiver for any "personal liability or obligation."

8 The position of a court appointed Receiver was set out in *Ed Mirvish*, *supra*, where Pepall J. stated:

> A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.
>
> Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act* provides that the discharge of a trustee discharges him [or her] from all liability in respect of any act done or default made by him [or her] in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.
>
> (at paras. 8 and 9)

9 Counsel for the Receiver indicated that the shortfall to creditors is in the neighbourhood of $110 million and those creditors who will already suffer a shortfall had agreed to the passing of accounts of the Receiver, the passing of accounts of counsel for the Receiver, and for the releases sought by the Receiver.

10 I am satisfied that this is not a sufficient answer to the questions raised by the applications of the Receiver. The Receiver is a Court appointed officer and the Court retains and must exercise a reasonable review of the actions taken by the Receiver and of the seriousness of any omissions relating to actions not taken by the Receiver. The Court cannot be bound by the corporate "monetary" decision taken by a creditor or by creditors who will have to bear the cost of an appropriate review by the Court.

11 An order following the format of the "Model Discharge Order" does not automatically include such a broad release and discharge as is contemplated in (e) above. Rather, if such a broad release and discharge is to be included, that inclusion must be drawn to the attention of the Court. The B.C. Model Insolvency Order Committee provided this comment in this regard:

> The BCMIOC was divided as to whether a general release might be appropriate. On the one hand, the Receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the Receiver likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity and as the Court's officer, so the Court may be of the view that it is appropriate to insulate the Receiver from liability by way of a general release. Some members of the BCMIOC felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership.
>
> Without intending to express an opinion as to whether a general release is appropriate, the BCMIOC has decided not to include the general release language in the body of the model order. Whether such language is appropriate is a matter to be considered by the presiding Judge based on the specific circumstances of the case. If this relief is being sought, stakeholders should be specifically advised and given ample notice.
>
> If a general release is ordered, the language approved by the BCMIOC is as follows:
>
> [RECEIVER'S NAME] is hereby released and discharged from any and all liability that [RECEIVER'S NAME] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME] while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, [RECEIVER'S NAME] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

12 In requesting this provision, counsel could not confirm that all "stakeholders" had been "specifically advised and given ample notice". Rather, notice was only provided to "Secured Noteholders" who will suffer a shortfall as a result of the receivership. Even if all stakeholders had been notified, I cannot be satisfied that the breadth of the release sought is appropriate even though it is the wording that is set out in the Model Discharge Order. Despite the suggested wording, it could not have been contemplated by the drafters that "any and all liability relating to matters that were raised, or which could have been raised" would include a release and discharge of liability for gross negligence or wilful misconduct. First, it would be contrary to what was set out in the Appointment Order. Second, the Court should not countenance the release and discharge of any gross negligence or wilful misconduct of its own officer.

13 Regarding the request that the Receiver be released and discharged from any liability it "may hereafter have", I am satisfied that it is inappropriate for the Receiver to make such a request. First, such a request would include a release and discharge of claims for gross negligence or wilful misconduct. Second, what is contemplated is that the Receiver will be discharged upon filing a "Receiver's Discharge Certificate" so that the Court will not necessarily have the benefit of a further Report from the Receiver about future activities.

14 The Tenth Report of the Receiver sets out a number of matters that remain unresolved and which will require further action by the Receiver. It is inappropriate to request that any future "acts or omissions" be released and discharged in view of this ongoing activity of the Receiver. Once all outstanding matters have been completed, the Receiver can re-apply for its discharge. At that time, the Court can take into account all activities of the Receiver and whether a claims bar process has been undertaken.

15 Once the further actions contemplated in the Tenth Report are completed by the Receiver, the Receiver will be in a position to apply for what is requested in (d) above. In this regard, the Explanatory Notes attached to the Model Discharge Order note the following regarding what is requested by the Receiver in (d) above: "Counsel should consider including this provision only if the Receiver's Report identifies any outstanding matters that should be completed before the Receiver's discharge. "As well, what is requested in (d) above does not include the necessary phrase: "...upon the Receiver filing a certificate certifying that it has completed the remaining outstanding activities described in the Report". Here, it is not clear whether all "outstanding matters that should be completed before the Receivers' discharge" are specifically set out in the Tenth Report.

16 So that the Court is in a position to confirm that all creditors and interested parties are aware of the effect of any release and discharge requested by the Receiver, the Receiver is in the position to establish "claims bar process" whereby all creditors and interested parties are notified that they will lose any rights to claim against the Receiver after a suitable period of time has elapsed and no application has been made to the Court to seek leave to proceed against the Receiver. In this regard, the Initial Order provided the following protection:

> THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of the Court.
>
> (para. 7)

17 Receiver will be at liberty to reapply for its release and discharge.

The Accounts of the Receiver and Its Counsel

18 The Appointment Order provided the following regarding the accounts of the Receiver and its counsel:

> THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property (the "Receiver's Charge") in priority to all security interests, trusts, liens, charges and encumbrances, statutory of otherwise, in favour of any Person, but excluding the charge on the ERIP Monies, the Administration Charge and the Directors' Charge.
>
> THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.

19 Regarding the question of the duty of a Court appointed receiver to report to the Court and to pass its accounts, the following statements were made in *Confectionately Yours Inc., Re* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.) [hereinafter Bakemates] by Borins J.A. on behalf of the Court:

> A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq*. As Bennett points out at pp. 445-446:
>
> > ...the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing

> order...Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

> One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions.*
>
> [Emphasis added.]

(at paras. 34-36)

(a) Receiver's Accounts

20 Attached as an appendix to the Tenth Report of Receiver is a "summary of the receiver's professional fees and disbursements for the period May 26, 2009 to September 27, 2014...." Those accounts total $2,244,414.45 including out-of-pocket disbursements of $123,408.26 and applicable taxes of $153,611.29. What was attached in the appendix set out the following information relating to the 43 invoices issued by Alvarez: (a) invoice number; (b) invoice date; (c) invoice period/ description; (d) total hours; (e) fees; (f) disbursements; (g) HST; and (h) invoice total. Despite the inclusion of the word "description", no description of the services was included. As well, there is no detail regarding the date when services were rendered and no breakdown of the "total charges for each of the categories of services rendered".

21 Also attached as an appendix to the Tenth Report is a list of the seven "Staff Members" who had worked on the receivership with the following included in that appendix: (a) staff member names; (b) title of the staff member; (c) the total hours spent by the staff member; (d) the billing rate of the staff member; and (e) the amount billed. The total of hours billed is 3,705.8. The average of the rates charged is $530.90, and the total billed is $1,967,394.90. There is no indication whether the billing

rates changed during the period of May 26, 2009 through September 27, 2014. As well, there is no indication of the seniority of the staff members who worked on the matter.

22 The purpose of a Receiver passing its accounts is to afford all interested parties the opportunity to question the Receiver's activities and conduct. In order to be in a position to ascertain whether the fees and disbursements of the Receiver were "properly made or incurred" and are "fair and reasonable" what was done should be set out. In *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 (Ont. C.A.), Borins J.A. on behalf of the Court, dealt with the accounts of a Court appointed receiver and manager and made the following statement in that regard:

> The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (S.C.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.
>
> Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). I agree.
>
> (at paras. 37 and 38)

23 In addressing the appropriate principles and factors to be considered in assessing the appropriate compensation for a receiver, Taggart J.A. on behalf of the Court in *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), made the following statements:

> The principles which guided the Registrar were those set out in the Belyea [*Belyea and Fowler v. Federal Business Development Bank* (1983), 46 C.B.R. (n.s.) 244 (N.B.C.A.) case to which he referred. He applied the relevant considerations listing them at the end of his recommendations. They included: (a) the value of the assets; (b) complications and difficulties encountered by the Receiver; (c) degree of assistance provided by Nican; (d) time spent by the Receiver; (e) Receiver's knowledge, experience and skill; (f) diligence and thoroughness; (g) responsibilities assumed; (h) results; (i) cost of comparable services
>
> In addition to those factors the Registrar took into the account the estimates made by the Receiver as to the cost of the receivership with particular reference to the various fee estimates provided from time to time.
>
> (at pp. 320-321)

24 In *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]), further "relevant considerations" were added including the existence of an indemnity agreement, the secured position for priority for payment, the demanding of efficiency by a debtor, and with special emphasis on the parties agreeing to a charged based on the number of hours times an hourly rate of the persons involved.

25 In *Bakemates*, *supra*, Borins J.A. made the statement regarding what information should be available to the Court in the passing of accounts of a receiver.

> When a "receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.
>
> (at para. 31)

26 Here, the accounts of the Receiver were not verified by Affidavit. Such an Affidavit should include what is set out in *Nican*, *BT-PR Realty*, both *supra*. As well, there is no description of what was done by each of the personnel who worked on the file and whose time is reflected in the 43 invoices which were issued. There is no information regarding the "standard rates

and charges" of each of the personnel. There is no ability to ascertain whether what was charged was at the "standard rates and charges" of the Receiver. It is not possible to ascertain whether the liability for the fees of the Receiver were expenditures or liabilities which were "...properly be made or incurred...." I adopt the statement made by Borins J.A. in *Bakemates*, *supra* regarding what should have been available:

> Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.
>
> (at para. 38)

27 Because any accounts actually rendered by the Receiver were not attached, because there was no actual description available to the Court about what the Receiver had accomplished, and because very few of the "relevant considerations" were provided to the Court, what was presented on behalf of the Receiver does not meet the requirements set out in *Nican*, *BT-PR Realty*, or *Confectionately Yours Inc., Re*, *all supra*. What should be presented must include copies of any invoices issued, information regarding the standard rates and charges of each of the personnel who had worked on the receivership, and an indication of seniority within the profession, a narrative description about what was done, statement of affairs setting out the assets and liabilities of the debtor, statement of receipts and disbursements, and time that the Receiver took to perform its duties. This information would allow the Court to determine the appropriateness of any standard rates and charges imposed. If there is any information in the invoices which is confidential, such information could be redacted or sealed in the records of the Court. The reference to a "summary basis" does not relate to reduced information that should be before the Court. Rather, the phrase relates to the basis to have the Court rather than the Registrar consider the materials that would ordinarily be before the Registrar.

28 I cannot interpret the phrase "pass their accounts from time to time" as meaning only once in the six years since the Receiver was appointed and close to the time when the activities of the Receiver have come to an end. Where total receipts of Redcorp and Redfern amount to in excess of $39,500,000, an appropriate passing of accounts cannot be interpreted as being once in six years. The same goes for the total fees and disbursements of the Receiver of in excess of $2,200,000. It is not unreasonable to expect that the passing of accounts "from time to time" would at least every two years. In this regard, s. 99(1) of the *Trustee Act, R.S.B.C. 1996 c. 464* provides for an "executor, administrator, trustee under a will" to pass his or her accounts every two years unless the accounts are approved and consented to in writing by all beneficiaries, or "the court otherwise orders". While the Receiver is not an executor, administrator, or trustee, I see no reason why it would not be appropriate for a Receiver to pass his or her accounts at least every two years. If necessary, a Court application could be made to extend that period if the circumstances justify such an extension.

29 If a lengthier time goes by, a Receiver will not have the benefit of any comments about the form of the accounts which can then be incorporated into later passing of accounts. By waiting six years, the Receiver has run the risk that what was presented was in a format which was unacceptable and lacking in the required detail.

30 The Receiver will be at liberty to re-apply for the passing of its accounts.

(b) The Accounts of Counsel for the Receiver

31 Attached as a further appendix to the Tenth Report is a "summary of the professional fees and disbursements for the Receiver's legal counsel" for the period of May 30, 2009 through November 9, 2015. The total fees are $1,065,788.24 including out-of-pocket disbursements of $18,545.43 and applicable taxes of $113,492.71. Also attached is a break-down of the 57 invoices rendered by counsel which include information under the following headings: (a) invoice number; (b) invoice date; (c) fees; (d) disbursements; (e) HST; and (f) invoice total. There was a breakdown of the personnel by "Staff Member" which included the following categories: students, associates, paralegals, partners, tax advisors, associate counsel, and "Word Processing". There was also a break-down under the following headings: (a) name of staff member; (b) their title; (c) their total hours; (d) their billing rate which included varying rates depending on the year that the services were rendered; and (e) amount billed attributable to each of them. There is no indication as to what services were rendered by any of those listed.

32 Regarding the "fees and disbursements" of legal counsel for the Receiver, the same comments can be made relating to what was presented. First, the accounts should have been verified by Affidavit. Second, there is nothing which would allow me to conclude that what was incurred for legal services was at the "standard rates and charges" of counsel. Third, because there is no description of the services rendered, it is not possible to ascertain whether this liability for legal fees was "properly...made or incurred". Fourth, the assessment of fees should not be just a matter of calculating the number of hours spent times an hourly rate. There should be some correlation of the cost to the benefits derived by the receivership: *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 (Ont. S.C.J.) at para. 20. Fifth, counsel should keep in mind Rule 14-1(31) of the *Supreme Court Civil Rules* which provides: "A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a Registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made." Sixth, the Court should not automatically approve the "usual" hourly rates for counsel. In this regard, see *Diemer*, *supra*, where Goodman J. made the following statement:

> In my view, the assumption that the court will automatically approve a "usual" hourly rate for Receiver's counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312, the court, with the assistance of opposing counsel [if there is one], has to play the role of what a client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.
>
> (at para. 30)

33 Regarding the fees and disbursements of counsel, I adopt the statement in *Bennett On Receiverships*, *supra*, where the learned author states:

> The court must scrutinize the accounts carefully to assure that the appropriate lawyers are performing services to the receiver on the same basis and factors as the receivers. Where legal accounts have no relevance to the receivership, the court will reduce the fees. Similar factors are considered on the taxation or assessment of the legal accounts, namely:
>
> (1) the time expended;
>
> (2) the complexity of the receivership;
>
> (3) the degree of responsibility assumed by the lawyers;
>
> (4) the amount of money involved, including reference to the debt, amount of proceeds after realization, payments to the creditors;
>
> (5) the degree and skill of the lawyers involved;
>
> (6) the results achieved;
>
> (7) the ability of the client to pay; and
>
> (8) the client's expectations as to the fee.

34 What should have been presented on behalf of legal counsel would be that which would have been presented to the Registrar on the assessment of an account being rendered to a client. As it was not, the Receiver will be in a position to reapply to have the fees and disbursements of the counsel for the Receiver approved.

(c) Should there be a Reference to the Registrar?

35 The question which arises is whether it is appropriate to refer the question of the passing of accounts of the Receiver and the passing of accounts of the counsel for the Receiver to the Registrar or whether it is appropriate to assess costs summarily as is provided in the Appointment Order. In this regard, Rule 14-1(15) of the *Supreme Court Civil Rules* provides that a Court

may award costs "of a proceeding" and "...in ordering those costs the court may fix the amount of costs, including the amount of disbursements". In the context of a trial and an order made for costs, Donald J.A. made these statements on behalf of the Court in *Graham v. Moore Estate*, 2003 BCCA 497 (B.C. C.A.):

> There remains the issue whether the Plaintiffs' costs should have been assessed before the Registrar rather than by the trial judge. It is said that Mr. Campa was denied the procedural protections of a Registrar's hearing, and he did not have an adequate opportunity to challenge items in the solicitor's bill. The Registrar's hearing would have involved more litigation in a losing cause; a problem that underlies all of Mr. Campa's process arguments.
>
> It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington was Royal Inland Hospital* (1995) 131 D.L.R. (4th) 15 [B.C.C.A.]. As in *Harrington*, the trial judge in the present case did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.
>
> Mr. Campa was unable to demonstrate any denial of the opportunity to address the reasonableness of the bill. (at paras. 45-47)

36 In view of the Appointment Order and in view of the desire to provide appropriate expediency to the procedures adopted by the Court, I am satisfied that the present Rule allows a summary determination by the Court rather than a reference to the Registrar on the question of costs. Such a summary determination by the Court is contemplated by the Appointment Order. This view is confirmed in the decision in *Gichuru v. Smith* (2014), 65 B.C.L.R. (5th) 17 (B.C. C.A.) where Harris and Goepel JJ.A. made these statements regarding the principles under which an assessment before a judge should take place:

> The principle governing cost assessments under the Rules is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the Rules and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily. (at para 101)
>
> The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs. (at para. 154)

37 In protracted proceedings dealing with the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 proceedings or a receivership, where a judge has heard each of the applications that have come before the Court, and has received regular reports, the assigned Judge can ascertain whether the accounts should be approved summarily without a reference to the Registrar. That is the most expeditious way of determining that question and is consistent with the Appointment Order. However, this decision should be made by the assigned Judge after the form and the completeness of the materials filed in support of the application can be reviewed so that, if the materials do not meet the criteria set out above, the matter can be referred to the Registrar with directions regarding the materials that must be produced. It would also depend on the question of whether notice has been provided to all, not some, stakeholders and whether a claims bar process has been undertaken and completed.

(d) Destruction of Records

38 The application contained the following request: "The Receiver is authorized to destroy any and all records of the Company in its possession." I am satisfied that this request runs contrary to the requirements set out in Provincial and Federal legislation regarding retention of records including the requirements of the Superintendent of Bankruptcy, of the Canada Revenue Agency, and of Provincial Legislation dealing with corporations. There is also an important reason "any and all records" of Redcorp and Redfern should not be destroyed. If, in the future, a party obtains the consent of the Receiver or the approval of the Court to proceed against the Receiver, the destruction of records means that the discovery process available pursuant to the *Supreme Court Civil Rules* would be meaningless. In the absence of the expiry of a limitation period, a claims bar process or a Court Order, the records of Redcorp and Redfern should be retained in accordance with Provincial and Federal legislation.

Costs

39 Receiver will be at liberty to speak to the question whether the costs of this application should be born by the creditors of Redfern Resources Ltd. and Redcorp Ventures Ltd.

Application dismissed.