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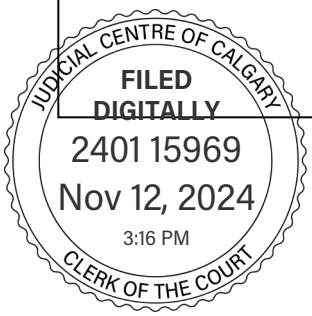

COURT FILE NUMBER	2401-
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, as amended

AND IN THE MATTER OF THE 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., 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 **BRIEF OF THE APPLICANTS: CCAA INITIAL ORDER or RECEIVERSHIP ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: 340252.00001

Application on the Commercial List

Thursday, November 14, 2024, at 2:00 p.m. before the Honourable Justice C. Feasby

CONTENTS

I. INTRODUCTION

1. This Brief is submitted on behalf of the applicants, a group of Canadian investors who invested in the subject real estate projects (the "**Applicant Investors**"), in support of the Originating Application for an initial order ("**Initial Order**") in respect of the "**Debtor Companies**",[1] pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"),[2] and among other things appointing Alvarez & Marsal (Canada) Inc. ("**A&M**") as Monitor with certain enhanced powers (the "**Monitor**"). Alternatively, the Applicant Investors seek to appoint A&M as Receiver (the "**Receiver**") of the property, assets, and undertaking of the Debtor Companies pursuant to the *Judicature Act* (the "***Judicature Act***").[3] The powers of the Receiver outlined in the proposed order include the ability to apply for the Initial Order and act as Monitor in any CCAA proceedings. Capitalized terms not defined herein have the meaning given to them in the Originating Application and the Affidavit of Michael Edwards sworn on November 12, 2024 (the "**Edwards Affidavit**").

2. The Applicant Investors represent a small portion of a much larger group of investors and bondholders in Canada and abroad who invested in the real estate development projects of the Debtor Companies.

3. The Debtor Companies represent just a portion of the A2A Group, an international land banking firm who raises money from Canadian investors (and offshore investors) through the exempt securities market. The A2A Group promised the Canadian investors ownership interests in the real estate projects with projected development timelines of four to seven years and in some cases, projected profits of 10% to 18% per annum over a four year period.

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[1] Angus A2A GP Inc. ("**Angus GP**"), Angus Manor Park A2A GP Inc. ("**Angus Manor GP**"), Angus Manor Park A2A Capital Corp. ("**Angus Manor Capital**"), Angus Manor Park A2A Developments Inc. ("**Angus Manor Developments**"), Hills of Windridge A2A GP Inc. ("**Windridge GP**"), Windridge A2A Developments, LLC ("**Windridge Developments**"), Fossil Creek A2A GP Inc. ("**Fossil Creek GP**"), Fossil Creek A2A Developments, LLC ("**Fossil Creek Developments**"), A2A Developments Inc. ("**Developments**"), Serene Country Homes (Canada) Inc. ("**Serene**"), and A2A Capital Services Canada Inc. ("**A2A CSC**").

[2] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [CCAA] [**TAB 1**].

[3] *Judicature Act*, RSA 2000, c J-2, as amended [*Judicature Act*] [**TAB 2**].

4. For years, management of the Debtor Companies has exhibited a complete lack of governance and controls, failing to maintain corporations key to the investment structure in good standing, never once producing a financial statement or an accounting of funds raised and used, and failing to develop the real estate project lands in the manner promised in the various offering memoranda.

5. These failures have not only jeopardized the investors' financial positions in the real estate projects but have given rise to actionable claims in negligence, or worse. Other interested parties have already made substantiated claims against management in the United States for, among other things, fraud, conspiracy, and misappropriation. As such, the Applicant Investors have lost all faith in the ability of management to operate the Debtor Companies in a manner that protects their interests and the interests of other stakeholders.

6. The Applicant Investors therefore seek the assistance of this Court to implement a single transparent process to allow the investors to organize, to preserve the assets of the Debtor Companies for the benefit of stakeholders, and to restructure or liquidate, as the case may be, under the supervision of the Court and with the assistance of reputable, independent professionals.

7. Given the differences between the subject real estate projects, restructuring plans, liquidation plans, or both may be warranted. The Applicant Investors therefore submit that the CCAA is an effective and appropriate tool to establish a single transparent proceeding so desperately needed to facilitate a restructuring for the benefit of all stakeholders. The test for granting the Initial Order is met in this instance and would be followed by an application pursuant to Chapter 15 of the United States *Bankruptcy Code* in Texas.

8. However, if the Court has any concerns over whether the test under the CCAA is met, the Applicant Investors are seeking in the alternative, the appointment of A&M as Receiver, to ensure the interim and immediate preservation of assets of the Debtor Companies and the Affiliate Entities (as defined below), as a first step towards an ultimate application by the Receiver for the Initial Order under the CCAA. Given all of the surrounding circumstances, the appointment of the Receiver over the Debtors Companies and the

Affiliate Entities is just and convenient, and necessary to preserve the assets for the benefit of the stakeholders.

9. The Initial Order sought includes, but is not limited to, the following relief:

(a) a declaration that the Debtor Companies are comprised of companies to which the CCAA applies;

(b) the appointment of A&M as Monitor of the Debtor Companies with enhanced powers including to manage and direct the Debtor Companies;

(c) the appointment of Fasken Martineau DuMoulin LLP ("**Fasken**") as representative counsel for the Canadian investors (the "**Canadian Representative Counsel**");

(d) the appointment of Norton Rose Fulbright Canada LLP ("**Norton Rose**") as representative counsel for the offshore investors (the "**Foreign Representative Counsel**");

(e) an authorization that the Debtor Companies, with the enhanced oversight and control of the Monitor, may remain in possession and control of their Property and to continue to carry on business in a manner consistent with the preservation of their businesses (the "**Businesses**") and Property;

(f) a declaration that the current directors and officers of the Debtor Companies shall have no further power or authority to direct the Debtor Companies, including but not limited to the power to direct the sale, transfer or other disposition of the Property or Business on behalf of the Debtor Companies;

(g) a stay, for an initial period of 10 days after the Initial Order (the "**Initial Stay Period**"), of all proceedings and remedies taken or that might be taken in respect of the Debtor Companies, the Businesses, the Property, and the Affiliate Entities except as otherwise set forth in the Initial Order or otherwise permitted by law, and upon subsequent application, a further period of time to be determined;

(h) the application and extension of the stay of proceedings to the Affiliate Entities;

(i) authorization for the Monitor to disclaim or resiliate any contract of the Debtor Companies as permitted under the CCAA, and to retain or terminate employees of the Debtor Companies;

(j) authorization for the Debtor Companies to pay all reasonable fees and disbursements of the Monitor and its legal counsel, the Canadian Representative Counsel and the Foreign Representative Counsel;

(k) authorization for the Debtor Companies to enter into the interim financing agreement with Pillar and to borrow from Pillar the initial principal amount of $500,000 with the ability to borrow up to $2,000,000 (the "**Interim Financing**");

(l) the creation of the following charges over the Property of the Debtor Companies in the following relative priorities:

(i) First – a charge in favour of the Monitor and its legal counsel, the Canadian Representative Counsel, and the Foreign Representative Counsel (the "**Administration Charge**") to a maximum amount of $500,000 but up to the amount of $250,000 during the Initial Stay Period; and

(ii) Second –a charge in favour of Pillar in respect of the Interim Financing to a maximum amount of $2,000,000 but up to the amount of $500,000 during the Initial Stay Period (the "**Interim Lender's Charge**");

(m) approval of the notice protocol through which the Applicant Investors will notify the larger A2A group of investors about these proceedings (the "**Notice Protocol**");

(n) authorization for Monitor to act as foreign representative and apply for recognition of the CCAA proceedings in other jurisdictions including in the United States Bankruptcy Court for the Northern District of Texas pursuant to a Temporary Restraining Order in the United States and a subsequent application pursuant to Chapter 15 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532;

(o) an order reviving all of the struck or dissolved Debtor Companies and limited partnerships and authorizing the Monitor to take all such steps necessary to further such revival with the respective corporate registries; and

(p) such further and other relief as may be requested and this Honourable Court deems just.

10. As noted, in addition to the named Debtor Companies, the application seeks to extend the stay of proceedings under the CCAA, if granted, to the "**Affiliate Entities**" who are critical to the investment structure and ownership interests of the Canadian investors. The Affiliates Entities include Angus A2A Limited Partnership ("**Angus LP**"), Angus Manor Park A2A Limited Partnership ("**Angus Manor LP**"), Hills of Windridge A2A LP ("**Windridge LP**"), Hills of Windridge A2A Trust ("**Windridge Trust**"), Fossil Creek A2A Limited Partnership ("**Fossil Creek LP**"), and Fossil Creek A2A Trust ("**Fossil Creek Trust**").

11. At the Comeback Hearing, the Monitor (or the Receiver, as applicable) will further seek to amend the Initial Order to:

(a) extend the stay of proceedings up to and including February 15, 2025;

(b) increase the maximum amount of the Administration Charge to $500,000; and

(c) increase the Interim Financing borrowings and the Interim Lender's Charge in an amount to be presented at the Comeback Hearing.

12. Alternatively, if the Court is not prepared to grant the Initial Order, the Applicant Investors seek a receivership order (the "**Receivership Order**") pursuant to the *Judicature Act* appointing A&M as the Receiver over all of the Debtor Companies, the Affiliate Entities and their respective Property and Businesses. Additionally, the Receivership Order sought as alternative relief:

(a) grants a Receiver's Charge to secure the professional fees of the Receiver and the Receiver's legal counsel, in the amount of $500,000;

(b) grants a Receiver's Borrowings Charge up to a maximum amount of $2,000,000;

(c) authorizes the Receiver to apply in other jurisdictions in Canada and internationally, to recognize the Receivership Order in those jurisdictions; and

(d) authorizes the Receiver to apply for the Initial Order under the CCAA, converting the Receiver's Charge to an Administration Charge and converting the Receivership's Borrowings Charge to an Interim Lender's Charge.

II. BACKGROUND

13. Further factual background supporting the relief sought may be found in the Edwards Affidavit, the Affidavit of Brian Richards, sworn November 12, 2024 (the **"Richards Affidavit**"), the Affidavit of Paul Lauzon, sworn November 12, 2024 (the **"Lauzon Affidavit**"), the Affidavit of Isabelle Brousseau, sworn November 8, 2024 (the **"Brousseau Affidavit**"), and the Affidavit of Pat Wedlund, sworn November 12, 2024 (the **"Wedlund Affidavit**").

A. The Applicant Investors

14. The Applicant Investors are comprised of a group of representative Canadian investors from each of the real estate projects owned by the Debtor Companies. The Applicant Investors hold claims arising due to the negligent operation of the investment structure and development projects by the Debtor Companies. Management of the Debtor Companies has completely disregarded the interests of the Investors by, among other things (together, the "**Management Misconduct**"):

(a) failing to provide updates to the Investors regarding the real estate projects;

(b) failing to respond to numerous requests for information from various investors or the brokers that sold the investment products;

(c) failing to produce any financial statements;

(d) failing to maintain certain of the Debtor Companies in good standing at the corporate registries;

(e) failing to advance the real estate projects in any meaningful way and as advertised when the funds from the Investors were solicited;

(f) failing to properly account for the funds received from the Investors, or at all; and

(g) failing to provide certain investors with the interests they were supposed to receive pursuant to the various offering memoranda and other applicable agreements between the Investors and the Debtor Companies.[4]

15. It is clear the Applicant Investors have serious claims against the Debtor Companies. Several lawsuits have already been commenced in the United States by offshore investors and others alleging, among other things, fraud, conspiracy, mismanagement, and misappropriation. The District Court of Tarrant Country in Texas has issued a judgment finding fraud in one such case.[5]

16. In light of other creditors taking steps to pursue claims against the Debtor Companies, the Applicant Investors have attempted to organize to pursue their claims in a single, fair, and transparent manner to preserve the assets of the Debtor Companies for all their stakeholders.

B. The A2A Group

17. The A2A Group, which includes the Debtor Companies and the Affiliate Entities, is comprised of real estate investment companies which purport to raise money from individual retail investors both in Canada and globally for the stated purpose of investing in real estate developments. The A2A Group states that it uses the investment funds to acquire lands and enhance the value of the lands through "beginning-to-end" land development programs to ultimately produce residential development communities. The A2A Group states to investors that its single goal is to deliver above average returns in realistic timeframes to its investors.[6] For example, the Fossil Creek OM projected returns to Canadian investors of approximately 10% per annum over a four year period. The

[4] Affidavit of Michael Edwards, sworn on November 12, 2024, at para 9 [Edwards Affidavit]

[5] Edwards Affidavit, at para 10.

[6] Edwards Affidavit, at para 12.

Windridge OM projected returns to Canadian investors of approximately 18% per annum over a four year period.

18. The same general ownership and investment scheme is utilized by the A2A Group across multiple projects including the following which specifically involve the Debtor Companies:

    (a) Angus Manor Park ("**Angus Manor**") advertised as a 167-acre residential development project located in Essa, Ontario;

    (b) The Trails of Fossil Creek ("**Fossil Creek**") advertised as a 93-acre residential development with 487 single detached family homes located in Forth Worth, Texas; and

    (c) The Hills of Windridge ("**Windridge**") advertised as a 415-acre residential development in the Dallas/Fort Worth area in Texas.[7]

19. Each of Angus Manor, Fossil Creek, and Windridge appear to be run as separate projects; however, certain corporate entities within the A2A Group are involved in all three projects to provide exempt market support services, administration services, and other management and marketing services.[8]

20. The general investment structure used by the A2A Group is set out in detail at paragraph 16 of the Edwards Affidavit. Broadly, a development corporation (a "**Development Corporation**") is incorporated in the jurisdiction of the relevant project to purchase certain property and a separate Canadian corporation (a "**General Partner**") and Canadian limited partnership (a "**Limited Partnership**") are established for each project.[9] Each Limited Partnership makes an offering by way of an offering memorandum for the sale of units of the partnership (or for certain projects located in the United States, a trust is created to hold units of the Limited Partnership). The proceeds from the offerings are used by the Limited Partnership to purchase undivided fractional interests ("**UFIs**") in the project land from

[7] Edwards Affidavit, at paras 13-14.
[8] Edwards Affidavit, at para 15.
[9] Edwards Affidavit, at para 16.

each Development Corporation and the UFIs are transferred to the Limited Partnership. The A2A Group solicited certain investments from investors abroad and transferred the relevant UFIs directly to each individual offshore investor.[10]

21. A2A CSC was to provide exempt market support services, but has since been dissolved for non-compliance, and Serene was to provide administrative services for the projects.[11]

22. A breakdown of the corporate organizational structures for Angus Manor, Windridge, and Fossil Creek are included at paragraphs 19 to 24, paragraphs 25 to 28, and paragraphs 29 to 32, respectively, of the Edwards Affidavit. Notably, Angus GP, Angus Manor GP, Windridge LP, and Fossil Creek GP have also been struck from or placed on inactive status with their respective Corporate Registries and Angus LP is anticipated to be terminated on December 31, 2024.[12]

C. The Real Estate Projects

i. Angus Manor

23. The A2A Group solicited two rounds of offerings in Angus Manor by way of the Angus A2A Limited Partnership Confidential Offering Memorandum, dated January 6, 2015 (the "**First OM**"), and the Angus Manor Park A2A Capital Corp. Confidential Offering Memorandum, dated March 23, 2016 (the "**Second OM**").[13]

24. Pursuant to the First OM, Angus LP offered units to certain Canadian investors (the "**Partnership Investors**") at a price of $100 per unit with a minimum subscription required per Partnership Investor of 50 units.[14] Angus LP was to use the funds to acquire UFIs in the Angus Manor Lands (as defined in the Edwards Affidavit) from Angus Manor Developments at a stated price of $5,000 per UFI.[15] The First OM was part of a larger

[10] Edwards Affidavit, at para 16.
[11] Edwards Affidavit, at paras 16, 35.
[12] Edwards Affidavit, at paras 19, 20, 22, 25, 30.
[13] Edwards Affidavit, at para 38.
[14] Edwards Affidavit, at para 39.
[15] Edwards Affidavit, at para 40.

offering of UFIs in the Angus Manor Lands to offshore investors for a total of 2,300 UFIs for $20,000,000.[16]

25. Through the Second OM, Angus Manor Capital offered 5% participating bonds to certain Canadian investors (the "**Bond Investors**" and together with the Partnership Investors, the "**Angus Manor Canadian Investors**") at a price of $1.00 per bond. The Second OM contemplated a minimum offering of 100,800 bonds up to a maximum offering of 5,997,600 bonds. The bonds carry a simple fixed interest rate of 5% per annum to be paid on or before September 30, 2021, and have a maturity date of September 30, 2026.[17] These proceeds were to be used to purchase limited partnership units in Angus Manor LP, which was to use the funds to purchase up to 952 UFIs from Angus Manor Developments at the price of $5,355 per UFI.[18] The Second OM provides that all investors in the Angus Manor Lands are to be treated *pari passu* amongst themselves.[19]

26. The Second OM states that Angus LP purchased 210 UFIs at $5,000 per UFI with the funds raised from the First OM, 887 UFIs were sold to offshore investors at $10,000 per UFI, and 246 UFIs were sold to offshore investors at $5,000 per UFI.[20]

27. It does not appear that any Angus Manor Canadian Investors received any money back from the A2A Group pursuant to either the First OM or the Second OM.[21]

28. It is also notable that the Angus Manor Canadian Investors did not receive what they bargained for in their respective offering memoranda.[22] In particular, only 212 UFIs were transferred to Angus LP on behalf of the Partnership Investors when the number of UFIs should have been 424.[23] Only 65 UFIs were transferred to Angus Manor LP on behalf of

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[16] Edwards Affidavit, at para 41.

[17] Edwards Affidavit, at para 45.

[18] Edwards Affidavit, at paras 46, 49.

[19] Edwards Affidavit, Exhibit "24" at section 1.3.

[20] Edwards Affidavit, at para 48.

[21] Edwards Affidavit, at para 54; Affidavit of Isabelle Brousseau, sworn November 8, 2024, at para 6 [Brousseau Affidavit].

[22] Edwards Affidavit, at para 58.

[23] Edwards Affidavit, at para 59.

the Bond Investors when it should have been 121.[24] It appears that the UFIs were sold at $10,000 per UFI, as opposed to the purchase price contained in the First OM of $5,000 and $5,355 in the Second OM, leaving Angus Manor Developments, a Dirk Foo company, with a larger ownership portion in the Angus Manor Lands.[25]

29. Without notifying the Angus Manor Canadian Investors, the A2A Group intends to sell the Angus Manor Lands.[26] The identity of the proposed purchaser is not known, and the Angus Manor Canadian Investors have been given no visibility into the questionably structured sale, nor has their approval as limited partnership unit holders been sought.[27] This is relevant as the limited partnerships hold UFIs in the Angus Manor Lands.

ii. Fossil Creek

30. Pursuant to a confidential offering memorandum, dated May 7, 2014, and amended on November 18, 2014 (the "**FC OM**"), the A2A Group solicited funds for Fossil Creek. The Fossil Creek Trust offered ownership units to certain Canadian investors (the "**FC Investors**") at a price of $100 per unit with a minimum subscription required per FC Investor of 100 units. The FC OM contemplated a minimum offering of 16,500 units and a maximum offering of 27,500 units.[28] Fossil Creek Trust was to use the funds to acquire Fossil Creek LP units at a subscription price of $100 per LP unit, and Fossil Creek LP would subsequently acquire UFIs in the Fossil Creek Lands (as defined in the Lauzon Affidavit) at a price of $7,857.30 per UFI.[29] The funds raised under the FC OM were part of a larger offering of UFIs in Fossil Creek Lands to offshore investors. The A2A Group purported to sell a total of 1,826 UFIs to offshore investors at a price of $10,000 USD per UFI.[30]

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[24] Edwards Affidavit, at para 60.

[25] Edwards Affidavit, at para 61.

[26] Brousseau Affidavit, at para 5; Affidavit of Pat Wedlund, sworn November 12, 2024, at para 7 [Wedlund Affidavit].

[27] Edwards Affidavit, at paras 96-98.

[28] Affidavit of Paul Lauzon, sworn November 12, 2024, at paras 11 [Lauzon Affidavit].

[29] Lauzon Affidavit, at para 12.

[30] Lauzon Affidavit, at para 13.

31. As in the case of Angus Manor, the A2A Group entities involved in Fossil Creek entered into certain material agreements governing their various transactions and relationships (the "**Fossil Creek Material Agreements**") and although they are referenced in the FC OM, they do not appear to have been made available to investors.[31]

iii. Windridge

32. Pursuant to an Amended and Restated Confidential Information Memorandum of Hills of Windridge A2A Trust, dated November 13, 2013 (the "**Windridge OM**"), the A2A Group solicited funding from certain Canadian investors.[32] The Windridge Trust offers ownership units in itself to Canadian investors at a price of $100 per unit with a minimum subscription per investor of 100 units. The minimum offering contemplated under the Windridge OM was 15,000 units and the maximum offering was 105,000 units.[33] Windridge LP was to use the funds raised to purchase UFIs in the Windridge Lands (as defined in the Edwards Affidavit) from Windridge Developments at a price of $10,500 per UFI, less $4,600 to be contributed to a development fund.[34] Like the other projects, the Windridge OM was part of a larger offering of UFIs in the Windridge Lands to offshore investors. The A2A Group reported to sell 2,450 UFIs to offshore investors at a price of $10,000 USD per UFI.[35]

33. Similar to the other projects, the A2A Group entities involved in Windridge entered into certain material agreements governing their transactions and relationships (the "**Windridge Material Agreements**").[36]

34. Investors in Windridge have not received correspondence from Windridge Developments since 2018.[37] As a result of the way title to the Windridge Lands is structured, it is impossible, without further information, to determine how the A2A Group recorded

[31] Lauzon Affidavit, at para 16.
[32] Edwards Affidavit, at para 69.
[33] Edwards Affidavit, at para 70.
[34] Edwards Affidavit, at para 71.
[35] Edwards Affidavit, at para 72.
[36] Edwards Affidavit, at para 75.
[37] Edwards Affidavit, at para 85.

fractional ownership. These issues are only further compounded by the lack of transparency into the A2A Group's dealings.[38]

D. A2A Litigation

35. Several legal proceedings have been commenced against the A2A Group and its management, including, among others:

(a) a lawsuit filed by Global Forest, LLC and Forest Funding, LLC on April 1, 2019, against, among others, Windridge Developments alleging breach of contract, fraud, misappropriation of funds and fraudulent transfer, conspiracy, breach of fiduciary duty, and statutory violations in the District Court of Tarrant County. A final judgment against Windridge Developments and Jospeh Attrux, a director and officer of several of the Debtor Companies and Affiliate Entities, issued August 24, 2020 (the "**Fraud Judgment**"), has been registered against title to the Windridge Lands in the amount of $3,844,256.50 USD, plus interest and fees. The final judgment against Mr. Attrux is specifically for fraud, misappropriation of funds, fraudulent transfer, and conspiracy;[39]

(b) a complaint has been filed by a group of offshore investors also in the District of Tarrant Country in 2018 against Mr. Foo, in his capacity as the trustee of the Hills of Windridge Trust and Fossil Creek Trust, Windridge Developments, and Fossil Creek Developments. The complaint is for, among other things, fraudulent conveyance, breach of trust, mismanagement, and fraud;[40] and

(c) a complaint filed by a group of investors in the District Court for the Northern District of Texas against Mr. Foo, in his capacity as the trustee of the Hills of Windridge Trust, for, among other things, a failure to communicate, a failure to distribute net income to beneficiaries, and a failure to properly manage the trust

[38] Edwards Affidavit, at para 81.

[39] Edwards Affidavit, at para 88-90.

[40] Edwards Affidavit, at para 91.

assets resulting in financial losses. The complainants had to file a motion for substitutional service due to stated difficulties serving Mr. Foo personally.[41]

E. The Debtor Companies are Insolvent

36. While the Applicant Investors do not have full insight into the financial state of the Debtor Companies, the Applicant Investors are aware of the following debts owing by the Debtor Companies, or certain of them as the case may be:

(a) the Bond Investors appear to be owed at least $1,300,000, plus interest, pursuant to the bonds acquired under the Second OM based on the information listed on title to the Angus Manor Lands, and specifically the amounts the A2A Group purports were paid by Angus Manor Capital (the vehicle for Bond Investors to own UFIs) for the UFIs;[42]

(b) the Fraud Judgment registered on title to the Windridge Lands against Windridge Development is for the amount of $3,844,256.50 USD, which is $5,347,937.01 CAD based on the conversion rate in effect as at November 9, 2024, of 1.39%;[43]

(c) there are property taxes owing on the Angus Manor Lands of at least $12,977.22; and

(d) the contingent claims of the Applicant Investors would be equivalent to at least the amount of funds raised from the Applicant Investors against each of the Debtor Companies.[44]

37. Thus, the Debtor Companies have not been meeting their obligations as they generally become due and are insolvent.

III. ISSUES

38. The issues to be considered on this Originating Application are:

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[41] Edwards Affidavit, at para 92.

[42] Edwards Affidavit, at para 45.

[43] Edwards Affidavit, at para 88.

[44] Edwards Affidavit, at para 103.

(a) *Should this Honourable Court revive certain of the dissolved Debtor Companies?*

(b) *Does the CCAA apply to the Debtor Companies?*

(c) *Is Alberta the appropriate filing jurisdiction for these CCAA proceedings?*

(d) *Do the Applicant Investors have standing to commence creditor-driven CCAA proceedings?*

(e) *Is the requested stay of proceedings necessary and appropriate in the given circumstances?*

(f) *Should the proposed Monitor be appointed with certain enhanced powers?*

(g) *Should the Canadian Representative Counsel and the Foreign Representative Counsel be appointed?*

(h) *Is the Administration Charge appropriate and reasonably necessary?*

(i) *Is the Interim Lender's Charge appropriate and reasonably necessary?*

(j) *Should the Notice Protocol be approved?*

39. Alternatively, if the Initial Order is not granted, the issues to be considered on this Originating Application are:

(a) *Should this Honourable Court exercise its jurisdiction to appoint a Receiver over the Debtor Companies and their Property?*

(b) *Are the Receiver's Charge and the Receiver's Borrowing Charge appropriate and reasonably necessary?*

(c) *Should the receivership be converted to proceedings under the CCAA?*

IV. LAW & ARGUMENT

A. This Court Should Revive the Struck Companies

40. The Applicant Investors respectfully request that this Court grant an Order instructing the relevant registrar of the corporate registries to revive the corporate bodies of Angus GP (in Alberta), Angus Manor GP (in Alberta), Fossil Creek GP (in Alberta), and A2A CSC (federally),[45] for the limited purpose of facilitating these proceedings. Additionally, the Applicant Investors are asking this Court to vest with the Monitor the power to take all such additional steps that are necessary to revive or otherwise bring the aforesaid corporate bodies back in good standing with the applicable corporate registries.

41. Pursuant to section 210 of the *Business Corporations Act*[46], an "interested person", upon notice to the Alberta Corporate Registrar, may apply to this Court within 10-years of a corporation's dissolution for an order reviving the body corporate. The Applicant Investors are considered "interested persons" for the purposes of the *ABCA* as they are creditors and persons who have a contractual relationship with the dissolved corporations.[47]

42. The Applicant Investors submit that this Court can make a similar Order under the *Canada Business Corporations Act*,[48] in respect of A2A CSC. While the CBCA provides that an "interested person" may apply to the Director of the federal Corporate Registrar to revive a dissolved corporation,[49] the urgent nature of the present case warrants that this Court to exercise its discretion to direct the revival of A2A CSC.

43. For the same reasons the Applicant Investors are "interested persons" under the *ABCA*, they are considered interested persons under the *CBCA* to seek to revive a dissolved corporation.[50] Notice has been given to the Director of the federal Corporate Registrar and this Court has jurisdiction to hear matters concerning the *CBCA*.[51]

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[45] Edwards Affidavit, at paras 20, 22, 30, 35, Exhibits "3", "5", "13", "18".

[46] *Business Corporations Act*, RSA 2000, c B-9, as amended at s 210 [*ABCA*] [**TAB 3**]

[47] *ABCA*, *supra* at s 206.1(a)-(b) [**TAB 3**].

[48] *Canada Business Corporations Act*, RSC 1985, c C-44, as amended [*CBCA*] [**TAB 4**].

[49] *CBCA*, *supra* at s 209 [**TAB 4**].

[50] *CBCA*, *supra* at s 209(6) [**TAB 4**].

[51] *CBCA*, *supra* at s 2(1), "court" [**TAB 4**].

B. This Court Should Exercise its Discretion to Grant the CCAA Initial Order

i. CCAA General Principles

44. The CCAA is remedial legislation, and Canadian courts have held it should be given a broad and liberal interpretation. It provides the Court with the flexibility to make any order that it considers appropriate in the given circumstances, so long as the requested relief is not expressly prohibited by the Act.[52]

45. The purpose of the CCAA is to enable the compromise or restructuring of corporation's debts to avoid the devastating social and economic effects of insolvency, by preserving the business in a manner that is intended to cause the least amount of harm to the company, its stakeholders, and to the communities in which it carries on business.[53]

46. Parallel restructuring regimes are accepted features of the insolvency law landscape, and to the extent possible insolvency laws should then be given a harmonious interpretation with an emphasis on reorganization over liquidation.[54]

C. The CCAA Applies to the Debtor Companies

47. The CCAA applies to a *debtor company* with outstanding claims against it of at least $5,000,000.[55]

48. *Company* is defined in the CCAA to include any company, corporation, or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company, wherever incorporated, having assets and doing business in Canada, and any income trust.[56]

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[52] CCAA, *supra* at s 11 [**TAB 1**]; *Canada v Canada North Group Inc*, 2021 SCC 30 at paras 21, 31 [*Canada North*] [**TAB 5**]; *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at paras 48-49 [*Callidus*] [**TAB 6**]; *Century Services Ltd v Canada (Attorney General)*, 2010 SCC 60 at paras 58, 61 [*Century Services*] [**TAB 7**]; *Re Stelco (2004)*, 48 CBR (4th) 299 at paras 11, 13, 15 (ON SC [Commercial List]) [*Stelco*] [**TAB 8**]; *Re Lehndorff General Partner Ltd (1993)*, 17 CBR (3d) 24 at para 5 (ON SC [Commercial List]) [*Lehndorff*] [**TAB 9**].

[53] *Callidus*, *supra* at paras 40-42 [**TAB 6**]; *Stelco*, *supra* at para 20 [**TAB 8**]; *Lehndorff*, *supra* at para 6 [**TAB 9**].

[54] *Century Services*, *supra* at para 24 [**TAB 7**].

[55] CCAA, *supra* at s 3(1) [**TAB 1**].

[56] CCAA, *supra* at s 2(1), "company" [**TAB 1**].

49. *Debtor company* is further defined by the CCAA as including any company that is bankrupt or insolvent.[57] The terms "insolvent" or "insolvency" are not defined under the CCAA; however, reference is commonly made to the definition of *insolvent person* included under the *Bankruptcy and Insolvency Act* (the "**BIA**"):[58]

> "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 became 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.

50. The test for an "insolvent person" under the BIA is disjunctive, and, as such, a company that satisfied any one of the above noted criteria is considered insolvent for the purposes of the CCAA.[59]

51. The $5,000,000 threshold prescribed in the CCAA is determined based on the cumulative amount of the claims against the debtor companies as a group rather than requiring each individual entity to meet the threshold. Section 3(1) of the CCAA states that the *total claims* against the debtor company or affiliated debtor companies must be in excess of $5,000,000 for the CCAA to apply.[60] The Supreme Court of Canada in *Callidus* reaffirmed that it is a cumulative threshold stating that "access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million".[61]

52. The Debtor Companies are each a "company" to which the CCAA applies. The Debtor Companies are each corporations incorporated pursuant to the laws of Alberta, Ontario, or

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[57] CCAA, *supra* at s 2(1), "debtor company" [**TAB 1**].

[58] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended at s 2(1), "insolvent person" [BIA] [**TAB 10**]; *Stelco, supra* at paras 21-22 [**TAB 8**].

[59] *Stelco*, *supra* at para 28 [**TAB 8**]; *Re Original Traders Energy Ltd*, 2023 ONSC 753 at para 39 [**TAB 11**].

[60] CCAA, *supra* at s 3(1) [**TAB 1**].

[61] *Callidus*, *supra* at para 38 [**TAB 6**].

Texas, as the case may be.[62] A further breakdown of the corporate details of each of the Debtor Companies is provided at paragraphs 19 to 35 of the Edwards Affidavit.

53. The Debtor Companies are collectively a "debtor company" to which the CCAA applies as they are insolvent and collectively, have claims against them in excess of $5,000,000:

(a) the proposed purchase price for the Angus Manor Lands is $14,000,000 payable over four years, whereas the Second OM suggested that the total amounts raised through both Angus Manor offerings was $17,000,000;

(b) the Bond Investors hold debt instruments and appear to be owed in excess of $1,300,000 plus interest;

(c) the Fraud Judgment remains on title four years after its issuance;

(d) certain property taxes remain unpaid;

(e) it does not appear that any investors or debt holders have received distributions outside of a few small distributions several years ago;[63]

(f) the A2A Group has reported that the development fund for Angus Manor has been depleted; and

(g) there are multiple claims in the United States outlining serious allegations.[64]

54. The Debtor Companies are therefore not meeting their liabilities generally as they come due and are "insolvent persons" pursuant to the BIA, and thus "insolvent" for the purposes of the CCAA.[65]

55. The total claims against the Debtor Companies exceed the $5,000,000 threshold set by the CCAA. The Fraud Judgment alone is in excess of $5,000,000 when converted to Canadian

[62] Edwards Affidavit, at paras 20, 22-24, 26-27, 30-31, 33-35, Exhibits "3", "5"-"7", "9"-"10", "13"-"14", "16"-"18".

[63] Edwards Affidavit, at para 101(c); Brousseau Affidavit, at para 6; Affidavit of Brian Richards, sworn November 12, 2024, at para 7 [Richards Affidavit].

[64] Edwards Affidavit, at para 101(e).

[65] Edwards Affidavit, at para 102.

dollars. While the Applicant Investors' contingent claims still need to be quantified, it is expected they will exceed their initial investment amounts.[66]

D. Alberta is the Appropriate Filing Jurisdiction

56. Notwithstanding that the Debtor Companies have ties to multiple jurisdictions in Canada and the United States and the Applicant Investors reside across Canada, this Court has jurisdiction to commence these CCAA proceedings as:

(a) the majority of the Debtor Companies and Affiliate Entities, being Angus LP, Angus GP, Angus Manor LP, Angus Manor GP, Angus Manor Capital, Fossil Creek LP, Fossil Creek GP, and Fossil Creek Trust, are formed pursuant to the laws of the Province of Alberta;

(b) aside from the entities that form Windridge, the entities in which the Applicant Investors hold an interest are all Alberta entities;

(c) with only one exception (Mr. Attrux), all of the directors and officers of the Debtor Companies have addresses in the City of Calgary, in the Province of Alberta; and

(d) the offering memoranda for Angus Manor, Fossil Creek, and Windridge repeatedly reference addresses for service in the City of Calgary, in the Province of Alberta.[67]

57. The Applicant Investors respectfully submit that the Province of Alberta is the appropriate filing jurisdiction for these CCAA proceedings.

E. The Investors Have Standing to Commence Creditor-Driven CCAA Proceedings

i. Creditor Driven CCAA Proceedings

58. Sections 4 and 5 of the CCAA grant a creditor the ability to bring an initial application under the CCAA in respect of certain debtor companies, as opposed to the debtors themselves.[68]

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[66] Edwards Affidavit, at para 103.

[67] Edwards Affidavit, at paras 106-107.

[68] CCAA, *supra* ss 4-5 [**TAB 1**].

59. Canadian courts have repeatedly recognized the ability of creditors to bring an application for an initial order pursuant to section 4 or 5 of the CCAA, including in *ATB Financial et al v Apollo Trust et al* where Campbell J recognized that a group of creditors, who were also investors in Asset Backed Commercial Papers issued by the debtor companies, had standing under sections 4 and 5 to seek an initial order.[69]

60. In *Great Basin Gold Ltd (Re)*, Justice Fitzpatrick noted that, while rare, commencement of CCAA proceedings by creditors of an insolvent company is "not unheard of".[70] In *Miniso International Hong Kong Limited Migu Investments Inc*, Fitzpatrick J again expressly recognized that the CCAA grants standing to creditors to commence creditor-driven CCAA proceedings.[71]

61. Creditor-driven CCAA proceedings are appropriate where management of the debtor company is either neglecting or failing to abide by its fiduciary duties or where management is not in a position to exercise its duties in an objective manner. Creditors must demonstrate that the active or passive conduct of management is detrimental to not only the creditors' interests but also those of other stakeholders.[72] Specifically, the Courts have allowed the commencement of creditor-driven CCAA proceedings while also granting enhanced powers to the monitor where i) the management body of the debtor company has resigned, ii) management is unfit to conduct CCAA proceedings, iii) management has no plan or their plan is doomed to fail, or iv) management is conflicted.[73]

ii. Canadian Investors Have Standing As Creditors

62. In the current proceedings, Bond Investors are creditors having subscribed for debt instruments pursuant to the bond offering under the Second OM.[74]

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[69] *ATB Financial et al v Apollo Trust et al*, 2008 CanLII 21724 (ON SC) at paras 7-8, 34 [**TAB 12**].

[70] *Great Basin Gold Ltd (Re)*, 2012 BCSC 1459 at para 97 [**TAB 13**].

[71] *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234 at paras 1, 45 [**TAB 14**].

[72] Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" (2019) 14 Ann Rev Insolv 1 at 2 [Morin] [**TAB 15**].

[73] Morin, *supra* at 6 [**TAB 15**].

[74] Edwards Affidavit, at para 45.

63. Further, the Partnership Investors are, collectively, contingent creditors of the Debtor Companies as they have claims in negligence and breach of contract at a minimum against the Debtor Companies.[75]

64. A creditor has a "claim" under the CCAA if they hold any indebtedness, liability, or obligations that would be considered a claim provable for the purposes of the BIA.[76] Contingent or unliquidated claims may be claims provable under the BIA.[77] As stated by the Supreme Court of Canada in *Newfoundland and Labrador v AbitibiBowater Inc*, "a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred" unlike in common law or civil proceedings.[78] The definition of claim used in the BIA, and adopted by the CCAA, is broad enough to include contingent and future claims. The Court in CCAA proceedings also possesses the power to assess the amount of an unliquidated claim as they would be able to do in common law or civil law proceedings.[79]

65. The CCAA seeks to include a broad range of claims to "ensure fairness between creditors and finality in the insolvency proceedings of the debtor".[80] In both a liquidation and a restructuring, it is equitable to permit as many creditors as possible to participate and share in the liquidation proceeds or the restructuring plan, and to avoid cases where a creditor with an immature claim at the time of the proceedings can no longer move against an inactive debtor after the conclusion. A broad approach is preferable to increase fairness and in the case of a restructuring, to give the debtor a chance at a fresh start following the end of the proceedings.[81]

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[75] Edwards Affidavit, at paras 9-10.

[76] CCAA, *supra* at s 2(1), "claim" [**TAB 1**].

[77] BIA, *supra* at ss 121(2), 135(1.1) [**TAB 10**].

[78] *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 at para 34 [*AbitibiBowater*] [**TAB 16**].

[79] *AbitibiBowater*, *supra* at para 34 [**TAB 16**].

[80] *AbitibiBowater*, *supra* at para 35 [**TAB 16**].

[81] *AbitibiBowater*, *supra* at para 35 [**TAB 16**].

66. When evaluating a contingent claim for inclusion in insolvency proceedings, courts will specifically consider whether the event that has not yet occurred is "too remote or speculative".[82]

67. The Applicant Investors have contingent claims that constitute provable claims for the purposes of the CCAA. Their claims are neither too remote nor speculative given the underlying facts which would give rise to several causes of action, including, but in no way limited to, breach of contract, negligent misrepresentation, oppression, or more serious claims.[83] Several of the Debtor Companies have already been dissolved due to mismanagement[84] and other investors in similar positions to the Applicant Investors have already filed claims against members of the A2A Group and, in one known case, received judgment.[85] The Debtor Companies appear unable to satisfy any judgments – and have yet to do so in respect of the Fraud Judgment issued approximately four years ago – which limits the recourse available to the Applicant Investors under the common law. It is in the interests of fairness and equity to recognize the contingent claims of the Applicant Investors against the Debtor Companies for the purposes of preserving and monetizing assets and efficiently advancing one single proceeding in which all claims can be assessed and addressed.

68. Creditor-driven CCAA proceedings are appropriate in the circumstances as management has abdicated its duties to the Applicant Investors, as evidenced by the Management Misconduct.[86]

69. As a result, management is unfit to remain in control of any assets and operations and drive a CCAA proceeding, or any other proceeding in which the interests of the stakeholders are advanced.

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[82] *AbitibiBowater*, *supra* at para 36 [**TAB 16**].

[83] Edwards Affidavit, at paras 9-10.

[84] Edwards Affidavit, at para 9(c).

[85] Edwards Affidavit, at para 10.

[86] Edwards Affidavit, at para 9; Brousseau Affidavit, at paras 5-6; Richards Affidavit, at paras 6-7; Wedlund Affidavit, at para 6.

70. For the aforementioned reasons, the Applicant Investors respectfully ask this Honourable Court to recognize their standing to seek an Initial Order under the CCAA. While the Applicant Investors acknowledge that the use of creditor-driven CCAA proceedings may not be common practice, there are circumstances which make it appropriate. Indeed, the present circumstances necessitate such relief as management of the Debtor Companies is both unwilling and unable to take steps to protect the interests of not only the Investors but those of the Debtor Companies' other stakeholders.

F. The Stay of Proceedings is Necessary to Stabilize the Debtor Companies' Businesses

71. An automatic stay is necessary in the given circumstances to create a level playing field and ensure that stakeholders' interests are addressed according to their respective entitlements. A stay of proceedings is required over the Affiliate Entities, as they are integrally related to the Debtor Companies' Businesses and the exercise of the Applicant Investors' interests.[87]

72. Pursuant to section 11 of the CCAA, this Court has the broad discretion to make any order that is considers appropriate in the circumstances, subject only to the restrictions contained in the CCAA.[88]

73. Section 11.02(1) of the CCAA empowers the Court, upon hearing an initial application, to grant a stay of proceedings with respect to a debtor company, restraining all proceedings, actions, and suits against the company for a period of not more than 10 days.[89] The relief granted on an initial application is limited to the relief that is reasonably necessary for the continued operations of the debtor company during the initial stay period.[90] The stay of proceedings can be extended, where appropriate, on subsequent applications.[91]

74. The stay of proceedings may be extended to include limited partnerships and trusts who are affiliates of the debtor company even though the limited partnerships and trusts

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[87] Edwards Affidavit, at para 108.

[88] CCAA, *supra* at s 11 [**TAB 1**].

[89] CCAA, *supra* at s 11.02(1) [**TAB 1**].

[90] CCAA, *supra* at s 11.001 [**TAB 1**]; *Re Lydian International Limited*, 2019 ONSC 7473 at paras 23-26 [*Lydian*] [**TAB 17**].

[91] CCAA, *supra* at s 11.02(2) [**TAB 1**].

themselves are not considered a "debtor company" under the CCAA or party to the proceedings.[92] This Court has previously extended the stay of proceedings to limited partnerships, who were not named applicants, under the initial orders granted in the relevant CCAA proceedings, including in the recent case of Razor Energy Corp.[93]

75. In the present circumstances, the application of the stay of proceedings to the Affiliate Entities is necessary as they are critical to the investment structure used by the Debtor Companies and to the interests held by the Applicant Investors.[94] Including these entities would further the purposes of the CCAA and enhance the prospect of any restructuring that may be advanced for the benefit of the investors.

76. The purpose of the stay of proceedings is to maintain the status quo for a period of time to allow the debtor company to concentrate its efforts on developing a viable plan of arrangement, compromise, or other restructuring alternative.[95] Extending the stay of proceedings prevents a debtor company from having to devote significant time and resources to potentially defending actions against related parties, at a time when resources need to be directed towards pursuing a successful restructuring.[96]

77. When considering whether to grant a stay of proceedings, the applicant must demonstrate to the Court that the order being sought is appropriate in the circumstances, and, in the context of an application for an extension of the stay, that the applicant has been acting in good faith and with due diligence.[97] The appropriateness of the order, good faith, and due diligence are considerations that underpin any exercise of the Court's discretionary authority under the CCAA.[98]

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[92] CCAA, *supra* at s 2(1), "company" [**TAB 1**].

[93] Order of the Honourable Justice KM Horner, granted April 28, 2017, *In the Matter of the Compromise or Arrangement of Walton International Group Inc*, Court of Queen's Bench of Alberta Court File No 1701-05845, at para 13 [**TAB 18**]; Order of the Honourable Justice NJ Whitling, granted February 28, 2024, *In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp*, Court of King's Bench of Alberta Court File No 2401-02680, at para 14 [**TAB 19**].

[94] Edwards Affidavit, at para 84.

[95] *Canada North*, *supra* at para 19 [**TAB 5**]; *Re Canadian Airlines Corp*, (2000) 19 CBR (4th) 1 (ABQB) at paras 17-18 [**TAB 20**].

[96] *Re Nortel Network Corp (2009)*, 57 CBR (5th) 232 (ON SC [Commercial List]) at paras 27, 36 [**TAB 21**].

[97] CCAA, *supra* at s 11.02(3) [**TAB 1**].

[98] *Callidus*, *supra* at para 49 [**TAB 6**].

78. Appropriateness is assessed by examining whether the order being sought advances the policy objectives that underly the CCAA. The remedial objectives of the CCAA are designed to mitigate the potentially catastrophic impacts insolvency can have, which objectives include: i) the timely, efficient, and impartial resolution of a debtor's insolvency, ii) preserving and maximizing value of the debtor's assets for the benefit of its stakeholders, iii) ensuring the fair and equitable treatment of claims against the debtor, and iv) the preservation of jobs and communities affected by the company's financial distress.[99]

79. The applicant is not required to present a plan or compromise at the initial application under the CCAA. The Court may grant relief under the CCAA where a debtor company or its representatives realistically plan to continue to operate or otherwise deal with its assets but requires the protection of the Court to do so and it is otherwise too early to determine whether the company will succeed.[100] The threshold for a stay of proceedings is low and the applicant only has to satisfy the Court that a stay would "usefully further" its efforts to reorganize and the objectives of the CCAA.[101]

80. The possibility that one or more stakeholders may be prejudiced as a result of a stay should not affect the Court's exercise of its authority. Any potential prejudice to stakeholders must be balanced against, and offset by, the benefits to all stakeholders impacted by the debtor company's reorganization. The Court's primary concern under the CCAA is the interests of the debtor company and, importantly, all of its stakeholders.[102]

81. In the present case, the requested stay of proceedings is sought with respect to the Debtor Companies and the Affiliate Entities for an initial period of 10 days.[103] At the Comeback Hearing, the Monitor (if appointed) intends to apply for a further extension of the stay up to and including February 15, 2025.[104]

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[99] *Callidus*, *supra* at paras 40, 42, 50 [**TAB 6**].

[100] *Lehndorff*, *supra* at paras 5-6 [**TAB 9**].

[101] *Century Services*, *supra* at para 70 [**TAB 7]**].

[102] *Canada North*, *supra* at para 31 [**TAB 5**]; *Century Services*, *supra* at para 60 [**TAB 7**]; *Lehndorff*, *supra* at paras 5-6 [**TAB 9**].

[103] Edwards Affidavit, at para 108.

[104] Edwards Affidavit, at para 8.

82. The requested stay of proceedings, which substantially conforms with the stay provisions of the Alberta Template CCAA Initial Order, is sought to:

(a) provide the parties with breathing room to identify and assess potential restructuring options;

(b) provide the parties with time to stabilize the Businesses and review the current state of the Property; and

(c) facilitate the single proceeding model by encouraging other claimants to participate in the within proceedings.

83. Allowing the parties to focus their energy and resources on a successful restructuring and liquidation will ensure that value is maximized for the benefit of all the Debtor Companies' stakeholders, including the Applicant Investors.

84. The Applicant Investors have been acting in good faith and seek an Initial Order in an effort to maximize recovery for all stakeholders. The Applicant Investors respectfully submit that it is therefore appropriate to grant the requested stay of proceedings and are fully supportive of such relief.

G. The Proposed Monitor Should be Appointed

85. Pursuant to section 11.7 of the CCAA, the Court is required to appoint a person to monitor the business and financial affairs of a debtor company upon granting an initial order. The monitor must be a trustee within the meaning of section 2(1) of the BIA and not fall within the category of any of the restrictions on who may be a monitor set forth in section 11.7(2) of the CCAA.[105]

86. The proposed Monitor in these proceedings is A&M, which is a trustee within the meaning of section 2(1) of the BIA and not subject to any of the restrictions pursuant to section 11.7(2) of the CCAA. A&M has executed a Consent to Act in the proposed CCAA

[105] BIA, *supra* at s 2(1), "trustee" or "licensed trustee" [**TAB 10**]; CCAA, *supra* at s 11.7 [**TAB 1**].

proceedings.[106] A&M has experience with complex real estate and cross border insolvency proceedings, and has spent some time with certain of the Applicant Investors and Azimuth Risk Management Ltd. gathering information and ascertaining details about the real estate projects.[107]

i. The Proposed Enhanced Powers of the Monitor Should be Granted

87. This Honourable Court has the authority to expand or enhance the powers of a monitor beyond those provided under section 23 of the CCAA and the Alberta Template CCAA Initial Order.[108] Courts have routinely granted enhanced powers where appropriate.[109]

88. The powers of a monitor may be expanded to allow it to function as a "super monitor" under the CCAA.[110] The Court should grant expanded powers where such relief furthers the remedial objectives of the CCAA, including the maximization of creditor recovery.[111] In *Bloom Lake*, the Superior Court of Quebec stated that the Courts may grant these powers as necessary and appropriate to enable the monitor to fulfill its duties and further the purposes of the CCAA.[112]

89. Courts have limited the extension of monitors' powers to exceptional circumstances, including where i) management has resigned leaving no directors or officers in place,[113] ii) management is unfit to conduct the restructuring process in a manner that would be in the best interests of stakeholders, iii) any potential restructuring path available would be doomed to fail otherwise, or iv) management is conflicted.[114]

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[106] Edwards Affidavit, at para 110, Exhibit "42".

[107] Edwards Affidavit, at para 110.

[108] CCAA, *supra* at ss 11, 23(1)(k) [**TAB 1**].

[109] *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946 at para 111 [*Bloom Lake*] [**TAB 22**]; *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014 at paras 107-108 [**TAB 23**]; *Arrangement relatif à Groupe Sélection inc*, 2022 QCCS 4284 at paras 45-46 [**TAB 24**].

[110] *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)*, 2020 QCCA 659 at para 68 [*Aquadis*] [**TAB 25**].

[111] *Aquadis*, *supra* at para 62 [**TAB 25**]; *Harte Gold Corp (Re)*, 2022 ONSC 653 at paras 91-93 [**TAB 26**].

[112] *Bloom Lake*, *supra* at para 73 [**TAB 22**].

[113] See also *Aquadis*, *supra* at para 19 [**TAB 25**].

[114] Morin, *supra* at 19 [**TAB 15**].

90. Expanded powers are appropriate in both the context of a restructuring plan and liquidating CCAA proceedings.[115]

91. The Applicant Investors submit that in order to conduct an effective, transparent and efficient CCAA proceeding, the Monitor requires enhanced powers including, among other things, to manage and direct the Debtor Companies due to the total abdication of duty by the current management. This would include overseeing the properties, communicating with investors, producing financial information where possible, taking steps to revive certain of the struck Debtor Companies and Affiliate Entities and ultimately formulating a plan for the benefit of stakeholders. Due to the Management Misconduct, the Applicant Investors have lost all faith in the ability of the Debtor Companies' management to carry out its fiduciary duties and act in a manner that preserves and protects the rights of the Applicant Investors and other stakeholders.[116]

92. The Applicant Investors therefore submit that it is appropriate that the proposed Monitor be appointed with the proposed enhanced powers.

H. It is Appropriate to Appoint the Canadian Representative Counsel and the Foreign Representative Counsel in the Circumstances

93. This Court has the necessary authority to appoint the Canadian Representative Counsel and the Foreign Representative Counsel pursuant to section 11 of the CCAA.[117] Justice Morawetz describes this discretion as "wide" as it not only allows the Court to appoint a representative but to order legal and other professional expenses of such representatives to be paid from the debtor company's estate.[118]

94. The two primary rationales for the appointment of representative counsel in CCAA proceedings are i) to provide effective communication with stakeholders and to ensure that their interests are brought to the attention of the Court and other participants, and ii) to bring increased efficiency and cost effectiveness to the proceedings as a whole by, among

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[115] *Bloom Lake*, *supra* at paras 92-93 [**TAB 22**].

[116] Edwards Affidavit, at para 9; Brousseau Affidavit, at para 7.

[117] CCAA, supra at s 11 [**TAB 1**]; *Urbancorp Inc (Re)*, 2016 ONSC 5426 at para 10 [*Urbancorp*] [**TAB 27**].

[118] *Nortel Network Corp, Re*, 2009 CarswellOnt 3028, [2009] OJ No 2166 at para 12 [**TAB 28**].

other things, streamlining notifications and eliminating the need for counsel to be retained for each individual stakeholder.[119]

95. In the CCAA proceedings of Canwest Publishing Inc., the Ontario Superior Court outlined the following factors to be considered by the Courts when determining whether to appoint representative counsel for a certain group of stakeholders:

(a) the vulnerability and resources of the group sought to be represented;

(b) any benefit to the companies under the CCAA protection;

(c) any social benefit to be derived from the representation of the group;

(d) the facilitation of the administration of the proceedings and efficiency;

(e) the avoidance of a multiplicity of legal retainers;

(f) the balance of convenience and whether it is fair and just including to the creditors of the estate;

(g) whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

(h) the position of other stakeholders and the monitor.[120]

96. As stated by Newbould J, the issue of whether to appoint representative counsel is one of equity and, therefore, the above listed factors can be informative but "there can be no hard and fast rules governing any particular case".[121]

97. In *Canwest Publishing*, the fact that the monitor in such proceedings had extensive responsibilities pursuant to the initial order granted favoured the appointment of

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[119] *Quadriga Fintech Solutions Corp (Re)*, 2019 NSSC 65 at para 9 [**TAB 29**].

[120] *Canwest Publishing Inc*, 2010 ONSC 1328 at para 21 [*Canwest Publishing*] [**TAB 30**]; See also *Urbancorp*, *supra* at para 11 [**TAB 27**].

[121] *Urbancorp*, *supra* at para 12 [**TAB 27**].

representative counsel for a group of unsecured creditors as it was "unrealistic" to expect the monitor to be fully responsive to their needs in an efficient and timely manner.[122]

98. The appointment of Fasken as the Canadian Representative Counsel for the Canadian investors and Norton Rose as the Foreign Representative Counsel for offshore investors is appropriate as:

(a) the investors reside across Canada and abroad, primarily across Asia.[123] The appointment of the Canadian Representative Counsel and Foreign Representative Counsel will provide each group with a primary point of contact and information source;

(b) given the number of investors in the A2A Group, requiring each individual investor to retain legal counsel would be repetitive and inefficient given the similarity in interests between investors;

(c) it is unclear if all individual investors would have the resources required to participate in these proceedings on their own;

(d) Fasken has already been retained on behalf of the Applicant Investors and this representation could be extended to other Canadian investors;

(e) the interests of the Canadian investors may be different than the offshore investors given that they hold different interests. In particular, the offshore investors appear to hold actual UFIs whereas the Canadian investors hold units in various entities that own the UFIs, and there appears to be a discrepancy between the number of Angus Manor UFIs contracted for and what appears to have been issued;

(f) communications between the Debtor Companies, the Monitor, and other stakeholders would be streamlined through the Representative Counsel; and

[122] *Canwest Publishing, supra* at para 24 [**TAB 30**].
[123] Edwards Affidavit, at para 105.

(g) as in the case of *Canwest Publishing*, the Monitor is proposed to have certain enhanced powers, and if granted, would not be best positioned to efficiently communicate with all of the investors in the A2A Group in a timely fashion. The appointment of the Canadian Representative Counsel and the Foreign Representative Counsel would alleviate these pressures on the Monitor. Further, given the potential for diverging interests between the Canadian investors and the offshore investors, each group will require independent counsel to advise on the proceedings and any communication issued by the Monitor or its representatives, and develop a strategy in relation thereto.

I. The Charges are Appropriate and Reasonably Necessary

99. The Applicant Investors seek two priority charges as part of the Initial Order, in the following order of priority:[124]

(a) the Administration Charge up to the amount of $500,000, with a limited charge not to exceed $250,000 during the Initial Stay Period, to secure the professional fees and disbursements of the Monitor, the Monitor's legal counsel, Canadian Representative Counsel, and Foreign Representative Counsel, whether incurred before or after the date of the Initial Order; and

(b) the Interim Lender's Charge up to the amount of $2,000,000, with a limited charge not to exceed $500,000 during the Initial Stay Period, to secure repayment of the amounts advanced under the Interim Financing Facility (as defined below) provided by Pillar.

i. Administration Charge

100. Section 11.52 of the CCAA expressly provides this Court with the authority to grant a charge in respect of professional fees and disbursements, on notice to affected secured creditors. To grant such a charge, the Court must be satisfied that i) notice has been given

[124] Edwards Affidavit, at para 111.

to secured creditors likely to be affected by the charge, ii) the amount is appropriate, and iii) the charge should extend to all of the proposed beneficiaries.[125]

101. In the absence of the protection afforded by a super-priority administration charge, the objectives of the CCAA would be frustrated as it is unreasonable to expect professionals to risk not being paid for their services. An administration charge can then be used to further the underlying purposes of the CCAA.[126]

102. In *Re Canwest Publishing Inc*, the Ontario Superior Court provided the following list of factors to be considered by the Courts when determining whether an administration charge is reasonable and should extend to the proposed beneficiaries:

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

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

(c) whether there is 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.[127]

103. Justice Morawetz recently applied these factors in the context of granting an administration charge on an initial application in *Lydian*.[128]

104. If an administration charge secures the professional fees and disbursements of representative counsel, then the Court must be satisfied, in applying the above noted

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[125] CCAA, *supra* at s 11.52 [**TAB 1**]; *Re Canwest Global Communications Corp (2009)*, 59 CBR (5th) 72 (ON SC [Commercial List]) at paras 37-38 [*Canwest I*] [**TAB 31**].

[126] *Canada North*, *supra* at paras 28, 30-31 [**TAB 5**]; *Re Timminco Ltd*, 2012 ONSC 506 at paras 44, 66-68 [**TAB 32**].

[127] *Re Canwest Publishing Inc*, 2010 ONSC 222 at para 54 [**TAB 33**].

[128] *Lydian*, *supra* at paras 46-48 [**TAB 17**].

factors, that such charge is "necessary for the effective participation of representative counsel in the proceedings."[129]

105. Under the proposed Initial Order, each of the Administration Charge and the Interim Lender's Charge would rank ahead of all Encumbrances. The Initial Order would allow the Debtor Companies to seek a further order from this Court on a subsequent application with broader notice to affected persons granting priority to the Administration Charge and Interim Lender's Charge over any Encumbrance it does not already have priority over pursuant to the Initial Order.[130]

106. The proposed Administration Charge is to secure the pre- and post-filing professional fees and disbursements of the Monitor, the Monitor's legal counsel, the Canadian Representative Counsel, and the Foreign Representative Counsel. The Applicant Investors submit that the amount and priority of the Administration Charge is fair and reasonable in the circumstances.[131]

107. The proposed restructuring and liquidation proceedings of the Debtor Companies will require extensive input from professional advisors. There is an immediate need for such advice, including as a result of the need to immediately bring an application for a Temporary Restraining Order in the United States. The Administration Charge provides assurances to the Monitor, its legal counsel, Canadian Representative Counsel, and Foreign Representative Counsel that their fees will be covered to allow them to effectively participate in these proceedings. The Applicant Investors therefore respectfully request that this Honourable Court grant the Administration Charge as set forth in the proposed Initial Order.

ii. Interim Lender's Charge

[129] *Urbancorp, supra* at para 14 [**TAB 27**].
[130] Edwards Affidavit, at para 112.
[131] Edwards Affidavit, at para 113.

108. Section 11.2 of the CCAA provides this Court with the necessary authority to grant a charge in respect of interim lending, on notice to affected secured creditors, and with regard to the debtor company's cash flow forecast. The security or charge may not secure pre-filing obligations owing to the interim lender. When granting such a charge, the Courts should consider, among other things:

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

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

(c) whether the debtor 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 debtor company;

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

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

(g) the monitor's pre-filing report, if any.[132]

109. No one factor is to be determinative in the Court's analysis, rather, the exercise is one of balancing the respective interests of the debtor company and its stakeholders to ensure, if appropriate, that the financing will assist the debtor company in obtaining breathing room to pursue a restructuring.[133]

110. Section 11.2(5) of the CCAA provides that a Court shall not grant an order for interim financing at the same time as granting an initial order under section 11.2, unless the Court is satisfied that the terms of the loan and charge being sought are limited to those amounts

[132] CCAA, *supra* at s 11.2 [**TAB 1**]; *Canwest I*, *supra* at paras 31 [**TAB 31**].
[133] *Re 1057863 BC Ltd*, 2020 BCSC 1359 at para 35 [**TAB 34**].

reasonably necessary for the debtor company's continued operations in the ordinary course of business during the initial stay of proceedings.[134] What is considered "reasonably necessary" depends on the facts of each case.[135]

111. As set out in the Cash Flow Forecast, and the proposed Monitor's Pre-Filing Report, first day interim financing is required in order to fund the Debtor Companies' continued operations and to pursue restructuring options given the Debtor Companies do not generate revenues at this time.[136]

112. The proposed Monitor and Pillar, as the "**Interim Lender**", with the support of the Investors, have negotiated terms for the provision of interim financing as set out in the Interim Financing term sheet between the parties appended to the proposed Monitor's pre-filing report. In summary, the Interim Lender will provide the Debtor Companies with interim financing up to the maximum amount of $2,000,000 (the "**Interim Financing Facility**"). As is standard, the Interim Financing Facility is conditional upon, among other things, the issuance of the proposed Initial Order approving the Interim Financing Facility and the granting of the Interim Lender's Charge.

113. The Applicant Investors submit that it is appropriate for this Court to exercise its discretion to approve the Interim Financing Facility and to grant the associated Interim Lender's Charge in favour of Pillar as the amount and priority of the Interim Lender's Charge is fair and reasonable in the circumstances.[137]

114. Due to any lack of revenues or financial contribution from the Debtor Companies, and the fact that the Applicant Investors are unlikely to pay additional funds to pursue these proceedings, the Interim Financing Facility and associated Interim Lender's Charge are necessary prerequisites to advancing these or any other restructuring proceedings.

iii. Notice to UFIs at Comeback Hearing

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[134] CCAA, *supra* at s 11.2(5) [**TAB 1**].

[135] *Re 8440522 Canada Inc*, 2013 ONSC 6167 at para 30 [**TAB 35**].

[136] Pre-Filing Report of Alvarez & Marsal Canada Inc. in its capacity as the proposed Monitor of the Debtor Companies.

[137] Edwards Affidavit, at para 113.

115. Because the Applicant Investors do not have any investor lists or the ability to contact the investor group at large, the Applicant Investors have not been able to provide notice of this Originating Application to the broader investor group. As a result, the Applicant Investors are proposing to provide notice of these proceedings, if granted, to the broader investor group through the Monitor as follows (the "**Notice Protocol**"):

(a) a public website will be created by the Monitor (the "**Website**") on which all relevant documents, including all court materials, and updates will be posted;

(b) a notice will be posted on the reference Facebook page to advise investors of the proceedings, the Website and contact information for representative counsel;

(c) a notice will be published in newspapers including the *National Post*, the *Globe and Mail* (National Edition), the *Dallas Morning News*, the *Straits Times*, and subject to the Monitor's discretion, *China Daily*; and

(d) the Monitor will take all other steps prescribed by the CCAA to give notice to every known creditor.

116. It is submitted that the Notice Protocol is an effective and efficient means of notifying investors broadly of the within proceedings and the Applicant Investors seek to validate service of the Comeback Hearing, provided the aforementioned steps are met.

J. Alternatively, This Court Has Discretion to Appoint a Receiver

i. This Court has the Authority to Appoint a Receiver

117. If this Court elects not to exercise its discretion to grant the Initial Order, notwithstanding that it has the jurisdiction to do so, the Court has the authority to appoint a receiver under section 13(2) of the *Judicature Act*.[138]

118. Section 13(2) of the *Judicature Act* provides this Court with the broad discretion to appoint a receiver separate and apart from any authority granted under any other statute for similar

[138] *Judicature Act*, *supra* at s 13(2) [**TAB 2**].

relief, such as the BIA. The *Judicature Act* allows for the appointment of a receiver when it is just and convenient to do so.[139]

119. Pursuant to the broad authority afforded to the Courts under the *Judicature Act* and its inherent jurisdiction, this Honourable Court has ample discretion to grant the proposed Receivership Order.

ii. Circumstances Exist that Justify the Appointment of a Receiver

120. The appointment of a receiver is a discretionary remedy that should not be lightly granted by the Courts. When faced with an application to appoint a receiver, the Courts "must carefully balance the rights of both the applicant and the respondent. "[140] The applicant has the burden of establishing that it is both just and convenient to grant the proposed receivership order after the conclusion of the balancing exercise.[141]

121. Justice Romaine, drawing from Bennett on Receiverships, provides a non-exhaustive list of factors that the Courts may consider when determining whether it is just and convenient to appoint a receiver in *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, as follows:

(a) whether irreparable harm might be caused if no order were made;

(b) the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

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[139] *Judicature Act*, *supra* at s 13(2) [**TAB 2**].

[140] *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127 at para 17 [*BG International*] [**TAB 36**].

[141] *BG International*, *supra* at para 17 [**TAB 36**].

(g) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

(h) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(i) the effect of the order upon the parties;

(j) the conduct of the parties;

(k) the length of time that a receiver may be in place;

(l) the cost to the parties;

(m) the likelihood of maximizing return to the parties; and

(n) the goal of facilitating the duties of the receiver.[142]

122. The third edition of Bennett on Receiverships has since added questions of equity to the *Paragon* list.[143] The above list of factors is not exhaustive and there is no burden on the applicant to satisfy each and every factor.

123. This Court has previously appointed a *Judicature Act* receiver on application by an investor.[144] In *Lindsay Estate*, Hawco J expressed concerns about the ability of the investors to recover their monies and found that as a result, the appointment of a receiver was just and equitable.[145]

124. It is just and convenient in the present circumstances to appoint a Receiver over the Debtor Companies and the Affiliate Entities and their Property having regard to the factors set out in *Paragon*. Even if the Court emphasizes the extraordinary nature of the requested relief,

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[142] *Paragon Capital Corp v Merchants & Traders Assurance Co Ltd*, 2002 ABQB 430 at para 27 citing to Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Carswell, 1999) at 130 [**TAB 37**].

[143] Frank Bennett, *Bennett on Receiverships*, 4th ed (Toronto: Carswell, 2021) at 189-197 [**TAB 38**].

[144] *Lindsay Estate v Strategic Metals Corp*, 2008 ABQB 602 at paras 27, 30 [*Lindsay Estate*], aff'd in *Lindsey Estate v Merondon Mining Corporation Ltd.*, 2010 ABCA 191 [**TAB 39**].

[145] *Lindsay Estate*, *supra* at paras 27, 30 [**TAB 39**].

the appointment of a Receiver is still favoured as the circumstances before the Court are themselves extraordinary.

125. *Irreparable harm will occur if a Receiver is not appointed*. Through the Management Misconduct, it is clear that management has no regard for the interests of the investors and has failed to comply with even the most basic corporate requirements.[146] When viewed in conjunction with the Management Misconduct, the pending sale of the Angus Manor Lands presents a real and potentially immediate risk of irreparable harm to investors. The purchaser is unknown. The purchase price is payable over a four year period without any discussion of the vendor take back security, if any. No vote of the unit holders of Angus LP and Angus Manor LP has been solicited to properly direct the general partners to vote on the sale.[147] Given the lack of communication from the A2A Group over the last 10 years, and the lack of response to questions posed of the A2A Group, there are serious doubts as to where the sale proceeds, if paid, will be directed. Several other investor groups have already initiated complaints in the United States against entities within the A2A Group and its management directly and, in one case, received judgment in fraud, among other things.[148] As such, there is a real risk to the ability of the Investors to recover their monies which is only compounded by management's lack of transparency into the affairs of the Debtor Companies.

126. *The nature of the Property requires the appointment of a Receiver*. Given the Management Misconduct, it is unclear whether any material steps have been taken in the past several years to use the funds raised by the A2A Group to advance any of the real estate projects. If there is any value in the real estate projects or the lands, the Debtor Companies, without the control of a third party, have not demonstrated that they are sufficiently trustworthy enough to control the projects or any proceeds derived from those projects.

[146] Edwards Affidavit, at paras 20, 22, 25, 30, 35.

[147] Edwards Affidavit, at paras 94, 96, 98.

[148] Edwards Affidavit, at paras 88-92.

127. The investors in the real estate projects are not only spread across Canada, but around the world. At this time, groups of investors are individually exercising their rights and there is a real need to bring these disparate claims into a single proceeding model.

128. *There is an apprehended waste of assets*. The evidence demonstrates an apprehended waste of assets. Management is not providing the Applicant Investors with any financial reporting, the UFI structure registered on title for the Angus Manor Lands does not reflect the number of UFIs that should be held by Angus LP and Angus Manor LP, and there are several claims alleging fraud, breach of trust, conspiracy and misappropriation, and a judgment finding fraud on the part of certain members of management.[149]

129. *The appointment of a Receiver is necessary to preserve and protect the Property*. As noted above, there is a pending sale for the Angus Manor Lands and the Investors have minimal information about this potential sale. The Applicant Investors further have no insight into the state of the Fossil Creek Lands or the Windridge Lands, despite requests for this information. In the absence of any governance or control within the A2A Group,[150] the appointment of a Receiver is necessary to preserve and protect the value in the Businesses and Property.

130. *The balance of convenience favours the appointment of a Receiver*. The Management Misconduct not only jeopardizes the ability of the Applicant Investors to recover their monies, but also the ability of other investors and stakeholders to do so. The fact that other investors have initiated legal proceedings against the A2A Group and management highlights the balance of convenience favouring the appointment of a Receiver.

131. *A Court-appointment is necessary for a Receiver to carry out its duties efficiently and effectively*. The Applicant Investors seek to use an open and transparent Court-process to recover their monies. Absent a CCAA proceeding with enhanced powers of the Monitor, a court-appointed Receiver is needed to facilitate this process and to manage potentially competing interests amongst investors in an effective and efficient manner.

[149] Edwards Affidavit, at paras 9, 58-62, 88-92.

[150] Edwards Affidavit, at para 9.

132. *The effect of the Receivership Order on the parties still weighs in favour of the appointment*. The Receivership Order will bring the appropriate oversight and expertise to the management of the Debtor Companies, both of which current management has been unable or unwilling to provide to the detriment of all of the Debtor Companies' and Affiliate Entities' stakeholders. Under the supervision of the Court, the Receiver will be able to address the claims of other stakeholders, including by converting the receivership proceedings to CCAA proceedings. Allowing management to remain in control will only cause more harm to the Businesses and Property. As a result, on a balance it is clear that the effect of the Receivership Order weighs in favour of the appointment.

133. *The Debtor Companies' conduct justifies the appointment of a Receiver*. The Management Misconduct gives rise to claims against the Debtor Companies in negligence and breach of contract, as well as more serious allegations. The claims commenced in the United States for fraud, conspiracy, and misappropriation and the Debtor Companies' current attempt to quietly sell the Angus Manor Lands only emphasizes that the prejudicial conduct on behalf of management is continuing.

134. For these same reasons, the circumstances require an extraordinary intervention such as the appointment of a Receiver, meeting another *Paragon* factor.

135. *The appointment of the Receiver increases the likelihood of maximizing realizations*. The appointment of the proposed Receiver will bring much needed insight into the affairs of the Debtor Companies and the ability to commence restructuring or liquidation proceedings to maximize realizations for all of the Debtor Companies' stakeholders. Without the appointment of a third party to control the assets, there are real concerns that the Applicant Investors will receive little to no realizations.

136. Given all of these circumstances, it is more than just and convenient to appoint a Receiver.

137. Accordingly, the Applicant Investors submit that this Honourable Court should grant the Receivership Order to appoint a Receiver over the Debtor Companies and their Property without delay. A&M has executed a Consent to Act as the Receiver in these proceedings.[151]

[151] Edwards Affidavit, at para 110, Exhibit "42".

iii. The Receiver's Borrowing Charge is Appropriate and Reasonably Necessary

138. Pursuant to section 13(2) of the *Judicature Act*, the Court is afforded the discretion to appoint a receiver on "any terms and conditions the Court thinks just".[152] The Applicant Investors respectfully request that this Court exercise this discretion to allow the proposed Receiver to borrow from Pillar, up to the maximum amount of $500,000, and grant the associated Receiver's Borrowing Charge up to the same amount.

139. As indicated in the Cash Flow Forecast, the Debtor Companies do not generate cash and are unable to fund any proceedings without outside assistance. The proposed funding from Pillar is therefore necessary. The provision of this funding is conditional upon the proposed Receiver's Borrowing Charge being granted.

140. In the context of receivership proceedings involving real estate developments, Canadian courts have previously granted initial Receiver's Borrowing Charges anywhere between $30,000 and several million dollars.[153] The proposed Receiver's Borrowing Charge is therefore well within the realm of reasonable and appropriate in the circumstances.

K. The Receivership, if Granted, Should be Converted to CCAA Proceedings

141. Given the *Judicature Act* is an Alberta statute, the proposed Receiver will be required to make subsequent applications to recognize the Receivership Order, if granted, in Ontario and potentially other jurisdictions within Canada where assets are located. This is in addition to the application that must be made in Texas pursuant to Chapter 15 of the U.S. Bankruptcy Code to preserve the Fossil Creek and Windridge projects. As a result, the Receiver is seeking the Court's permission to recognize any receivership order granted in other jurisdictions.

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[152] *Judicature Act*, *supra* at s 13(2) [**TAB 2**].

[153] Order of the Honourable Justice CL Kenny, granted June 30, 2010, *Re Shire International Real Estate Investments Ltd*, Alberta Court of Queen's Bench Court File No 0901-11866, at para 20 [$30,000 Receiver's Borrowings Charge] [**TAB 40**]; *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855 at para 49 [Receiver's Borrowings Charge was initially $2,500,000] [**TAB 41**]; Order of the Honourable Justice KM Eidsvik, granted October 29, 2019, *Hillsboro Ventures Inc v Ceana Development Sunridge Inc*, Court of Queen's Bench of Alberta Court File No 1801-04745, at para 3 [Receiver's Borrowings Charge was initially $4,500,000] [**TAB 42**].

142. Certain of the Debtor Companies' real estate projects may be restructured while others require liquidations. Proceedings under the CCAA are better equipped to handle this duality as compared to a receivership.

143. As such, if appointed, it is anticipated that the Receiver will apply in another court application to i) convert the receivership proceedings to proceedings under the CCAA, and ii) obtain the proposed Initial Order, which provides for, among other things, a nationally applied and enforced stay of proceedings, appointment of A&M as the Monitor with enhanced powers, the Administration Charge, and the Interim Lender's Charge.

144. The additional applications by the Receiver to recognize the provincial appointment across Canada and then apply for a CCAA Initial Order represent additional steps that, while necessary, will increase the cost of the proceedings and delay preservation of the assets in other jurisdictions. However, the additional expense may be avoided by granting the Applicant Investors' request for the Initial Order on November 14, 2024.

145. If required, a Receiver has standing to convert a receivership to a CCAA proceeding.[154]

146. A liquidator of a debtor company may bring an application for an initial order under the CCAA pursuant to sections 4 and 5, which state that where a compromise or arrangement is proposed between a debtor company and its secured or unsecured creditors, as the case may be:

> the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors of 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.[155]

147. The Receiver, if appointed under the *Judicature Act*, is a liquidator of the Debtor Companies. Further, the BIA recognizes a receiver to be a person who is appointed or takes

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[154] Order of the Honourable Justice Osborne, granted August 29, 2023, *In the Matter of a Plan of Compromise or Arrangement of Validus Power Corp et al*, Ontario Superior Court of Justice [Commercial List] Court File No CV-23-00705215-00CL [**TAB 43**].

[155] CCAA, *supra* ss 4-5 [**TAB 1**].

possession or control of the property of an insolvent person under "a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager."[156]

148. Further, if just and convenient to do so, a receiver may be authorized "take any other action that the court considers advisable".[157]

149. It is within this discretionary power, as a receiver recognized under the BIA, that the Receiver will apply to convert the receivership proceedings to CCAA proceedings. As a liquidator of the Debtor Companies, the Receiver has standing under the CCAA to commence such proceedings. The conversion of proceedings is just and convenient given, as described above, that the CCAA is better suited to handle both the required restructuring and liquidation processes.

V. CONCLUSION

150. The Applicant Investors require the assistance of this Honourable Court to conduct a transparent process to facilitate the recovery of their investments in the Debtor Companies by way of a restructuring plan, a liquidation plan, or both. Given the Management Misconduct to date in which management demonstrates it is not capable of governing or looking after the investors' interests, the Applicant Investors have lost all faith in the possibility of realizing any value from their contributions, absent a Court-supervised process that preserves assets and provides insight into the affairs of the Debtor Companies.

151. Given all of the surrounding circumstances, it is within this Court's jurisdiction to grant relief pursuant to the CCAA. Doing so is consistent with the remedial nature of the legislation. For this and all of the aforementioned reasons, the Applicant Investors respectfully submit that the Initial Order sought is appropriate and necessary in the circumstances.

152. Alternatively, it is also within the jurisdiction of the Court to appoint A&M as Receiver of the Debtor Companies and Affiliate Entities as all of the surrounding circumstances

[156] BIA, *supra* at s 243(2)(b)(ii) [**TAB 10**].
[157] BIA, *supra* at s 243(1)(c) [**TAB 10**].

demonstrate it is just and convenient to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF NOVEMBER, 2024.

FASKEN MARTINEAU DuMOULIN LLP

Per: _____

Robyn Gurofsky/Kaitlyn Wong
Counsel for the Applicants

LIST OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
2. *Judicature Act*, RSA 2000, c J-2.
3. *Business Corporations Act*, RSA 2000, c B-9.
4. *Canada Business Corporations Act*, RSC 1985, c C-44.
5. *Canada v Canada North Group Inc*, 2021 SCC 30.
6. *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10
7. *Century Services Ltd v Canada (Attorney General)*, 2010 SCC 60.
8. *Re Stelco* (2004), 48 CBR (4th) 299 (ON SC [Commercial List]).
9. *Re Lehndorff General Partner Ltd* (1993), 17 CBR (3d) 24 (ON SC [Commercial List]).
10. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
11. *Re Original Traders Energy Ltd*, 2023 ONSC 753.
12. *ATB Financial et al v Apollo Trust et al*, 2008 CanLII 21724 (ON SC).
13. *Great Basin Gold Ltd (Re)*, 2012 BCSC 1459.
14. *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234.
15. Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" (2019) 14 Ann Rev Insolv 1.
16. *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67.
17. *Re Lydian International Limited*, 2019 ONSC 7473.
18. Order of the Honourable Justice KM Horner, granted April 28, 2017, *In the Matter of the Compromise or Arrangement of Walton International Group Inc*, Court of Queen's Bench of Alberta Court File No 1701-05845.
19. Order of the Honourable Justice NJ Whitling, granted February 28, 2024, *In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp*, Court of King's Bench of Alberta Court File No 2401-02680.
20. *Re Canadian Airlines Corp*, (2000) 19 CBR (4th) 1 (ABQB).

21. *Nortel Network Corp, Re*, 2009 CarswellOnt 3028, [2009] OJ No 2166 (ON SC [Commercial List]).

22. *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946.

23. *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014.

24. *Arrangement relatif à Groupe Sélection inc*, 2022 QCCS 4284.

25. *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)*, 2020 QCCA 659.

26. *Harte Gold Corp (Re)*, 2022 ONSC 653.

27. *Urbancorp Inc (Re)*, 2016 ONSC 5426.

28. *Nortel Network Corp, Re*, 2009 CarswellOnt 3028, [2009] OJ No 2166.

29. *Quadriga Fintech Solutions Corp (Re)*, 2019 NSSC 65.

30. *Canwest Publishing Inc*, 2010 ONSC 1328.

31. *Re Canwest Global Communications Corp (2009)*, 59 CBR (5th) 72 (ON SC [Commercial List]).

32. *Re Timminco Ltd*, 2012 ONSC 506.

33. *Re Canwest Publishing Inc*, 2010 ONSC 222.

34. *Re 1057863 BC Ltd*, 2020 BCSC 1359.

35. *Re 8440522 Canada Inc*, 2013 ONSC 6167.

36. *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 127.

37. *Paragon Capital Corp v Merchants & Traders Assurance Co Ltd*, 2002 ABQB 430

38. Frank Bennett, *Bennett on Receiverships*, 4th ed (Toronto: Carswell, 2021).

39. *Lindsay Estate v Strategic Metals Corp*, 2008 ABQB 602.

40. Order of the Honourable Justice CL Kenny, granted June 30, 2010, *Re Shire International Real Estate Investments Ltd*, Alberta Court of Queen's Bench Court File No 0901-11866.

41. *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855.

42. Order of the Honourable Justice KM Eidsvik, granted October 29, 2019, *Hillsboro Ventures Inc v Ceana Development Sunridge Inc*, Court of Queen's Bench of Alberta Court File No 1801-04745.

43. Order of the Honourable Justice Osborne, granted August 29, 2023, *In the Matter of a Plan of Compromise or Arrangement of Validus Power Corp et al*, Ontario Superior Court of Justice [Commercial List] Court File No CV-23-00705215-00CL.

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act

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

Currency

An Act to facilitate compromises and arrangements between companies and their creditors

R.S.C. 1985, c. C-36, as am. R.S.C. 1985, c. 27 (2nd Supp.), ss. 10 (Sched., item 3), 11; S.C. 1990, c. 17, s. 4; 1992, c. 27, s. 90(1)(f); 1993, c. 28, s. 78 (Sched. III, item 20) [Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1993, c. 34, s. 52; 1996, c. 6, s. 167(1)(d), (2); 1997, c. 12, ss. 120-127; 1998, c. 19, s. 260; 1998, c. 30, s. 14(c); 1999, c. 3, s. 22; 1999, c. 28, s. 154; 2000, c. 30, ss. 156-158; 2001, c. 9, ss. 575-577; 2001, c. 34, s. 33; 2002, c. 7, ss. 133-135; 2004, c. 25, ss. 193-195; 2005, c. 3, ss. 15, 16; 2005, c. 47, ss. 124-131 [ss. 124, 126 amended 2007, c. 36, ss. 105, 106.]; 2007, c. 29, ss. 104-109; 2007, c. 36, ss. 61(1), (2), (3) (Fr.), (4), 62 (Fr.), 63-73, 74(1), (2) (Fr.), 75-82, 112(17), (20), (23) [s. 63 repealed 2007, c. 36, s. 112(15).]; 2009, c. 33, ss. 27-29; 2012, c. 16, s. 82; 2012, c. 31, ss. 419-421; 2015, c. 3, s. 37; 2017, c. 26, s. 14; 2018, c. 10, s. 89; 2018, c. 27, s. 269; 2019, c. 29, ss. 136-140; 2023, c. 6, s. 5; 2024, c. 15, s. 274 [To come into force June 20, 2026.].

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.
2(1)Definitions
In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company; *("agent négociateur")*

"bond" includes a debenture, debenture stock or other evidences of indebtedness; *("obligation")*

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; *("état de l'évolution de l'encaisse")*

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; *("réclamation")*

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; *("convention collective")*

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

Proposed Amendment — 2(1) "company"

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

2024, c. 15, s. 274 [To come into force June 20, 2026.]

"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

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

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

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

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

R.S.C. 1985, c. C-36, s. 3

s 3.

Currency

3.

3(1)Application

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

3(2)Affiliated companies

For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3)Company controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4)Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one ore more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

Amendment History

1997, c. 12, s. 121; 2005, c. 47, s. 125

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part I — Compromises and Arrangements (ss. 4-8)

R.S.C. 1985, c. C-36, s. 4

s 4. Compromise with unsecured creditors

Currency

4.Compromise with unsecured creditors

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

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part I — Compromises and Arrangements (ss. 4-8)

R.S.C. 1985, c. C-36, s. 5

s 5. Compromise with secured creditors

Currency

5.Compromise with secured creditors

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.

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

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11.General power of court

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.

Amendment History

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

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

R.S.C. 1985, c. C-36, s. 11.001

s 11.001 Relief reasonably necessary

Currency

11.001Relief reasonably necessary

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History

2019, c. 29, s. 136

Currency

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

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

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

R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

11.2

11.2(1)Interim financing

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.

11.2(2)Priority — secured creditors

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

11.2(3)Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4)Factors to be considered

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.

11.2(5)Additional factor — initial application

When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (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.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

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

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

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

R.S.C. 1985, c. C-36, s. 11.7

s 11.7

Currency

11.7

11.7(1)Court to appoint monitor

When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

11.7(2)Restrictions on who may be monitor

Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

11.7(3)Court may replace monitor

On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

11.7(4) [Repealed 2005, c. 47, s. 129.]

11.7(5) [Repealed 2005, c. 47, s. 129.]

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 129

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Monitors [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 23

s 23.

Currency

23.

23(1)Duties and functions

The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation 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;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(iv) [Repealed 2007, c. 36, s. 72(2)]

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

23(2)Monitor not liable

If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Amendment History

2005, c. 47, s. 131; 2007, c. 36, s. 72

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TAB 2

Alberta Statutes
Judicature Act

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

Currency

R.S.A. 2000, c. J-2, as am. R.S.A. 2000, c. A-30, s. 91; R.S.A. 2000, c. 16 (Supp.), ss. 27, 36, 73 [s. 73(3) not in force at date of publication. Repealed 2004, c. 11, s. 3(5).]; S.A. 2001, c. 24, s. 9; 2002, c. 32, s. 9; 2003, c. 41, s. 1; 2003, c. 42, s. 11; 2004, c. 11, s. 3(1)-(4) [s. 3(2) amended 2006, c. 4, s. 2.]; 2005, c. 15, s. 7; 2007, c. 21; 2008, c. 13, s. 14; 2009, c. 53, s. 1; 2011, c. N-6.5, s. 13 [Not in force at date of publication.]; 2011, c. 20, s. 8(17); 2013, c. 10, s. 20; 2013, c. 11, s. 2(2); 2013, c. 23, s. 8; 2014, c. 13, s. 29; 2017, c. 22, s. 30; 2018, c. 20, s. 9; Alta. Reg. 137/2022, s. 7; 217/2022, s. 120; 2022, c. 21, s. 45; Alta. Reg. 75/2023, s. 43.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

End of Document

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Currency

Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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TAB 3

Alberta Statutes
Business Corporations Act

R.S.A. 2000, c. B-9

Currency

R.S.A. 2000, c. B-9, as am. S.A. 1992, c. M-20.1 s. 63 [Not in force at date of publication. Repealed R.S.A. 2000, c. T-6, s. 214(c).]; R.S.A. 2000, c. H-7, s. 136; R.S.A. 2000, c. T-6, s. 193; R.S.A. 2000, c. 8 (Supp.) [Not in force at date of publication. Repealed 2005, c. 8, s. 62.]; 2001, c. C-28.1, s. 447 [s. 447(2) amended 2001, c. 23, s. 1(8).]; 2002, c. A-4.5, s. 22; 2005, c. 8, ss. 1-60; 2005, c. 40; 2006, c. S-4.5, s. 106; 2007, c. U-1.5, s. 68; 2008, c. A-4.2, s. 121; 2008, c. 7, s. 2; 2009, c. 7, s. 2; 2009, c. 53, s. 30; 2011, c. 13, s. 1; 2014, c. 8, s. 17; 2014, c. 13, s. 49; 2014, c. 17, s. 57; 2016, c. 18, s. 1; 2018, c. 20, s. 2; 2020, c. 25, s. 1; 2021, c. 3, s. 1; 2021, c. 16, s. 3; 2021, c. 18, ss. 1-74; Alta. Reg. 217/2022, s. 27; 2023, c. 3, s. 5 [s. 5(3), (4) not in force at date of publication.]; Alta. Reg. 75/2023, s. 11; 2023, c. 9, s. 4.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

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Alberta Statutes
Business Corporations Act
Part 17 — Liquidation and Dissolution (ss. 206.1-229)

R.S.A. 2000, c. B-9, s. 206.1

s 206.1 Definition

Currency

206.1Definition
In this Part, **"interested person"** means

(a) a shareholder, a director, an officer, an employee and a creditor of a dissolved corporation,

(b) a person who has a contractual relationship with a dissolved corporation,

(c) a trustee in bankruptcy for a dissolved corporation, or

(d) a person designated as an interested person by an order of the Court.

Amendment History
2005, c. 8, s. 48

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R.S.A. 2000, c. B-9, s. 210

s 210. Revival

Currency

210.Revival

210(1) Any interested person may apply to the Court within 10 years after the date of dissolution for an order reviving a body corporate dissolved under this Part.

210(1.1) A body corporate may not be revived after the expiry of 10 years from the date of dissolution.

210(1.2) [Repealed 2021, c. 18, s. 52(c).]

210(2) An applicant under subsection (1) shall give notice of the application to the Registrar and the Registrar is entitled to appear and be heard in person or by counsel.

210(3) An order under subsection (1) may revive the body corporate for the purpose of carrying out particular acts specified in the order and the order shall state that the revival remains in effect for a specific time limited by the order.

210(4) In an order under subsection (1), the Court may

(a) give directions as to the holding of meetings of shareholders, the appointment of directors and meetings of directors,

(b) [Repealed 2021, c. 18, s. 52(e).]

(c) [Repealed 2021, c. 18, s. 52(e).]

(d) change the name of the body corporate to a number designated or name approved by the Registrar, and

(e) give any other directions the Court thinks fit.

210(5) Where a person seeks the approval of the Registrar under subsection (4)(d), the person shall provide to the Registrar documents relating to corporate names that are prescribed by the regulations.

210(6) [Repealed 2021, c. 18, s. 52(f).]

210(7) A body corporate revived by an order under this section is dissolved on the expiration of the time limited by the order.

210(8) If an order is made under this section, the applicant shall forthwith send a certified copy of the order to the Registrar who shall file it and restore the body corporate to the register under the *Companies Act*.

210(9) A body corporate is revived on the making of an order under this section and, subject to the terms imposed by the order and to rights acquired by any person prior to the revival, the body corporate is deemed to have continued in existence as if it had not been dissolved.

Amendment History

2005, c. 8, s. 49; 2007, c. U-1.5, s. 68(3); 2021, c. 18, s. 52

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

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TAB 4

Canada Federal Statutes
Canada Business Corporations Act

R.S.C. 1985, c. C-44

Currency

An act respecting Canadian business corporations

R.S.C. 1985, c. C-44, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 187 (Sched. V, item 3); R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 5); R.S.C. 1985, c. 1 (4th Supp.), s. 45 (Sched. III, item 5) (Fr.); S.C. 1988, c. 2, s. 19 [1988, c. 2, s. 19 repealed ss. 263 and 264 of 1974-75-76, c. 33, which had been neither consolidated nor repealed by R.S.C. 1985, c. C-44.]; 1990, c. 17, s. 6; 1991, c. 45, ss. 551-556; 1991, c. 46, ss. 595-597; 1991, c. 47, ss. 719-724; 1992, c. 1, ss. 53-57, 142 (Sched. V, items 11, 12); 1992, c. 27, s. 90(1)(h); 1992, c. 51, s. 30; 1993, c. 28, s. 78 (Sched. III, item 24) [Not in force at date of publication. Repealed 1999, c. 3, s. 12 (Sched., item 4).]; 1994, c. 21, s. 125; 1994, c. 24, ss. 1-32, 34(c) [ss. 1, 2(1), (2), 4, 5(2), 8(1), 9, 13-15, 22(4), 34(c): (Fr.)]; 1996, c. 6, s. 167(g); 1996, c. 10, ss. 212-214; 1998, c. 1, ss. 380, 381; 1998, c. 30, s. 15(b); 1999, c. 3, s. 16; 1999, c. 31, ss. 63-65; 2000, c. 12, s. 27; 2001, c. 14, ss. 1-136, Sched. [ss. 1(2), (6), 2, 11(4), 16, 17(1), 18(1), 20, 21(1), 22(1), (2), 24, 28(2), 33, 34, 36, 47(2), 49, 65, 73, 78(2), 83(2), 91(2), 94(1), 96(2), 99(9), 103(1), 107, 113, 114(1), 117, 118, 123, 134: (Fr.)]; 2001, c. 27, s. 209; 2002, c. 7, s. 88; 2004, c. 25, s. 187; 2005, c. 33, s. 5; 2007, c. 6, ss. 399-401; 2009, c. 23, ss. 309-311, 344-346; 2011, c. 21, ss. 13(1), (2), (3) (Fr.), (4), (5), 14 (Fr.), 15-19, 20 (Fr.), 21-24, 25 (Fr.), 26-52, 53 (Fr.), 54-58, 59 (Fr.), 60 (Fr.), 61(1), (2) (Fr.), (3) (Fr.), 62 (Fr.), 63, 64, 65 (Fr.), 66-71; 2015, c. 3, s. 12; 2018, c. 8, ss. 1-4, 5 (Fr.), 6 (Fr.), 7-13, 13.1 (Fr.), 14 (Fr.), 15-23, 23.1 (Fr.), 24, 25, 26 (Fr.), 27, 28(1), (2) (Fr.), (3), (4) (Fr.), (5)-(7), 29 (Fr.), 30 (Fr.), 31, 32, 33-35 (Fr.), 36(1)-(3), (4) (Fr.), (5), 37, 38(1), (2), (3) (Fr.), (4), 39-42, 43 (Fr.), 44, 45, 46 (Fr.) [ss. 17, 19, 22, 37 not in force at date of publication.]; 2018, c. 27, ss. 182-185; 2019, c. 29, ss. 98 (Fr.) 99-101, 141-144 [ss. 142-144 not in force at date of publication.] [s. 143(1) amended 2019, c. 29, s. 151(3).]; 2022, c. 10, ss. 430-434 [s. 434 repealed before producing its effects, 2023, c. 29, s. 19.]; 2023, c. 14, s. 3; 2023, c. 29, ss. 1-15, 20; 2024, c. 17, ss. 232-234, 375.

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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Canada Federal Statutes
Canada Business Corporations Act
Part I — Interpretation and Application (ss. 2-4)
Interpretation

R.S.C. 1985, c. C-44, s. 2

s 2.

Currency

2.
2(1)Definitions
In this Act,

"affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate; *("affaires")*

"affiliate" means an affiliated body corporate within the meaning of subsection (2); *("groupe")*

"articles" means the original or restated articles of incorporation, articles of amendment, articles of amalgamation, articles of continuance, articles of reorganization, articles of arrangement, articles of dissolution, articles of revival and includes any amendments thereto; *("statuts")*

"associate", in respect of a relationship with a person, means

(a) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than ten per cent of the voting rights under all circumstances or by reason of the occurrence of an event that has occurred and is continuing, or a currently exercisable option or right to purchase such shares or such convertible securities,

(b) a partner of that person acting on behalf of the partnership of which they are partners,

(c) a trust or estate or succession in which that person has a substantial beneficial interest or in respect of which that person serves as a trustee or liquidator of the succession or in a similar capacity,

(d) a spouse of that person or an individual who is cohabiting with that person in a conjugal relationship, having so cohabited for a period of at least one year,

(e) a child of that person or of the spouse or individual referred to in paragraph (d), and

(f) a relative of that person or of the spouse or individual referred to in paragraph (d), if that relative has the same residence as that person;

("liens")

"auditor" includes a partnership of auditors or an auditor that is incorporated; *("vérificateur")*

"beneficial interest" means an interest arising out of the beneficial ownership of securities; *("véritable propriétaire")*

"beneficial ownership" includes ownership through any trustee, legal representative, agent or mandatary, or other intermediary; *("véritable propriétaire")et("propriété effective")*

"body corporate" includes a company or other body corporate wherever or however incorporated; *("personne morale")*

"call" means an option transferable by delivery to demand delivery of a specified number or amount of securities at a fixed price within a specified time but does not include an option or right to acquire securities of the corporation that granted the option or right to acquire; *("option d'achat")*

"corporation" means a body corporate incorporated or continued under this Act and not discontinued under this Act; *("société par actions")*

"court" means

(a) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court of the Province,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court of the Province,

(c) in the Provinces of Manitoba, Saskatchewan, Alberta and New Brunswick, the Court of Queen's Bench for the Province,

(d) in the Province of Quebec, the Superior Court of the Province, and

(e) the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice;

("tribunal")

"court of appeal" means the court to which an appeal lies from an order of a court; *("Cour d'appel")*

"debt obligation" means a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured; *("titre de créance")*

"Director" means the Director appointed under section 260; *("directeur")*

"director" means a person occupying the position of director by whatever name called and "directors" and "board of directors" includes a single director; *("administrateur")*

"distributing corporation" means, subject to subsections (6) and (7), a distributing corporation as defined in the regulations; *("société ayant fait appel au public")*

"entity" means a body corporate, a partnership, a trust, a joint venture or an unincorporated association or organization; *("entité")*

"going-private transaction" means a going-private transaction as defined in the regulations; *("opération de fermeture")*

"incapable", in respect of an individual, means that the individual is found, under the laws of a province, to be unable, other than by reason of minority, to manage their property or is declared to be incapable by any court in a jurisdiction outside Canada; *("incapable")*

"incorporator" means a person who signs articles of incorporation; *("fondateur")*

"individual" means a natural person; *("particulier")*

R.S.C. 1985, c. C-44, s. 209

s 209.

Currency

209.

209(1)Revival

When a corporation or other body corporate is dissolved under this Part, section 268 of this Act, section 261 of the *Canada Business Corporations Act*, chapter 33 of the Statutes of Canada, 1974-75-76, or subsection 297(6) of the *Canada Not-for-profit Corporations Act*, any interested person may apply to the Director to have the dissolved corporation or other body corporate revived as a corporation under this Act.

209(2)Articles of revival

Articles of revival in the form that the Director fixes shall be sent to the Director.

209(3)Certificate of revival

On receipt of articles of revival, the Director shall issue a certificate of revival in accordance with section 262, if

(a) the dissolved corporation or other body corporate has fulfilled all conditions precedent that the Director considers reasonable; and

(b) there is no valid reason for refusing to issue the certificate.

209(3.1)Date of revival

The dissolved corporation or other body corporate is revived as a corporation under this Act on the date shown on the certificate of revival.

209(4)Rights and obligations preserved

Subject to any reasonable terms that may be imposed by the Director, to the rights acquired by any person after its dissolution and to any changes to the internal affairs of the corporation or other body corporate after its dissolution, the revived corporation is, in the same manner and to the same extent as if it had not been dissolved,

(a) restored to its previous position in law, including the restoration of any rights and privileges whether arising before its dissolution or after its dissolution and before its revival; and

(b) liable for the obligations that it would have had if it had not been dissolved whether they arise before its dissolution or after its dissolution and before its revival.

209(5)Legal actions

Any legal action respecting the affairs of a revived corporation taken between the time of its dissolution and its revival is valid and effective.

209(6)Definition of "interested person"

In this section, **"interested person"** includes

(a) a shareholder, a director, an officer, an employee and a creditor of the dissolved corporation or other body corporate;

(b) a person who has a contract — other than, in Quebec, a contract by gratuitous title — with the dissolved corporation or other body corporate;

(c) a person who, although at the time of dissolution of the corporation or other body corporate was not a person described in paragraph (a), would be such a person if a certificate of revival is issued under this section; and

(d) a trustee in bankruptcy or liquidator for the dissolved corporation or other body corporate.

Amendment History
2001, c. 14, s. 102; 2009, c. 23, s. 310; 2018, c. 8, s. 28(1), (3), (5)-(7)

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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TAB 5

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1781, 2021 CarswellAlta 1780, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 2 S.C.R. 571, [2021] 2 R.C.S. 571, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, [2021] S.C.J. No. 30, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

Her Majesty The Queen in Right of Canada (Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada (Respondents) and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

Counsel: Michael Taylor, Louis L'Heureux, for Appellant
Darren R. Bieganek, Q.C., Brad Angove, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as Monitor
Jeffrey Oliver, Mary I. A. Buttery, Q.C., for Respondent, Business Development Bank of Canada
Kelly J. Bourassa, for Intervener, Insolvency Institute of Canada
Randal Van de Mosselaer, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
Tax
II Income tax
II.22 Special rules
II.22.c Bankruptcy
II.22.c.i Corporations
Headnote
Tax --- Income tax — Special rules — Bankruptcy — Corporations

charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

14 After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

15 Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

16 The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

17 In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. CCAA Regime

18 The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

19 The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the

debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

20 The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "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" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

21 The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "[o]n 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'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

22 On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

23 In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

24 As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

25 In *Sun Indalex Finance, LLC v. United Steelworkers*2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous

Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

27 After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

28 There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings .... 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" (*Callidus Capital*, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

29 This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "[p]rofessional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*2012 ONSC 1299, at para. 51 (CanLII)).

30 Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality ... that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

31 It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods*

Ltd. [*v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] ... Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

B. Nature of the Interest Created by Section 227(4.1) of the ITA

32 The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

33 Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

34 When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

35 Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the *CCAA*, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

36 Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also

TAB 6

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.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.
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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

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

TAB 7

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

Tax
I General principles
I.7 Tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.12 Collection and remittance
III.12.b GST/HST held in trust

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA,

studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (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. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts 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 (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

TAB 8

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act
Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no

material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability 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.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> 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.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant

would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

TAB 9

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne * Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; 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
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings
Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.
The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They

Re Langley's Ltd., [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

TAB 10

Canada Federal Statutes
Bankruptcy and Insolvency Act

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

Currency

An Act respecting Bankruptcy and Insolvency

R.S.C. 1985, c. B-3, as am. R.S.C. 1985, c. 27 (1st Supp.), s. 203; R.S.C. 1985, c. 31 (1st Supp.), ss. 3, 28, 69-77; R.S.C. 1985, c. 3 (2nd Supp.), s. 28; R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); S.C. 1990, c. 17, s. 3; 1991, c. 46, s. 584; 1992, c. 1, ss. 12-20, 143 (Sched. VI, item 2), 145, 161; 1992, c. 27, ss. 1-90; 1993, c. 28, s. 78 (Sched. III, items 6, 7) [Amended 1999, c. 3, s. 12 (Sched., item 3).]; 1993, c. 34, s. 10; 1994, c. 26, ss. 6-9, 46; 1995, c. 1, s. 62(1)(a); 1996, c. 6, s. 167(1)(b), (2); 1996, c. 23, s. 168; 1997, c. 12, ss. 1-119; 1998, c. 19, s. 250; 1998, c. 21, s. 103; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 1999, c. 28, ss. 146, 147; 1999, c. 31, ss. 17-26; 2000, c. 12, ss. 8-21; 2000, c. 30, ss. 143-148; 2001, c. 4, ss. 25-27, 28 (Fr.), 29-32, 33(1) (Fr.), (2), (3); 2001, c. 9, ss. 572-574; 2002, c. 7, ss. 83-85; 2002, c. 8, s. 182(1)(b); 2004, c. 25, ss. 7(1), (2) (Fr.), (3)-(8), (9) (Fr.), (10), 8, 9 (Fr.), 10(1) (Fr.), (2), (3) (Fr.), 11 (Fr.), 12-16, 17 (Fr.), 18, 19 (Fr.), 20-23, 24 (Fr.), 25(1), (2) (Fr.), 26, 27(1)-(3), (4) (Fr.), (5), 28-31, 32(1), (2), (3) (Fr.), 33-35 (Fr.), 36-48, 49(1) (Fr.), (2), (3), 50(1), (2) (Fr.), (3), 51 (Fr.), 52(1) (Fr.), (2), 53-64, 65 (Fr.), 66, 67-69 (Fr.), 70-74, 75 (Fr.), 76 (Fr.), 77, 78 (Fr.), 79 (Fr.), 80-83, 84 (Fr.), 85 (Fr.), 86, 87, 88(1), (2) (Fr.), 89, 90 (Fr.), 91 (Fr.), 92, 93, 94 (Fr.), 95-99, 100(1) (Fr.), (2), 101 (Fr.), 102(1), (2) (Fr.), 103; 2005, c. 3, ss. 11-14; 2005, c. 47, ss. 2(1), (2) (Fr.), (3)-(5), (6) (Fr.), 3-52, 53 (Fr.), 54-100, 101(1), (2) (Fr.), (3), 102-123 [ss. 20(3), 30(2), 31(3), 37, 104(3), 106, 116, 120(2) repealed 2007, c. 36, ss. 95-98, 101-104; ss. 39(2), 103 amended 2007, c. 36, ss. 99, 100.]; 2007, c. 29, ss. 91-102; 2007, c. 36, ss. 1-3, 4 (Fr.), 5-7, 8 (Fr.), 9(1) (Fr.), (2), (3), 10, 11 (Fr.), 12-32, 33(1), (2), (3) (Fr.), (4), (5), 34, 35, 36 (Fr.), 37-52, 53(1) (Fr.), (2), 54-60, 112(4), (10)(b), (13), (14) [ss. 25, 31, 40 repealed 2007, c. 36, s. 112(2), (7), (10)(a).]; 2009, c. 2, ss. 355 (Fr.), 356 (Fr.); 2009, c. 31, ss. 63-65; 2009, c. 33, ss. 21-26; 2012, c. 16, ss. 79-81; 2012, c. 31, ss. 414-418; 2014, c. 20, s. 484; 2015, c. 3, ss. 6 (Fr.), 7 (Fr.), 8, 9, 10 (Fr.); 2017, c. 6, s. 122; 2017, c. 26, ss. 5-10; 2018, c. 10, s. 82; 2018, c. 27, ss. 265 (Fr.), 266-268; 2019, c. 29, ss. 133-135, 160, 161; 2022, c. 5, s. 12; 2022, c. 10, ss. 137, 173(2); 2023, c. 6, ss. 2-4.

Currency
Federal English Statutes reflect amendments current to June 19, 2024
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End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

("fiducie de revenu")

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

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

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

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

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*
R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

"child" includes a child born out of marriage;

Currency
Federal English Statutes reflect amendments current to June 19, 2024
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R.S.C. 1985, c. B-3, s. 121

s 121.

Currency

121.

121(1)Claims provable

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

121(2)Contingent and unliquidated claims

The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

121(3)Debts payable at a future time

A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

121(4)Family support claims

A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

1992, c. 27, s. 50; 1997, c. 12, s. 87(1), (2); 2000, c. 12, s. 14

Note:

S.C. 2000, c. 12, s. 14, amended s. 121 by replacing s. 121 (4). Pursuant to S.C. 2000, c. 12, s. 21, the amendment applies only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21, on July 31, 2000. Prior to the amendment, s. 121(4) read as follows:

> *121.(4) Family support claims*
> *A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.*

Currency

Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

TAB 11

2023 ONSC 753
Ontario Superior Court of Justice [Commercial List]

In the Matter of the Companies' Creditors Arrangement Act

2023 CarswellOnt 1528, 2023 ONSC 753, 2023 A.C.W.S. 331

In the Matter of the Companies' Creditors Arrangement Act

AND In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.

Osborne J.

Heard: January 30, 2023
Judgment: January 30, 2023
Docket: CV-23-693758-00CL

Counsel: Stephen Graff, Miranda Spence, Tamie Dolny, Samantha Hans, for Applicants
Raj Sahni — Proposed Monitor, KPMG Inc.
Roger Jaipargas, for RBC

Subject: Corporate and Commercial; 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 — Miscellaneous
Companies were wholesale fuel supplier that serviced mainly First Nations petroleum stations and communities across Ontario — Companies were insolvent and sought protection from creditors while they continued as going concern to allow time to explore various restructuring options for benefit of stakeholders — Companies applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Absent protection under CCAA, companies lacked sufficient cash to meet their obligations as they became due, and their liabilities exceeded value of their assets — Companies were balance sheet insolvent and were facing looming liquidity crisis — It was anticipated that companies would have sufficient cash to sustain operations throughout proposed CCAA proceeding, but would lack sufficient funds to cover outstanding liabilities — Challenges were compounded by fact that liabilities faced by companies were precipitated by alleged executive misconduct by former president, with result that financial information and records were unreliable and incomplete — It was anticipated that role of proposed monitor would include recovering and analyzing records — Companies owed material amounts to provincial and federal regulators and tax authorities with result that required licences were in jeopardy — Evidence established that relief under CCAA was required to stabilize integrated enterprise and preserve value of business for benefit of stakeholders — Absent protection being granted, operations of companies, and therefore uninterrupted supply of fuel to First Nations communities throughout Ontario and during winter months, was at risk — Companies met test for protection under CCAA — CCAA applied by its express terms to debtor companies, but court had jurisdiction to extend protection of stay to partnerships where operations of those partnerships were integral and closely related to operations of companies to ensure that purposes of CCAA could be achieved — Stay of proceedings was necessary here if any form of restructuring process was to be successful — Monitor was appointed, and it should have additional investigatory powers — Sealing order was granted as court openness posed serious risk to important public interest; order was necessary to prevent serious risk because reasonably alternative measures would not sufficient; and benefits outweighed negative effects — Administrative charge of $500,000 was granted, as was directors' and

34 The Applicants are corporations that collectively owe over $5 million in outstanding liabilities. They have delivered the documents and financial statements required under s. 10(2) of the CCAA. The CCAA applies to a "debtor company" or an "affiliated debtor company". The CCAA defines a "debtor company" as, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act (“BIA”).

35 This Court considered the circumstances in which a debtor company was insolvent in Stelco Inc. Re, [2004] 48 C.B.R. (4th) 299 (“Stelco”), and held that in order to give effect to the CCAA objectives of allowing a debtor company breathing room to restructure, a debtor is insolvent if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.

36 As noted, and while the Applicants presently have sufficient cash for the CCAA proceedings and to fund future obligations, their cash flow is not sufficient to provide for the payment of all due and owing obligations.

37 Moreover, they are balance sheet insolvent. As confirmed by the Applicants and the Proposed Monitor, total assets are estimated to be $67,523,927 as against total liabilities of $95,392,669.

38 The Applicants therefore meet the test under the BIA and as contemplated by the Court in *Stelco*, discussed above.

39 The terms "insolvency" or "insolvent" are not defined in the CCAA, but "insolvent person" is defined in the BIA (s.2.1). In the BIA definition, it includes a person whose liability to creditors provable as claims under [the BIA] amount to $1000, and who is for any reason unable to meet his obligations as they generally become due, who has ceased paying his current obligations in the ordinary course of business as they generally become due, or 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 of his obligations, due and accruing due.

40 I observe, as did Farley, J. In *Stelco*, that the BIA tests are disjunctive so that at debtor company meeting any one of the tests is determined to be insolvent (*Stelco*, at para. 28, quoting with authority from Re Optical Recording Laboratories Inc., (1990) 1990 CanLII 6672 (ONCA), 75 D.L.R. (4th) 747 at pg. 756). Moreover, and also as observed by Farley, J., the phrase "accruing due" has been interpreted by the courts as broadly identifying all obligations that will "become due" at some point in the future (*Stelco*, at para. 59).

41 In *Stelco*, Farley, J. considered the test set out in s.2.1 of the BIA as informed by what he described as "the expanded CCAA test" such as was necessary to give effect to the intention of Parliament in enacting the CCAA to achieve its stated objectives. Since the term "insolvent" is not defined in that statute, it should be given the meaning that the overall context of the CCAA requires. Farley, J. referenced with approval what he called "the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42 (CanLII) [2002] S.C.R. 559 at 580: "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."" (*Stelco*, para. 23).

42 It is the position of the Applicants that the present financial structure is sustainable only if they can negotiate pricing changes for OTE GP with certain suppliers, restructure operations and implement cost-cutting, and determine the quantum in nature of outstanding liabilities to creditors including regulatory and taxation authorities, all for the purpose of developing a plan to satisfy those obligations.

43 Having considered the evidence in the record, I am satisfied that the Applicants meet the test for protection under the CCAA, in addition to which I note that a number of creditors of the OTE Group have demanded payment and have threatened to or have already commence proceedings.

44 Moreover, and while the CCAA applies by its express terms to debtor companies, it is well-established that this Court has the jurisdiction to extend the protection of the stay of proceedings to partnerships, where the operations of that partnership or

TAB 12

Court File No. 08-CL-7440
DATE: 20080408

ONTARIO

SUPERIOR COURT OF JUSTICE
(Commercial List)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

B E T W E E N:	)	
	)	
THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO	)	*B. Zarnett, F. Myers, B. Empey* for the Applicants
Applicants	)	
- and -	)	*R.S. Harrison*, for Metcalfe & Mansfield Alternative Investments Corps.
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 6932819 CANADA INC. AND 4446372 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO	)	*Scott Bomhof, John Laskin* for National Bank of Canada
	)	*Peter Howard, William Scott* for Asset Providers/Liquidity Providers
	)	*Jeff Carhart, Joe Marin, Jay Hoffman* for Ad Hoc Committee of ABCP Holders
	)	*T. Sutton* for Securitus
	)	*Jay Swartz, Natasha MacParland* for New Shore Conduits
	)	*Aubrey Kauffman* for 4446372 Canada Inc.
	)	*Stuart Brotman* for 6932819 Canada Inc.
	)	*Robin B. Schwill, James Rumball* for Coventree Capital Inc., Coventree Administration Corp., Nereus Financial Inc.
	)	*Ian D. Collins* for Desjardins Group
Respondents	)	*Harvey Chaiton* for CIBC
	)	*Kevin McEicheran, Geoff R. Hall* for Bank of Montreal, Bank of Nova Scotia, CIBC,

) Royal Bank of Canada, Toronto Dominion
) Bank
) *Marc S. Wasserman* for Blackrock Financial
) *S. Richard Orzy* for CIBC Mellon,
) Computershare and Bank of New York as
) Indenture Trustee
) *Dan Macdonald, Andrew Kent* for Bank of
) Nova Scotia
) *Virginie Gauthier, Mario Forte* for Caisse
) de Dépôt
) *Junior Sirivar* for Navcan
)
) **HEARD:** March 17, 2008

REASONS FOR DECISION

[1] These are the reasons for this Court having granted on March 17, 2008 an Initial Order under the *Companies Creditors Arrangement Act* ("CCAA") in respect of various corporate trustees in respect of what is known as Asset Backed Commercial Paper ("ABCP.")

[2] This highly unusual and hopefully not to be repeated procedure (given its magnitude and implications) represents the culmination of a great deal of work and effort on the part of the Applicants known informally as the Investors' Committee under the leadership of a leading Canadian lawyer and businessman, Purdy Crawford.

[3] Assuming approval of the proposed Plan under the CCAA, the process will result in the successful restructuring of the ABCP market in Canada and avoid a liquidity crisis that would result in certain loss to many of the various participants in the ABCP market.

[4] It is neither necessary nor appropriate in these Reasons to describe in detail just what is involved in the products and operation of the ABCP market.

[5] The Information Circular that is part of the Application and will be sent to each of the affected Noteholders (and is also found on the website of the Monitor, Ernst & Young), contains a complete description of the nature of the products, the various market participants, the problem giving rise to the liquidity crisis and the proposed Plan that, if approved, will allow for recovery by most Noteholders of at least their capital over time in return for releases of other market participant parties.

[6] An equally informative but less detailed description of the market for ABCP and its problems can be found in the affidavit of Mr. Crawford in the sites referred to above.

[7] The Applicants include Crown corporations, business corporations, pension funds and financial institutions. Together, they hold more than $21 billion of the approximately $32 billion of ABCP at issue in this proceeding. Each Applicant holds ABCP for which at least one of the Respondents is the debtor. Each Applicant has a significant ABCP claim.

[8] Each series of ABCP was issued pursuant to a trust indenture or supplemental trust indenture. Each trust indenture appointed an "Indenture Trustee" to serve as trustee for the investors, and gave that trustee certain rights, on behalf of investors, to enforce obligations under ABCP. However, the Indenture Trustee has no economic interest in the underlying debt and, under the circumstances, it is neither practical nor realistic to expect the Indenture Trustees to put forward a restructuring plan.

[9] In this proceeding, the Applicants seek to put forward and obtain approval of the restructuring plan they have developed in their own right as holders of ABCP and as the real creditors of the Respondents.

[10] Each Respondent is a corporation which is the trustee of one or more Conduits. Each Respondent is the legal owner of the assets held for each series in the Conduit of which it is the trustee, and is the debtor with respect to the ABCP issued by the trustee of that Conduit. The ABCP debt for which each Respondent is liable exceeds $5 million.

[11] Each ABCP note provides that recourse under it is limited to the assets of the trust. The trust indentures pursuant to which each series of notes were issued provide that each note is to be repaid from the assets held for that series.

[12] Since mid-August, 2007, the trustees of each of the Conduits have, in respect of each series of ABCP, had insufficient liquidity to make payments that were due and payable on their maturing ABCP. Each remains unable to meet its liabilities to the Applicants and to the other holders of each series of ABCP as those obligations become due, from assets held for that series. Accordingly, each of the Respondents is insolvent.

[13] Most of the Conduits originally had trustees that were trust companies. The original trustees that were trust companies were replaced by certain of the Respondents, in accordance with applicable law and the terms of the applicable declarations of trust, in order to facilitate the making of this Application. The Respondents that replaced the trust companies assumed legal ownership of the assets of each Conduit for which they serve as trustees and assumed all of the obligations of the original trustees whom they replaced.

[14] The Applicants chose court proceedings under the CCAA because the issuer trustees of the Conduits, as currently structured, are insolvent because they cannot satisfy their liabilities as they become due. The CCAA process allows meaningful efficiencies by restructuring all of the affected ABCP simultaneously while also providing stakeholders, including Noteholders, with more certainty that the Plan will be implemented. In addition, the CCAA provides a process to obtain comprehensive releases, which releases bind Noteholders and other parties who are not directly affected by the Plan. The granting of these comprehensive releases is a condition of participation by certain key parties.

[15] The CCAA expresses a public policy favouring compromise and consensual restructuring over piecemeal liquidation and the attendant loss of value. It is designed to encourage and facilitate consensual compromises and arrangements among businesspeople; indeed the essence of a CCAA proceeding is the determination of whether a sufficient consensus exists among them

to justify the imposition of a statutory compromise. It is only after this determination is made that the Court will examine whether a plan is otherwise fair and reasonable.

[16] On the first day of a CCAA proceeding, the Court should strive to maintain the *status quo* while the plan is developed. The Court will exercise its power under the statute and at common law in order to maintain a level playing field while allowing the debtor the breathing space it needs to develop the required consensus. At this stage, the goal is to seek consensus - to allow the business people and individual investors to make their judgments and to express those judgments by voting. The Court's primary concern on a first day application is to ensure that the business people have a chance to exercise their judgment and vote on the Plan.

[17] The Applicants submitted that the Initial Order sought should be granted and the creditors given an opportunity to vote on the Plan, because (a) this application complies with all requirements of the CCAA and is properly brought as a single proceeding; (b) the relief sought is available under the CCAA. It is also consistent with the purpose and policy of the CCAA and essential to the resolution of the ABCP crisis; and (c) the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

[18] ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling." Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption," ABCP would readily be saleable without the need for extraordinary funding measures.

[19] There are three questions that need to be answered before the Court makes an Order accepting an Initial Plan under the CCAA.

[20] The first question is, does the Application comply with the requirements of the CCAA? The second question involves determining that the relief sought in the circumstances is available under the CCAA and is consistent with the purpose and policy of the statute. The third question asks whether the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

[21] I am satisfied that all three questions can be answered in the affirmative.

[22] The CCAA, despite its relative brevity and lack of specifics, has been accepted by the Courts across Canada as a vehicle to encourage and facilitate consensual compromise and arrangements among various creditor interests in circumstances of insolvent corporations.

[23] At the stage of accepting a Plan for filing, the Court seeks to maintain a status quo and provide a "structured environment for the negotiation of compromises between a company and

its creditors." The ultimate decision on the acceptance of a Plan will be made by those directly affected and vote in favour of it.[1]

[24] Section 3(1) of the CCAA applies in respect of a "debtor company" or "affiliate debtor companies" with claims against them of $5 million.

[25] The problem faced by the applicants in this proceeding is that the terms "company" and "debtor company" as defined in s. 2 of the CCAA do not include trust entities.

[26] For the purpose of this Application and proposed Plan, those entities that did not qualify as "companies" for the purposes of the CCAA were replaced by Companies (the Respondents) that do meet the definition.

[27] I am satisfied in the circumstances that these steps are an appropriate exercise of legally available rights to satisfy the threshold requirements of the CCAA. I am satisfied that the change in trustees was undertaken in good faith to facilitate the making of this application.

[28] The use of what have been called "instant" trust deeds has been judicially accepted as legitimate devices that can satisfy the requirement of s. 3 of the CCAA as long as they reflect legitimate transactions that actually occurred and are not shams.[2]

[29] I am satisfied that the Respondents are "debtor companies" within the meaning of the CCAA because they are companies that meet the s. 2 definition and they are insolvent. The Conduits (referred to above) are trusts and the Respondents are trustees of those trusts. The trustee is the obligor under the trusts covenant to pay. I am satisfied that the trustee corporations are "insolvent" within the judicially accepted meaning under the CCAA.

[30] The decision in *Re Stelco*[3] sets out three disjunctive tests. A company will be an insolvent “debtor company” under the CCAA if: (a) it is for any reason unable to meet its obligations as they generally become due; or (b) it has ceased paying its current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of its 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 its obligations, due and accruing due.

[31] I am satisfied that on the material filed as of August 13, 2007 and the stoppage of payment by trustees of the Conduits (which continues), the Conduits and now the Respondents remain unable to meet their liabilities at the present time.

[32] The Conduits and now trustees in my view meet the test accepted by the Court in *Re Stelco* of being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."[4] Indeed, it was that

---

[1] See *Lehndorff General Partner, Re* (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Gen. Div.) contrasted with *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 at 316.
[2] *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (Ont. C.A.) per Doherty J.A. (in dissent on result but not on this point); also cases referred to in *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div.)
[3] *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) at paras 21-22; leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336
[4] *Supra* at (2004) paragraphs 26 and 28.

very circumstance that brought about the standstill agreement and the ensuing discussions and negotiations to formulate a Plan.

[33] Finally on this point I am satisfied that the insolvency of the Respondents is not affected or negated by contractual provisions in the applicable notes and trust indentures that limit Noteholders' recourse to the trust assets held in the Conduits. This statement should not be taken as a determination of the rights or remedies of any creditor.

[34] It was urged and I accept that the applicants are creditors under ss. 4 and 5 of the CCAA and as such are entitled to standing to propose a Plan for restructuring the ABCP.

[35] On the return of the motion for the Initial Order, while the proceeding was technically "ex parte," a significant number of interested parties were represented. None of those parties opposed the making of the Initial Order and since then no one has come forward to challenge the entitlement of the Applicants to the Initial Order.

[36] S. 8 of the CCAA renders ineffective any provisions in the trust indentures that otherwise purport to restrict, directly or indirectly, the rights of the Applicants to bring this application:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

[37] See also the following for the proposition that a trust indenture cannot by its terms restrict recourse to the CCAA.[5]

[38] Another feature of this Application is the joining within a single proceeding of claims by many parties against each of the Respondents. Rules 5.01 and 5.02 of the *Rules of Civil Procedure* allow for the joinder of claims by multiple applicants against multiple respondents. It is not necessary that all relief claimed by each applicant be claimed against each respondent. Here the Applicants assert claims for relief against the Respondents involving common questions of law and fact. Joining of the claims in one proceeding promotes the convenient administration of justice.

[39] I am satisfied that in the unique circumstances that prevail here, the practical restructuring of the ABCP claims can only be implemented on a global basis; accordingly, if there were separate proceedings, each individual plan would of necessity have been conditional upon approval of all the other plans.

[40] One further somewhat unusual aspect of this Application has been the filing of the proposed Plan along with the request for the Initial Order. This is not unusual in what have come to be known as "liquidating" CCAA applications where the creditors are in agreement when the

---

[5] Instruments such as trust deeds may give specified rights to creditors or any class of them in certain circumstances. Some instruments may purport to provide that a creditor may not circumvent any limitation in the rights contained in the instrument by proposing an arrangement under the CCAA and thereby obtaining wider or extended rights. … Relief under the CCAA is available notwithstanding the terms of any instrument. [Footnote omitted.] (John D. Honsberger, *Debt Restructuring: Principles and Practice*, vol. 1 (Aurora: Canada Law Book, 1997+) at 9-18). See also *Citibank Canada v. Chase Manhattan Bank of Canada*, *supra*, at paras. 25-26 (Ont. Gen. Div.); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 at para. 11 (B.C.S.C.)

TAB 13

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Great Basin Gold Ltd. (Re),*
2012 BCSC 1459

Date: 20121001
Docket: S126583
Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
and
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44
and
In the Matter of Great Basin Gold Ltd.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioner:	P.J. Reardon J.L. Cockbill W. Rostom (via phone)
Counsel for Monitor:	J. McLean, Q.C. A. MacFarlane (via phone) R. Adlington (via phone) P.J. Reynolds
Counsel for Credit Suisse AG:	P.L. Rubin K. McEachern D. O'Donnel (via phone) M. Chow (via phone)
Counsel for Ad Hoc Group of Convertible Debenture Holders:	J.R. Sandrelli C. Cheuk R. Jacobs S. Kukulowicz K. Mak B. Grossman (via phone)
Counsel for CIBC:	M. Stewart (via phone)
Place and Date of Hearing:	Vancouver, B.C. September 26 and 27, 2012
Place and Date of Judgment:	Vancouver, B.C. October 1, 2012

[93] Before addressing the practicalities of such a strategy, I must consider whether there is any basis upon which GBG Inc., Antler and Rodeo can or should be added as petitioners to this proceeding. If not, then the Ad Hoc Group has indicated that it cannot or will not proceed with its proposal and the remainder of the issues relating to its proposal would be moot.

[94] Supreme Court Civil Rule 6-2(7) provides for the addition of parties and in particular, petitioners:

> **Adding, removing or substituting parties by order**
>
> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> ...
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[95] Supreme Court Civil Rule 6-2(10), however, provides that "a person must not be added or substituted as a plaintiff or petitioner without the person's consent".

[96] Mr. Reardon, who acts for GBG Inc., Antler and Rodeo, indicates that his clients have no interest in joining these proceedings as a petitioner.

[97] The Ad Hoc Group then contends that these U.S. subsidiaries should be added as respondents to this proceeding. I agree that Rule 6-2 would allow that relief. Sections 4 and 5 of the *CCAA* expressly provide that a compromise or arrangement may be proposed by not only the "debtor company", but by any creditor. While rare, *CCAA* proceedings commenced by creditors of an insolvent

company are not unheard of: see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.J.). In this Court, a recent example includes the initial order granted in respect of Bear Mountain Master Partnership on March 25, 2010 in proceedings commenced by HSBC Bank Canada as petitioner (#S102120 - Vancouver Registry). In both cases, the "debtor company" was named as a respondent to the proceeding.

[98] Accepting that Rule 6-2 would allow this court to add GBG Inc., Antler and Rodeo as respondents to this proceeding, I must consider whether the *CCAA* would provide the necessary jurisdiction to do so.

[99] Section 3(1) of the *CCAA* provides that the *Act* applies in respect of a "debtor company". "Debtor company" is defined in s. 2 and means in part any "company" that is insolvent. "Company" is also a defined term found in s. 2:

> "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 ....
>
> [Emphasis added]

[100] It is not in dispute on this application that GBG Inc., Antler and Rodeo do not do business in Canada. The question then becomes whether they have assets in Canada.

[101] The GBG Group operates a cash management system. Under this system, receipts from gold sales are eventually deposited in various bank accounts and these funds ultimately arrive in Canada. In relation to the Hollister gold sales, the process is as follows: sale proceeds are deposited into an account in Rodeo's name in Switzerland; those proceeds are then transferred to GBG's investment account held with CIBC here in Vancouver; GBG, in turn, transfers monies to Rodeo's accounts in the U.S. to fund the Hollister operations. The proceeds from these gold sales are, upon receipt, immediately credited as against the substantial intercompany loans owing by the U.S. subsidiaries. As of August 31, 2012, the U.S. subsidiaries owed GBG in excess of US$187 million.

TAB 14

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miniso International Hong Kong Limited v. Migu Investments Inc.,* 2019 BCSC 1234

Date: 20190729
Docket: S197744
Registry: Vancouver

Between:

MINISO INTERNATIONAL HONG KONG LIMITED, MINISO INTERNATIONAL (GUANGZHOU) CO. LIMITED, MINISO LIFESTYLE CANADA INC., MIHK MANAGEMENT INC., MINISO TRADING CANADA INC., MINISO CORPORATION and GUANGDONG SAIMAN INVESTMENT CO. LIMITED

Petitioners

And

MIGU INVESTMENTS INC., MINISO CANADA INVESTMENTS INC., MINISO (CANADA) STORE INC., MINISO (CANADA) STORE ONE INC., MINISO (CANADA) STORE TWO INC., MINISO (CANADA) STORE THREE INC., MINISO (CANADA) STORE FOUR INC., MINISO (CANADA) STORE FIVE INC., MINISO (CANADA) STORE SIX INC., MINISO (CANADA) STORE SEVEN INC., MINISO (CANADA) STORE EIGHT INC., MINISO (CANADA) STORE NINE INC., MINISO (CANADA) STORE TEN INC., MINISO (CANADA) STORE ELEVEN INC., MINISO (CANADA) STORE TWELVE INC., MINISO (CANADA) STORE THIRTEEN INC., MINISO (CANADA) STORE FOURTEEN INC., MINISO (CANADA) STORE FIFTEEN INC., MINISO (CANADA) STORE SIXTEEN INC., MINISO (CANADA) STORE SEVENTEEN INC., MINISO (CANADA) STORE EIGHTEEN INC., MINISO (CANADA) STORE NINETEEN INC., MINISO (CANADA) STORE TWENTY INC., MINISO (CANADA) STORE TWENTY-ONE INC. and MINISO (CANADA) STORE TWENTY-TWO INC.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioners: K.M. Jackson
G.P. Nesbitt

INTRODUCTION

[1] The petitioners bring these proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Unlike the usual circumstance where the debtor companies commence the proceedings, the petitioners are the secured creditors of the respondent debtor companies, resulting in a creditor-driven *CCAA* proceeding.

[2] The petitioners, collectively described as the "Miniso Group", are the owners of the "Miniso" Japanese lifestyle product brand. The Miniso Group manufactures products and operates a number of Miniso stores in Asia where those products are sold. The Miniso Group licenses the "Miniso" name for use in other parts of the world and sells products to those entities.

[3] The respondent debtor companies, collectively described as the "Migu Group", are the Canadian owners and operators who have licensed the use of the "Miniso" brand in Canada. The Migu Group also purchases products from the Miniso Group for resale here in Canada.

[4] On July 12, 2019, I granted an initial order in this matter (the "Initial Order") with reasons to follow. These are those reasons.

BACKGROUND FACTS

[5] The evidence at the hearing consisted of the Affidavit #1 of Qihua Chen, an employee of one entity within the Miniso Group, sworn July 11, 2019.

[6] The Miniso Group manufacture lifestyle products under the "Miniso" brand name and distribute those products, under licence, to retail outlets selling "Miniso" branded inventory to the public.

[7] The Miniso Group, through a related entity, Miniso Hong Kong Limited, holds all applicable trademarks related to the "Miniso" brand (respectively, the "Miniso Trademarks" and the "Miniso Brand"), including in Canada.

[40] The result is obvious – the Migu Group cannot operate their business and generate revenue without the cooperation and support of the Miniso Group.

***CCAA* ISSUES**

[41] I will briefly discuss the various issues that arose on this application for the Initial Order.

Statutory Requirements

[42] The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total amount of claims against the debtor or its affiliates exceeds $5 million: *CCAA*, s. 3(1). "Debtor company" is defined in s. 2 of the *CCAA* to include any company that is bankrupt or insolvent.

[43] I am satisfied that each of the companies within the Migu Group is a "company" existing under the laws of Canada or one of the provinces and that the claims against them exceed $5 million.

[44] Further, I am satisfied that the Migu Group, either individually or collectively, are unable to meet their liabilities as they come due and are therefore insolvent, and thus each is a "debtor company" within the meaning of the *CCAA*: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2; *Re Stelco Inc.*, [2004] O.J. No. 1257 (Sup. Ct. J.) at paras. 21-22; leave to appeal ref'd, [2004] O.J. No 1903 (C.A.); leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No 336.

[45] The *CCAA* expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: *CCAA*, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Sup. Ct. J.) at para. 34.

Objectives of the *CCAA*

[46] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court provided a detailed analysis of the purpose and policy behind the *CCAA*. Of particular note were the Court's comments that:

TAB 15

2019 ANNREVINSOLV 14

Annual Review of Insolvency Law
Editor: Janis P. Sarra

14 — In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs

In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s

Luc Morin and Arad Mojtahedi [*]

I. — INTRODUCTION

> *"A Jedi uses the Force for knowledge and defence, never for attack."*
>
> *- Master Yoda - The Empire Strikes Back*

The title of this article was not intended to echo the upcoming final chapter of the most recent Star Wars trilogy. In fact, we came up with the title before *The Rise of Skywalker* was announced. But for some reason, we could not help but to think that this was a sign from the force. After all, the very nature of the ethereal powers of a monitor appointed under the *Companies' Creditors Arrangement Act* [1] (*CCAA* or the "Act"), were akin to those bestowed upon any Jedi knight: guardian of the peace guided by selfless morality.

Monitor's powers have been described as being supervisory in nature and its role as being those of a fiduciary towards all stakeholders of an insolvent corporation. A *CCAA* monitor is not the agent of any particular category of stakeholders, let alone a secured creditor. It serves to be the eyes and ears of the court, to monitor the restructuring process of the insolvent corporation and account for all major operations and sometimes missteps, as the case may be, and report same to the court and the overall body of stakeholders. It must maintain an over the crowd attitude aimed at ensuring that the restructuring process is being conducted in accordance with the canonical code of conduct set forth in the *CCAA*, at the behest of a variety of stakeholders.

The roots of the monastic role of the monitor stem from the importance of the ultimate objective of the *CCAA*, which is to favour the restructuring of a struggling business and limit the terrible consequences of a corporate insolvency on its stakeholders. The *CCAA* does not provide for a scheme of distribution, which is the case under the *Bankruptcy and Insolvency Act* [2] (*BIA*). It seems that failure to restructure was never an option contemplated under the *CCAA*'s purview, the legislator leaving this to be dealt with by the *BIA*.

The *CCAA* was historically aimed at *facilitating* a compromise between creditors and an insolvent corporation. *CCAA*'s historical objective is in the very title of the Act. That said, not all insolvent corporations can or should be saved, and to the extent that efforts are made to restructure their business, courts have justifiably concluded that the *CCAA*'s objective would not be thwarted by facilitating the liquidation of the insolvent corporation's assets, property and undertakings. After all, in most cases, such a liquidation would take the form of a transfer of assets allowing for the business of the insolvent corporation to continue, albeit under a new entity or structure. Comfort could be taken in the end result that enables the restructuring of a business, even if it means that this business would have to thrive under a new master and/or a different structure.

It is in this context that one must analyze the recent trend allowing for the *CCAA* process to be initiated by secured creditors while granting extended powers to the *CCAA* monitor akin to those of a *BIA* receiver. To the extent that management of an insolvent corporation fails or neglects to address the restructuring needs of the business, courts have allowed a *CCAA* process to

be initiated at the request of a secured creditor. Similarly, in the event that management is conflicted, notably with its intention to sponsor or be associated with a bid within a sale and investment solicitation process ("SISP") conducted in the context of a *CCAA* process, courts have allowed the monitor to extend its role, to overstep the supervisory nature of its duties and play an active role in the management of the business while having direct powers over the assets, property and undertakings of an insolvent corporation.

That said, the driving factor in allowing a secured creditor to take control over a typically debtor-driven *CCAA* process and for the monitor to have extended powers is that management of the insolvent corporation is either neglecting/failing to abide by its fiduciary duties or that management was simply not in a position to exercise same in an objective manner. It must be demonstrated that management is acting, be it actively or passively, in a manner that is detrimental not only to the secured creditors' interest but also to all other stakeholders of the corporation, and that the extended powers granted to the monitor at the request of the secured creditor is for the purpose of restructuring the business of the insolvent corporation.

This raises a number of questions. What if the secured creditor has simply lost confidence in the management and wants to appoint a professional to overview an orderly liquidation of the corporation's business, assets, property and undertakings? Can it rely on the *CCAA* to initiate a restructuring process? Is it still management's game? What would be the difference with a *BIA* receivership? Should the monitor be considered an agent of the secured creditor?

All of these questions merit attention. First, the Supreme Court of Canada in *Lemare Lake* [3] appropriately warned insolvency practitioners that the insolvency legislation's purpose may not be set aside lightly. Second, even if from a practical standpoint, a *CCAA* monitor and a *BIA* receiver are actually the same professional, a licensed trustee, the reality is that the role and nature of the duties associated with each of these appointments have historically been very different, and to some extent plainly incompatible. The old saying of "same professional, different hat" might be too simplistic and inappropriate when it comes to separating the *BIA* receiver from the *CCAA* monitor.

This article proposes a review of case law and authorities on the competing roles of a *CCAA* monitor and a *BIA* receiver, with a special focus on the circumstances giving rise to the creditor-driven *CCAA* processes providing for extended powers being granted to a *CCAA* monitor. We argue that the *CCAA*'s historical objective is in line with limiting the monitor's powers, and only extending the same when absolutely necessary. *CCAA* monitor should remain neutral and exercise supervisory powers over the restructuring process, driven by the debtor, unless evidence demonstrating that its management is failing or neglecting to exercise its fiduciary duties appropriately.

The *CCAA* is a debtor-driven process, the secured creditor-driven process being the *BIA* receivership. The line between these two processes should not be blurred by the overarching practicalities that has come to define our Canadian Insolvency practice.

May the force be with you, dear readers.

II. — HISTORICAL PURPOSE AND OBJECTIVES OF THE *CCAA*: PRESERVATION OF GOING CONCERN

The *CCAA* was drafted with little consultation by the Conservative government of RB Bennett at the height of the Great Depression in 1933. [4] It was introduced via Bill 77 by Charles H Cahan, MP, who then stated that the economic circumstances of the time required the government to adopt a law that would allow for compromises between a debtor and its creditors without wholly destroying the company and forcing the wasteful sale of its assets:

> Mr. Speaker, at the present time any company in Canada, whether it be organized under the laws of the Dominion of Canada or under the laws of any of the provinces of Canada, which becomes bankrupt or insolvent is thereby brought under either the Bankruptcy Act or the Winding-up Act. **These acts provide for the liquidation of the company under a trustee in bankruptcy in the one case and under a liquidator in the other, and the almost inevitable result is that the organization of the company is entirely disrupted, its good-will depreciated and ultimately lost, and the balance of the assets sold by the trustees or the liquidator for whatever they will bring.** There is no mode or method under our laws whereby the creditors of a company may be brought

> into court and permitted by amicable agreement between themselves to arrange for a settlement or compromise of the debts of the company in such a way as to permit the company effectively to continue its business by its reorganization. [...]
>
> At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby **compromises might be carried into effect under the supervision of the courts without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets**. [5]
>
> [Emphasis added.]

In the Senate, the Right Honourable Arthur Meighen (Conservative) similarly stated that the *CCAA* allows for cooperation and compromises for the greater good, notably by preserving the interests of employees and security holders:

> Honourable senators, the purpose of this Bill is to enable companies which otherwise would be confronted with bankruptcy to arrange compromises by means of conferences among their various classes of security holders. [...] The depression has brought almost innumerable companies to the pass where some such arrangement is necessary in the interest of the company itself, in the interest of its employees -- because the bankruptcy of the company would throw the employees on the street -- and in the interest of the security holders, who may decide that it is much better to make some sacrifice than run the risk of losing all in the general debacle of bankruptcy. [...] As it is, the best result can be attained only by the passage by our legislatures of such co-operative measures as will enable civil rights, and companies within their purview, to be interfered with for the general advantage. [6]

The Act, at merely 20 provisions long and without a preamble or a clear policy statement, was barely debated in the Parliament and was quickly passed into law without objection. [7] Yet, it was soon beset by constitutional controversy, as for the very first time a federal law could bind secured creditors' rights, an area which was then believed to be within the exclusive power of the provincial legislatures. [8]

The reluctance of practitioners at the time to use the *CCAA* or the *Farmers' Creditors Arrangement Act* [9] prompted the Bennett government to refer them to the Supreme Court of Canada in 1934 and 1936, respectively. [10] The Supreme Court held that both laws were *intra vires* of the Parliament of Canada. In essence, the Supreme Court ruled that pursuant to s 91(21) of the *Constitution* [11] the *CCAA* is valid so long as it concerns arrangements between an insolvent debtor and its creditors.

From 1950 onwards the *CCAA* fell out of favour, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds, and by 1970 it was considered a dead letter law. It took another wave of economic recessions to revive the use of the Act in the 1980s and 1990s.

As a consequence of its ability to grant a broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization, the *CCAA* rose to become the functional equivalent of the American Chapter 11 restructuring. That characterization has since influenced its judicial interpretation. [12] Ever since, the courts have significantly widened the scope of the Act. As noted by one author in this Review, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world." [13]

To this day, and after multiple amendments, the *CCAA* lacks an express purpose clause. Nonetheless, the courts, culminating in the Supreme Court's decision of *Century Services*, have time and again held that the Act has first and foremost a remedial purpose, geared at preserving the value of a company as a going concern:

> [15] As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to **permit the debtor to continue to carry on business and, where possible, avoid the social and economic**

> **costs of liquidating its assets**. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> [16] Prior to the enactment of the *CCAA* in 1933, practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company. [...]
>
> [17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal.
>
> [18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation. Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. **Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.** [14]
>
> [References omitted -- Emphasis added.]

In furthering this remedial objective, the *CCAA* provides the supervising judge with wide discretion, which must be exercised with care. As mentioned by the Supreme Court, the court must be cognizant of the interests of *all* stakeholders, which often extend beyond those of the debtor and creditors:

> [59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> [60] Judicial decision-making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. [...] **In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company.** [15]
>
> [References omitted -- Emphasis added.]

Courts and practitioners alike have had a natural tendency to resort to a comparative analysis between the *BIA* and the *CCAA* in trying to justify the objective, purpose and identity of each of those two major pieces of the Canadian insolvency legislation.

In the spirit of such a comparative analysis, one cannot disregard that, as opposed to the *BIA*, the *CCAA* does *not* provide for a scheme of distribution. Despite clear recommendations made by the *Standing Senate Committee on Banking, Trade and Commerce* in this regard, leading to the 2009 amendments to the *BIA* and *CCAA*, [16] the legislator chose not to incorporate a scheme of distribution amongst different stakeholders of a company restructuring its affairs under the *CCAA*. This gives further weight to the consideration given by the legislator to the historical objective of the *CCAA*: to restructure an insolvent

corporation's business by preserving the continuation of its going concern, thus avoiding, or at least narrowing the negative consequences attached to the pure liquidation of its assets, property and undertakings.

Increasingly the lines between liquidation and restructuring are blurred. [17] This pattern is further intensified by the increasing popularity of liquidating *CCAA*s.

Historically, liquidation was effected via *BIA* receiverships, bankruptcies, or a combination of both. Although such liquidation efforts could result in the continuation of the debtor's business for a time through a receiver or trustee in bankruptcy acting *in lieu* of the management, typically the liquidation conducted under the *BIA* would result in a piecemeal sale of the insolvent corporation's assets, property and undertakings. [18]

Generally speaking, for their fullest implementation, *BIA* processes are more rule-driven and require less discretion than the *CCAA*. The purpose of the *BIA* consists in bringing consistency to the administration and liquidation of bankrupt estates and, if possible, in facilitating restructuring under a proposal. [19] The *BIA* offers two alternatives to the remedial path of the proposal, a debtor-driven restructuring process similar in its objective to what the *CCAA* is:

- The Bankruptcy Regime: A pure liquidation process conducted under the helm of a trustee in bankruptcy having full control over the assets, property and undertakings of the insolvent debtor. Bankruptcy is triggered either voluntary, by a general assignment executed by the debtor's management in favour of the creditors, or forced upon by a creditor through an application for a bankruptcy order. Bankruptcy is used in order to shut down an insolvent debtor's business, liquidate its assets and distribute any proceeds to creditors in accordance with a statutory scheme of distribution. Once effective, management has no longer any powers over the assets, property and undertakings of the insolvent corporation; and

- Receivership: The other alternative made available under the *BIA* is the appointment of a receiver pursuant to section 243 of the *BIA*. The appointment of a receiver is reserved to secured creditors only, who must convince the court that it is "just and convenient" to appoint a licensed trustee to exercise control over the assets, property and undertakings of an insolvent corporation. What circumstances qualify as being "just and convenient" under section 243 of the *BIA* has been the subject of a significant body of case law and is beyond the purview of this article. For the purpose hereto, we will limit ourselves to saying that the appointment of a receiver under section 243 of the *BIA* usually requires a demonstration to the court that the main secured creditor has lost confidence in the management of the insolvent corporation and that there is a tangible risk that management is unjustifiably putting at risk the secured creditor's position.

To the extent that we accept that transferring the assets of an insolvent corporation required to continue the going concern of its business qualifies as restructuring, a *BIA* receivership may serve to effectively restructure a business, similar to what would be achieved under a liquidating *CCAA*. However, as previously mentioned, the major difference is that a *BIA* receivership is a secured creditor-driven process whereas the *CCAA* remains a debtor-driven process.

Receivership was crafted to allow for a secured creditor in specific circumstances to take over the management of an insolvent corporation through the appointment of a licensed trustee that it selects. The role and more specifically the beneficiary of the receiver's duties have yet to be defined by case law and authorities. Since the receiver is chosen/retained by the secured creditor, wherein the *BIA* does not provide for continuing reporting obligations to the court, let alone the debtor's management (as is the case under the *CCAA* regime), one could argue that the receiver appointed under section 243 of the *BIA* is acting as an agent of the secured creditor that has petitioned for its appointment. Undoubtedly, receivership is a secured creditor-driven process which cannot be initiated by the insolvent corporation.

In contrast, in a liquidating *CCAA* the insolvent corporation typically remains in possession and control of its assets, property and business. The monitor, who has continuous reporting obligations to the court and the stakeholders, exerts no specific power over the assets, property and business of the insolvent corporation. Management remains at the forefront of all restructuring efforts. A *CCAA* process is therefore a typically debtor-driven one. We will see from recent case law that courts have allowed

secured creditors to resort to the *CCAA* to effectuate liquidating *CCAA*s, but always with a view to preserve the going concern operations of the business operated by the insolvent corporation.

Yet this remains the exception to the rule. Even in its liquidating form, a *CCAA* process is to be driven by the insolvent corporation's management. From recent cases, we have identified four scenarios in which courts have allowed a secured creditor to rely on the *CCAA* while extending the powers of the monitor, rather than proceeding with a receivership under section 243 of the *BIA*:

- **Resignation of the management body**: when all directors and officers resign after a *CCAA* process has been initiated, courts have allowed for the continuation of the *CCAA* process by extending powers to the monitor akin to those of a receiver. Commonly referred to as a "super monitor," these powers allow the monitor to have direct powers over the assets, property and undertakings of the insolvent corporation and, for all intents and purposes, to act *in lieu* of management;

- **Unfitness of management to conduct *CCAA* proceedings**: this is trickier because it requires a demonstration that management is not fit to conduct a formal *CCAA* proceedings without causing harm to the stakeholders, akin to a fiduciary duties violation;

- **Management has no plan or their plan is doomed to fail**: this requires an analysis from the Court that management has no germ of a plan or that any potential restructuring plan is doomed to fail; and

- **Management being conflicted**: in the event that management is contemplating sponsoring or being associated with a bid in respect to the company's assets, property and undertaking in the context of a SISP.

The remainder of this article will analyze a recent rise in case law of *CCAA* liquidation processes, largely influenced or driven by creditors. The article will then aim to synthesize when and under what conditions such processes are appropriate.

III. — INCREASING USE OF LIQUIDATING *CCAA*s: A PATH FOR SECURED CREDITORS

Since the 2009 amendments to the *CCAA*, courts across Canada have held that the purpose of the *CCAA* may be met where a restructuring is effected by way of a liquidation. This has facilitated the transfer of assets, property, undertakings of an insolvent corporation related to a business to allow for its going concern operations to be preserved, even if it means that such operations ought to be continued under a new entity and/or structure. Such restructurings have become commonly referred to as liquidating *CCAA*s.

The concept of liquidating *CCAA*s was broadly approached in the recommendations made in the Senate Report, leading to the adoption of section 36 as part of the 2009 *CCAA* amendments:

> During a reorganization, an insolvent company may benefit from an opportunity to sell part of its business in order to generate capital, avoid further diminution in value and/or focus better on the financially solvent aspects of its operations. In some situations, a win-win situation would be created: insolvent companies would be able to increase their chance of survival as they gain capital and focus on their solvent operations, and creditors would avoid further reductions in the value of their claims. These sales would occur outside the normal course of the organization's business. **In some cases, the best situation for stakeholders might involve the sale of the business in its entirety**. [...]
>
> The Committee also believes that there are circumstances where **all stakeholders would benefit from an opportunity for an insolvent company involved in reorganization to divest itself of all or part of its assets**, whether to raise capital, eliminate further loss for creditors or focus on the solvent operations of the business.[20]
>
> [Emphasis added.]

However, even in the most extreme cases where the debtor is "doomed to fail," the process must have a prospect for the continuation of, among other things, employment for employees, supply relationships between suppliers and trade creditors, and the credit relationships between the debtor business and creditors. [21] It cannot be a liquidation driven process without the prospect of a going concern being preserved and continued. The proper forum for such pure liquidation process being the *BIA*.

Virginia Torrie has argued that the *CCAA* is historically a lender remedy, refuting conventional views of the Act being a debtor remedy inspired by concern for stakeholder groups, such as labour. [22] Accordingly, "if the Act was intended as a lender remedy (rather than to facilitate going-concern reorganizations) there may be less reason to object to liquidating *CCAA*s on normative or policy grounds." [23]

However, and as also noted by Dr Torrie, we respectfully submit that this perspective, taken to its extreme, risks undermining the rule of law. It is generally true that insolvency laws were enacted and amended in response to the needs of major creditors. Dr Torrie notes, regarding the *CCAA*, that the "impetus for this federal statute was to help prevent large bondholders [financial institutions] from failing, by allowing them to restructure debtors (read: restructure losses) and so return these companies (read: investments) to profitability." [24] Having said this, courts should not ignore the very purpose of the *CCAA*, as repeatedly and explicitly mentioned in Parliament and confirmed by the Supreme Court (as well as implicitly acknowledged in the aforementioned quote), which is to preserve the value of the debtor companies as a going concern for the benefit of all of its stakeholders, including employees, and when possible avoid the economic consequences of a liquidation for the society at large by "returning these companies to profitability".

It is a long-standing concern that judicial discretion in insolvency matters is bound by little in terms of procedure, *stare decisis*, or appellate oversight. As noted by David Bish, while this flexibility is of great value and is a cornerstone of Canadian restructuring law, the integrity of our system (as well as the equally important appearance of integrity), depends on the practitioners and the courts following meaningful checks and balances based on the purpose of the Act, unless we (the society at large) are comfortable embracing unfettered judicial discretion:

> If the beauty of our system lies in the unrestrained freedom of judges to drive a desirable commercial outcome, we should embrace it. If, however, we are not comfortable embracing unrestrained judicial discretion, at the very least we ought to find a way to credibly define and impose meaningful limits on that discretion. Either way -- whether transparent unfettered discretion or meaningful checks and balances -- the integrity of our system depends on it. [25]

As previously noted, the *CCAA* does not benefit from a scheme of distribution for debtors' assets and was not subject to parliamentary scrutiny and debate in this regard. Arguably, a *CCAA* court is granted wide discretion because our society expects this discretion to be used in a manner that will benefit the society at large. Given the impossibility to codify and rank the innumerable considerations that could come into play when a court is tasked with maintaining the operations of an insolvent debtor as a going concern, the great flexibility provided by the *CCAA* is entirely warranted in such circumstances.

Large creditors, who often enjoy secured status, are often best placed to evaluate the benefits and consequences of debtors' risk-taking. To allow them to call the shots by freely choosing between *CCAA* liquidation, receivership or bankruptcy will lead to inappropriate risk-taking and could, in theory, aggravate the often discussed inequity between stakeholders by syphoning value from stakeholders at large to their sole advantage.

We will see from the case law that the courts' position has evolved significantly after the 2009 *CCAA* amendments, which led, *inter alia*, to the enactment of section 36.

1. — The Case Law Prior to the 2009 *CCAA* Amendments

Prior to the enactment of the 2009 amendments to the *CCAA*, appellate decisions remained wary of using *CCAA* to effect liquidations.

In 1990, the British Columbia Court of Appeal explicitly stated that the purpose of the *CCAA* is to facilitate the making of a compromise or arrangement in order to allow the debtor to continue business:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business. [...] When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. [26]

Similarly, in 1991, Justice LeBel, then of the Quebec Court of Appeal, wrote that what distinguishes the *CCAA* from the *BIA* is that *CCAA* is aimed at helping the debtor company avoid bankruptcy or emerge from its insolvency:

> More so than its liquidation, this *Act* is aimed at the reorganization of the company and its protection during the intermediate period, during which the approval and the realization of the reorganization plan is sought. Conversely, the *Bankruptcy Act* (RSC 1985, chapter B-3) seeks the orderly liquidation of the property of the bankrupt and the distribution of the proceeds of such liquidation among the creditors, in the order of priority defined by the Act. **The *Arrangements Act* responds to a distinct need and purpose, at least according to the interpretation generally given to it since its adoption. We want to either to prevent bankruptcy, or to help the company emerge from this situation.** [27]
>
> [Our translation -- Emphasis added.]

In 1998, Justice Blair of the Ontario Court of Justice held that liquidation orders can be granted under the *CCAA* "if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation."[28]

In 1999, the Alberta Court of Appeal unanimously sided with Justice Paperny of the Alberta Court of Queen's Bench, who ruled in the first instance that the *CCAA* should not be used when the sale of the assets generates liquidity that is insufficient to be distributed to unsecured creditors and where no plan of arrangement was put to the creditors. [29] The Court of Appeal went a step further, by calling into question the use of the *CCAA* to liquidate the assets of insolvent companies:

> [w]hile we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. **Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella.** [30]
>
> [Emphasis added.]

The notion that *CCAA* process could end in liquidation in exceptional situations was also recognized by the Quebec Superior Court in 2004. In *Papiers Gaspésia*, [31] Papiers Gaspésia Inc. ("Gaspésia") was a limited partnership created by the Fonds de Solidarité FTQ, SGF Rexfor and Tembec. The Chandler paper mill was subject, since 2001, to redevelopment and modernization, and Gaspésia was seeking potential partners to refinance this project.

On 30 January 2004, Gaspésia obtained an order declaring that the company was subject to the provisions of the *CCAA*, that Ernst & Young Inc was appointed as monitor, and also offered certain relief to offer Gaspésia time to prepare a plan of compromise or arrangement. During the process the three directors of Gaspésia resigned, which event changed the role of the monitor. The monitor requested that it be allowed to act in the place of the board of directors for this matter and to represent Gaspésia in litigation before court.

The Superior Court of Quebec held that it is not excluded that proceedings under the *CCAA* can result in the liquidation of the debtor's assets, but this is only possible in exceptional and appropriate circumstances. [32]

In 2008, the British Columbia Court of Appeal appeared, in *obiter*, to cast further doubt about the possibility of liquidation conducted under the *CCAA* in *Cliffs Over Maple Bay*:

> I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. [33]

This line of reasoning was picked up by the Supreme Court in the above discussed 2010 decision of *Century Services*, [34] marking the last time the purpose of the Act was directly addressed on appeal. [35] Noteworthy, the *Century Services* decision was rendered on facts that occurred prior to the 2009 *CCAA* amendments and the enactment of section 36.

2. — The Case Law Since the 2009 *CCAA* Amendments

Comprehensive changes made to the *CCAA* in 2009 brought with them the addition of section 36, which now permits the sale of assets outside the ordinary course of business subject to court authorization. As nothing in this section requires the filing of a plan or a continuing entity as a condition for court's approval, courts across the nation ruled that the court has the power to allow the sale of substantially all of the debtors' assets in the absence of a plan. Following the 2009 amendments, the trend towards liquidating *CCAA*s picked up.

In 2010, Alberta's Court of Queen's Bench granted an initial order under the *CCAA* with respect to Fairmont Resort Properties Ltd, Lake Okanagan Resort Vacation (2001) Ltd, Lake Okanagan Resort (2001) Ltd and LL Developments Ltd (the "Fairmont Group"). [36] The Fairmont Group's operations were able to continue under *CCAA* protection from the date of the initial by taking certain key measures.

FRPL Finance Ltd ("FRPL") and a related corporation were major secured creditors of the Fairmont Group, and supported the *CCAA* proceedings. FRPL had issued bonds to many individual investors in order to provide capital to the group. The capital raised by FRPL, which amounted to approximately $41.5 million, was loaned to the Fairmont Group between 2005 and 2007.

On 15 April 2010, in proceedings linked to the *CCAA* process, FRPL applied for a final order in respect of a plan of arrangement pursuant to section 193 of the *Business Corporations Act*, RSA 2000, c B-9. At a bondholder meeting, FRPL proposed a reorganization plan which included the options available for recovery of FRPL's loans to the Fairmont Group.

Under the proposed plan, bondholders would exchange their bonds for trust units in the newly established Northwynd REIT. Northwynd REIT would acquire the Fairmont Group loans and security interest through a wholly-owned limited partnership, Northwynd Limited Partnership ("Northwynd"). The limited partnership would then take steps under the security to acquire ownership and control of the Fairmont Group assets.

Roughly 60 to 63% of total bondholders were represented at the meeting and a vast majority of voting bondholders voted in favour of the proposed arrangement. Justice Romaine found that the statutory procedures had been met, the application had been put forward in good faith, the arrangement had a valid business purpose and, on the basis of the strong bondholder support and the lack of opposition, the plan was fair and reasonable.

After being assigned the secured debt amounting to approximately $52 million, Northwynd applied for an order under the *CCAA* proceedings approving the acceptance by Fairmont Group of its offer to purchase all of the assets of the Fairmont Group in consideration for the discharge of the DIP financing and the crediting of $43.8 million against the secured debt owed to FRPL.

The sale of the assets under the *CCAA* proceedings was allowed. Citing *Anvil*, [37] Justice Romaine stated that "Farley, J. noted that the *CCAA* may be used to effect a sale or liquidation of a company in appropriate circumstances, most particularly where to do so would 'maximize the value of the stakeholders' pie'". [38] Justice Romaine also noted that, while the alternative of

selling the assets through a receivership would be commercially equivalent, approval pursuant to the *CCAA* proceedings would be more efficient. [39]

Northwynd's plan proposed two options to bondholders: either continue under the existing *CCAA* proceedings or through the termination of the proceedings and the appointment of a receiver. Northwynd submitted that the most time-efficient and cost-effective method of proceeding was the sale pursuant to the *CCAA* proceedings. On the contrary, monitor Ernst & Young submitted that "the potential of achieving a sale price for the secured assets greater than the offer was very low and that the costs of a sales process would be significant," thus concluding that neither alternative would improve the return of creditors.

Based on precedents, Justice Romaine affirmed that a sale of substantially all of the assets of a debtor company is permitted in a *CCAA* proceeding pursuant to s 36 of the *CCAA* if certain statutory criteria are met and, in accordance with previous authority, if such a sale is consistent with the purpose and policy of the *CCAA* and in the best interests of creditors generally. [40]

Justice Romaine went on to cite Brenner CJ in *Pope & Talbot*:

> The decision by courts to extend the use of the CCAA to a liquidation is based on a recognition of the wider interests at stake in such a proceeding. **The purpose of a liquidating CCAA where the assets are to be sold on an operating basis, is to fairly have regard for the interests of not only the creditors and the stakeholders of the petitioner, but also the interests of employees, suppliers and others who will be affected by a complete shutdown. So provided that the objective is to dispose of assets on an operating basis, then even though it is a liquidation**, the exercise is not designed to effect a recovery for solely the secured lenders as submitted by Canfor. Clearly a continuation of operation will benefit a wider constituency. [41]
>
> [Emphasis added.]

Justice Romaine, pitting *BIA* receivership against *CCAA* as proper forum to effectuate a liquidation, relied heavily on the fact that the liquidating *CCAA* was aimed at preserving the going concern business of the insolvent corporation, thus finding comfort in the historical objective of the *CCAA*: to preserve going concern business while avoiding the dire impact on a variety of stakeholders resulting from the shutdown and pure liquidation of same.

Noting that s 36 of the *CCAA* does not require that a plan be filed as a condition of court approval or there be a continuing entity after liquidation, Justice Romaine concluded that it made both practical and commercial sense to allow the sale process to take place under the existing *CCAA* proceedings. In the alternative, a bankruptcy would have been less efficient and would have jeopardized the going concern business, to the detriment of all stakeholders. [42]

More recently in *Bloom Lake* (2017), [43] Justice Hamilton, then at the Superior Court of Quebec, recognized once more that liquidating *CCAA* can serve a legitimate purpose but justly ruled that creditors should have analogous entitlements in liquidations under the *CCAA* and the *BIA*. Otherwise, the debtor or creditors can choose liquidation under the *CCAA* in order to avoid their responsibilities under the *BIA*. [44]

In *Bloom Lake*, the debtors, Wabush Iron Co Limited and Wabush Resources lnc and the *mises-en-cause* Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *CCAA*. The Wabush CCAA Parties had two pension plans for their employees governed by the *Newfoundland and Labrador Pension Benefit Act* ("NLPBA"). Therein, the monitor filed a motion seeking direction with respect to the priority's order of the debts. The purpose of this decision was to determine the preliminary question of whether the Court must defer to the Supreme Court of Newfoundland and Labrador for the application of certain rules concerning trusts and security interests under the NLPBA. Furthermore, the Court responded to the key issue of whether "the *CCAA* proceedings themselves, or some event within the *CCAA* proceedings, constitute a liquidation, assignment or bankruptcy" of the employer.

Recognizing its jurisdiction to interpret the provisions of NLPBA in the context of this *CCAA* proceeding, the Court concluded that this was a liquidating *CCAA* at the outset, which triggered the application of the deemed trusts under the federal *Pension Benefits Standards Act* and the NLPBA. To this end, the Court noted:

- Liquidation regime under Part XVIII of the *Canada Business Corporations Act* is only available to corporations that are solvent. [45]

- The debtor in a *CCAA* proceeding remains in possession of its assets and this is sufficient to meet the requirement of the estate in liquidation, assignment or bankruptcy. [46]

- The employer should not be allowed to avoid the priority of the deemed trust by choosing to liquidate under *CCAA* rather than the *BIA*. [47]

> [160] It is clear in the present matter that the Wabush CCAA parties have liquidated their assets. With the sale of the Wabush mine in June, the Wabush CCAA parties have now sold all or substantially all of their assets. However, they did not institute formal liquidation proceedings. **They proceeded instead under the CCAA with what has come to be known as a "liquidating CCAA" [...]** [48]
>
> [174] **The Court notes that there is nothing in any way pejorative about qualifying the CCAA as a liquidating CCAA. That is a legitimate and increasingly frequent use of CCAA proceedings. However, a liquidating CCAA should be more analogous to a BIA proceeding. One of the consequences is that the deemed trusts should be triggered.** [49]
>
> [References omitted -- Emphasis added.]

In 2014, Justice Dumas in *Lac Mégantic* insisted that the question as to whether liquidations are allowed under the *CCAA* remains an open one, as there has been no recent decision from a court of appeal on this matter in Canada, but concluded that liquidating *CCAA*s were possible, on a case-by-case basis. [50]

More recently in 2019, the same Justice Dumas rendered a decision in the matter of *MPECO Construction* [51] denying a motion seeking extension of the stay of proceedings on the basis that there were no prospect for a plan of arrangement. Justice Dumas did not cast a doubt on the possibility for an insolvent corporation to liquidate its assets under a *CCAA* process. Rather, Justice Dumas questioned whether the *CCAA* was the proper forum to allow for such a liquidation exercise to be conducted to the extent that there were no reasonable grounds suggesting that such a liquidation would lead to the preservation of the going concern and that the proceeds of such an exercise could lead to the filing of a plan of arrangement being submitted to the creditors:

> [34] The objective of the CCAA is embedded in its title.
>
> [35] The objective of the Act is to allow for a struggling company to present a plan of arrangement to its creditors with the ultimate objective to restructure its business. (...)
>
> [44] That a liquidation of a debtor's assets is possible prior to the filing of a plan of arrangement is not in litigation. Courts will exercise their discretion in this regard on a case-by-case basis. **That said, one must keep in mind that the debtor's request and acts under the CCAA should lead to the filing of a plan of arrangement submitted to the creditors**.
>
> [45] Proceedings under the CCAA ought not to be used to short circuit realization process under the Bankruptcy and Insolvency Act. [52]

[Our translation -- Emphasis added.]

Liquidating *CCAA* is no longer a trend. It is justly considered an efficient tool to facilitate the transfer of businesses on a going concern basis. So long as the liquidation conducted under a *CCAA* process will enhance the prospect of maintaining the going concern of the business(es) operated by an insolvent corporation, even if this going concern may ultimately be continued under a new entity/structure, courts are now relying on section 36 of the *CCAA* to allow such liquidation to proceed. [53] This is in line with the historical purpose and objective of the *CCAA*.

Prime evidence of the fact that liquidating *CCAA*s are now well accepted are Sears Canada Inc's *CCAA* proceedings, which began in 2017. In a span of less than two years, the monitor was capable of monetizing substantially all of the tangible assets of these entities while temporarily maintaining certain operations and allowing for the transfer of certain businesses formally operated under the banner of Sears, hence maximizing chances that going concern preservation is maintained. [54]

On a final note, it is interesting to note that Parliament's recent amendments to the *CCAA* via Bill C-97, which will add section 11.001 to the *CCAA* requiring initial orders to "be limited to relief that is reasonably necessary *for the continued operations of the debtor company in the ordinary course of business during that period*" [emphasis added]. [55] Buried deep within the government's budget, it remains to be seen how this new provision will be interpreted by the courts and if it will serve to reaffirm the primary and historical purpose of the *CCAA*, which is to enable a restructuring of an insolvent corporation's business for the benefit of a variety of stakeholders.

Following the guidance from the above decisions, in recent years liquidations under the *CCAA* have been effected when the maintenance of the debtors' business as a going concern was shown to increase the value for stakeholders and when the complexity of the matter justified the flexibility provided under the *CCAA*, always with a view to preserve the going concern of a business operated by an insolvent corporation. With the objective of avoiding or limiting the negative impact on a variety of stakeholders that the alternative of a liquidation on a piecemeal basis would bring. This is in line with the historical objective and very purpose of the *CCAA*.

That said, who should be at the helm of a liquidating *CCAA*? In coming to accept liquidating *CCAA*s, Courts have insisted on the fact that it was for the benefit of all stakeholders of the insolvent corporation, in some cases plainly shrugging at the idea of a liquidating *CCAA*s that would serve no more than to reimburse the secured creditor. Can the debtor-driven *CCAA* process be continued or even initiated by a secured creditor? This is the question that next section seeks to address.

IV. — CREDITOR-DRIVEN *CCAA*s AND ENHANCED POWERS FOR THE MONITOR

1. — Initiating the *CCAA* Process

The *CCAA* does not prohibit creditors from bringing forth an application for an initial order. Nonetheless, given that the process is typically driven by the debtor, the courts have historically been reluctant to grant an application made by creditors. While multiple cases in recent years have allowed the creditors to initiate the *CCAA* process and enhanced the role of the monitor, *CCAA* remains first and foremost debtor-driven.

In *Crystallex* (2012), a decision which was unanimously confirmed by the Ontario Court of Appeal, Justice Newbould held that when the court is presented with competing *CCAA* applications from the debtor and from a creditor, the key consideration is which application offers the best chance for a fair balancing of the interests of all stakeholders. [56] A creditor should not be able to prevent a debtor company from undertaking restructuring efforts under the *CCAA* to maximize recovery for the benefit of all stakeholders unless it can be shown that the company's efforts are "doomed to fail."

Crystallex is a mining company whose principal focus was the exploration and development of gold projects in Venezuela. In 2004, the company issued nearly $100 million worth of senior unsecured notes due on 23 December 2011. On 22 December 2011, one day prior to the maturity of the notes, Crystallex and the noteholders filed competing *CCAA* applications. The noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be

undertaken, and if, or to the extent, the equity proceeds were insufficient to pay out the noteholders, the notes would be converted to equity.

Crystallex concurrently sought authority to file a plan of compromise and arrangement, the authority to continue to pursue an arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management. In coming to the aforementioned conclusions, Justice Newbould wrote:

> [20] The CCAA is intended to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company **realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA**. The benefit to a debtor company could, depending upon the circumstances, mean a benefit to its shareholders.
>
> [21] It is clear that the CCAA serves the interests of a broad constituency of investors, creditors and employees. Thus it is appropriate at this stage to consider the interests of the shareholders of Crystallex. [...]
>
> [26] In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. **To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.**
>
> [27] The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. **The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.** [57]
>
> [References omitted -- Emphasis added.]

In *Semi-Tech* (1999), [58] the debtor ("Semi-Tech") was a holding company and its common shares traded on the Toronto Stock Exchange. Enterprise Capital Management Inc ("Enterprise"), on its own behalf and on behalf of funds managed by it, and with the support of other holders of senior secured notes, applied for an initial order under the *CCAA* and sought orders in order to restrain the management and control of Semi-Tech in its operations by, for example, prohibiting Semi-Tech to make any payments to senior officers and directors and altering any material contracts. Agreeing that the Enterprise would be able to establish that Semi-Tech had breached certain covenants under the trust indenture, Justice Ground noted that due to lack of appropriate notices, there had been no event of default as defined in the agreement. [59]

After mentioning the remedial purpose of the *CCAA*, and noting that an application by creditors is a rarity, Justice Ground held that in the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries, it would be inappropriate to make any order pursuant to the *CCAA*:

> [23] It is usual on initial applications under the *CCAA* for the applicant to submit to the Court at least a general outline of the type of plan of compromise and arrangement between the company and its creditors proposed by the applicant. **The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case**. Enterprise

> has submitted that it is not in a position to submit an outline of a plan to the Court in that it lacks sufficient information and has been unable to obtain such information from Semi-Tech. Enterprise points out that, in the usual case, the application is brought by the company, the company has all the necessary information at hand and has usually had the assistance of a firm which is the proposed monitor and which has worked with the company in preparing an outline of a plan. [...]
>
> [25] **In the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the *CCAA*. If the Noteholders intend simply to liquidate the assets of Semi-Tech** and distribute the proceeds, it would appear that **they could do so** by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes **by the appointment of a receiver or otherwise**. [60]
>
> [Emphasis added.]

In *SM Group* (2018), [61] the Court was presented with competing *CCAA* applications from management and secured creditors. The Quebec Superior Court chose to side with the secured creditors given the evidence submitted in respect to the loss of confidence in the management of the insolvent corporation. Serious allegations about the influence of the former president, and current main shareholder, caught in fraudulent criminal accusations and recent payments made to his benefit by management prior to the filing led the Court to side with the secured creditors' arguments that the appointment of a chief restructuring officer with powers akin to a *BIA* receiver was the best alternative to preserve going concern value of the SM Group, for the benefit of all stakeholders, including employees.

In *Taxelco* (2019), [62] the Court was presented with a motion seeking the issuance of an initial order by the main secured creditor, the National Bank of Canada, with a view to implement a SISP and preserve the going concern value of the business, while granting extended powers to the monitor, acting in lieu of management. The Court accepted the Bank's arguments, which focused on the fact that management had refused to file a motion to issue an initial order and that the directors and officers had announced their intention to resign.

In *Sural* (2019), [63] the Court was presented with a motion seeking the issuance of an initial order while granting enhanced powers to the monitor, akin to those of a *BIA* receiver, to allow for the company to implement a SISP on 28 June 2019. The motion was presented by the company and supported by its management.

In *Miniso*, the most recent decision rendered on the subject, the secured creditors of the debtor companies initiated the proceedings under the *CCAA*, and an initial order was granted on 12 July 2019. The British Columbia Supreme Court confirmed the standing for a creditor to commence *CCAA* proceedings while granting enhanced powers to the monitor: [64]

> The **commencement of *CCAA* proceedings is a proper exercise of creditors' rights** where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario. [...]
>
> A&M will have **enhanced powers as Monitor** to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group ... [65]
>
> [Emphasis added.]

That being said, contrary to *Semi-Tech* and *Crystallex* cases, the *Miniso* case proceeded on an uncontested basis and management of the insolvent debtor company did not oppose the initiation of the *CCAA* process by the secured creditor, who was also providing interim financing to allow the corporation to continue its operations and preserve value for all stakeholders:

> 52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. **The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders**, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.
>
> 53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. **However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here**. [66]
>
> [Emphasis added.]

Following the guidance from *Crystallex*, removing *ab initio* the management of an insolvent corporation from the driver seat in a restructuring process under *CCAA* in favour of the secured creditors ought to be considered as an extraordinary measure, and to address serious concerns with respect to the incapacity and/or inability of management to conduct such a process. It requires a demonstration that management has no plan or that such a plan is "doomed to fail," or that management has resigned, is unfit or conflicted to conduct such a process for the benefit of all stakeholders.

To the extent that management can demonstrate that it is focusing its efforts on exploring restructuring paths and that such efforts may reasonably lead to the restructuring of the insolvent corporation's business, preserving the going concern value of the business, for the benefit of all stakeholders, including but not limited to the secured creditors, management should not be stripped of its powers and duties lightly. Besides, we must be mindful that the *CCAA* provides at section 11.5 for the proper mechanism to remove a director that "is unreasonably impairing the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

We also find comfort in the reasoning in *Semi-Tech*, which reminds us that the *CCAA* is not to be considered as a mechanism which allows a secured creditor to liquidate the assets, unless it can be demonstrated that the proposed restructuring efforts will lead to the going concern value preservation, referring to the *BIA* receivership for such an operation to be conducted. [67] The objective sought pursuant to the *CCAA* proceedings thus remaining to favour restructuring while preserving going concern value for all stakeholders involved.

2. — Continuing the *CCAA* Process and Enhancing the Role of the Monitor

Courts have also allowed *CCAA* process initiated by the company, under certain circumstances, to be continued by the secured creditors by granting extended powers to the monitor, akin to a *BIA* receiver.

In the matter of *BioAmber*, [68] a Quebec-based company operating a succinic acid production facility in Sarnia (Ontario), the Court issued an initial order for the purpose of, *inter alia*, allowing the company to implement a SISP. When it became obvious that the SISP would not lead to the desired transaction and that management was involved/associated with a potential bidder, the Court at the request of secured creditors, issued an order granting additional powers to the monitor, akin to those of a *BIA* receiver.

In *ILTA Grain*, [69] a British Columbia-based grain producer, filed for protection under the *CCAA* on 7 July 2019. It was the company, and its management, that filed for the issuance of the Initial Order.

In its first report, filed merely eight days after the *CCAA* proceedings commenced, the monitor reported that it had become clear that certain members of the company's management did not support the company's current strategy of undertaking a SISP and pursuing transactions that may lead to the sale of the company's business and assets. [70] The Court, at the request of the company,

and likely pursuant to a strong suggestion from the secured creditors, issued an order to enhance powers of the monitor, but not to the extent of what would be typical of a *BIA* receiver.

Essentially, to ensure that the secured creditors and the monitor have confidence in the company's management, the order granted the monitor with specific recommendation, providing incremental powers while giving control powers over the receipt and disbursements to the monitor. [71]

While the role of the monitor has been expanded in various files, the Quebec Court of Appeal in *Aquadis* [72] recently brought into question the limits of such expanded role in file driven *de facto* by the creditors. Notably, the Court highlighted that enhancing the powers of the monitor must not interfere with its role and neutrality. In that file, the debtor 9323-7055 Québec inc (formerly Aquadis International Inc, "Aquadis") was a wholesale seller of plumbing fixtures. Aquadis, however, suffered serious financial difficulties when hundreds of defective faucets supplied by it failed, causing significant damage to property owners whose insurers ultimately filed subrogated claims against Aquadis. The value of those claims amounted to nearly $22 million and the monitor estimated the value of potential future claims at an additional $25 million.

According to the monitor's first and second reports, Aquadis significantly reduced its operations in 2014, completely liquidated and ceased operations in 2015. As of the date of the initial order, Aquadis had no realizable assets and the near totality of its liabilities were the litigious claims of the insurers.

To maximize the value of Aquadis' assets, in December 2016, the monitor instituted legal proceedings against the Taiwanese manufacturers and distributor and their insurers. At the same time, the monitor was negotiating with the Canadian distributors and retailers. On 20 June 2018, the supervising judge authorized settlements between the monitor and the Taiwanese distributor and its insurers in the total amount of $7.2 million.

The monitor filed a plan of arrangement on 8 January 2019, and amended the plan at the meeting of the creditors on 25 April 2019. According to the amended plan, the monitor was empowered to institute legal proceedings on behalf of Aquadis' creditors against the other persons involved in the manufacture, distribution or sale of the defective faucets. It was approved by the Superior Court on 4 July 2019, over the objections of the retailers that a plan of arrangement cannot provide for the institution of legal proceedings by the monitor, on behalf of the creditors, against third parties in connection with rights that belong to the creditors and not to the debtor company. [73]

On 20 August 2019, Justice Hamilton of the Quebec Court of Appeal granted the retailer's motions for leave to appeal, noting that the matter at hand goes to the serious issue regarding the role and neutrality of the monitor and the scope of the powers that it can obtain:

> [11] The issue is not frivolous. There are a number of *CCAA* cases where the debtor is a party to significant litigation in which there are a number of third parties who may be solidarily liable with the debtor to its creditors. In those cases, in order to reach a global settlement of all of the litigation relating to the debtor, the plan may allow third parties to contribute to a litigation pool with the debtor for the benefit of the creditors and to obtain a release. However, this case goes one step further and authorizes the Monitor to sue, on behalf of the creditors, third parties who decline to contribute to the litigation pool. There does not appear to be any precedent on this issue.
>
> [12] The issue is crucial to the file because the proceedings by the Monitor against the Canadian distributors and retailers, including the Petitioners, are a key feature of the Amended Plan and the validity of those proceedings goes to the acceptance of the plan by the creditors and the approval of the plan by the judge.
>
> [13] **It is also important to the practice because it goes to the serious issue as to the role and neutrality of the monitor in *CCAA* proceedings and the scope of the powers that can be granted to a monitor**. More specifically, the issue of whether the court can approve a plan that provides for the monitor instituting legal proceedings, on behalf of the creditors, against third parties who do not owe anything to the debtor is a novel

> issue and is of particular relevance in *CCAA* proceedings used to reach a global settlement of significant litigation involving third party co-defendants. [74]
>
> [References omitted -- Emphasis added.]

3. — Filing of a *CCAA* Plan of Arrangement

More rarely, courts have also allowed secured creditors to directly file a plan of arrangement and have same submitted to other creditors.

In 2001, the Superior Court of Ontario in *Anvil* ruled that a plan submitted by the secured creditors through an interim receiver [75] appointed by them as a result of all directors and officers resigning was fair and reasonable even though it offered nothing to unsecured creditors. In coming to that decision the Court insisted on the fact that the value of the company's assets was insufficient to yield any recovery to unsecured creditors and that it is not unreasonable for a court in such circumstances to sanction a plan which is directed solely at secured creditors. [76]

Anvil Range Mining Corporation ("Anvil") was the owner of a lead and zinc mine in the Yukon Territory. In 1990, Anvil applied for and received protection from its creditors under the *CCAA*. In 1998, Deloitte & Touche Inc had been appointed as the Interim Receiver ("IR") as a result of management resigning.

The hearing dealt with the application by the IR for the sanctioning of a plan of arrangement. The plan dealt with a series of complex priority disputes both within creditor classes and among creditor classes, as well as the allocation of funds in the IR's possession. The plan had been unanimously approved by the three groups of creditors in 2001. The unsecured creditors and the major shareholders objected to the plan because they asserted that the secured debt was lower than claimed and that the value of Anvil's assets was higher than suggested.

Justice Farley approved the plan, noting that it complied with all the statutory requirements and it was also fair and reasonable. It was determined that the IR exercised its judgment in a reasoned, practical and functional way.

The mere fact that the opponents of the plan were advocating an alternative did not imply that the IR had lost its neutrality. In fact, the alternatives proposed were unrealistic. Additionally, the plan was deemed fair because the secured claims were far in excess of the value of the assets.

> [11] While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company -- or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. **Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.**
>
> [12] The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A **Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors.** See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), supra at pp. 513-8; *Re Philip Services Corp.*, [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Re Olympia & York* (1993), *supra* at pp. 508, 517-8. [...]

> [18] In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship. [...]
>
> [20] Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd*., [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. **In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR**. [77]
>
> [Emphasis added.]

The reasoning of Justice Farley was soon reaffirmed by the Ontario Court of Appeal in *Bob-Lo Island*. [78] On 25 June 2004, an initial order was authorized against the debtor companies and on 22 November 2004, the plan of arrangement under the *CCAA* was sanctioned by the Court. Mr Randy Oram, a shareholder of one of the debtor companies and also an unsecured creditor, requested a leave to appeal of the sanctioned order. His main objection was that "the plan of arrangement is a secured-creditor-led plan that excludes the unsecured creditors from any realistic prospect of recovery, without requiring the secured creditors to go through the formal process of enforcing their security and without exposing the secured assets to the market." [79] Accordingly, the assets of the debtor company were to be disposed and the debtor company would not continue as a going concern.

The Ontario Court of Appeal dismissed the motion for leave to appeal. Concluding that Mr Oram had failed to establish an economic interest in the assets, the Court also noted that while there may be merit to the issue that the plan was contrary to the purposes of *CCAA*, Mr Oram had also failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case:

> [27] In this case, Randy Oram submits that there are serious and arguable grounds for suggesting that, by sanctioning Amico's Plan and granting a vesting order to a non-arm's length purchaser, the motion judge erred in the application of the legal principles for determining if a *CCAA* plan is fair and reasonable. In particular, the Randy Oram contends that the plan:
>
> **i)** is contrary to the broad, remedial purpose of the *CCAA*, namely to give debtor companies an opportunity to find a way out of financial difficulties short of other drastic remedies;
>
> **ii)** is a proposal by the secured creditors for the exclusive benefit of the secured creditors, designed to liquidate the property of the debtor companies **without regard to the interests** of the debtor companies, their lien claimants, **unsecured creditors** or shareholders;
>
> **iii)** does not provide for the continued operation of the debtor companies as going concerns;
>
> **iv)** does not provide for the marketing and sale of the property to maximize its value for all of the debtor companies' stakeholders;
>
> **v) rather than leaving unsecured creditors as an unaffected class, releases their claims against the property, the debtor companies, Amico, and the purchaser...**
>
> [30] [T]his is not the first time a secured-creditor-led plan, which operates exclusively for the benefit of secured creditors and under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern, has received court approval: see *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (C.A.). (See also the discussion of the purposes of the *CCAA* in the cases referred to in *Re Anvil Range Mining Corp.*, *supra* at para. 11 (S.C.J.)).

> [31] **Moreover, the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement**: *Re Anvil Range Mining Corp.*, *supra* at para. 31 (C.A.). [80]
>
> [Emphasis added.]

Bob-Lo Island and *Anvil*, while cautious in their approach, represented an arguably controversial shift in the evolution of the role of secured creditors under the *CCAA* and the use of the statute as a flexible and advantageous restructuring tool for secured creditors. [81]

V. — CONCLUSION

We can appreciate from the case law that the *CCAA* remains largely a debtor-driven process and that the monitor is to be considered, in the vast majority of cases, as the supervisory agent safeguarding the interest of a variety of stakeholders. This is in line with the historical, and dare we say, societal objective pursued by the legislator in enacting the *CCAA*.

The *CCAA* was enacted to offer an alternative to the liquidation path offered by the *BIA*; to counter the devastating consequences on a variety of stakeholders when a corporation fails and ceases its operations; and to preserve the going concern value of a business for the good of the greater pool of stakeholders. Although we have come to accept "liquidating *CCAA*s," the end result is usually a transfer of the assets required for a business to be continued, albeit under a new structure. Arguably, this is also in line with the *CCAA*'s objective, which is focused on preserving going concern operations of a struggling corporation.

To remove management from the helm of this restructuring process and extend the powers of the monitor accordingly is a measure that courts have cautiously limited to exceptional circumstances. In addition to adducing evidence that the *CCAA* process is likely to preserve going concern value of the business, it must be demonstrated to the court that either (i) management has resigned, leaving no directors and officers in place, (ii) management is unfit to conduct a restructuring process in a manner that would be in the best interest of all stakeholders, (iii) any potential restructuring path available would be doomed to fail, and/or that (iv) management is conflicted, notably because it is participating in the SISP under a *CCAA*.

Under those circumstances, courts have allowed the secured creditors to play a more active role in the restructuring process under a *CCAA*, be it through the appointment of a Chief Restructuring Officer, an interim receiver, or by the enhancement of the monitor's power to equate those of a *BIA* receiver.

As we have stated, the monitor's traditional role was not intended to exceed supervisory powers. This is also consistent with the fact that the monitor does not possess the required skill set to run a business on a long term basis -- management does. This is why we believe that courts have and continue to exercise caution in all such cases in order to ensure that the powers afforded to the monitor are absolutely necessary and justified by specific and special circumstances.

Footnotes

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

2 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

3 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 CBR (6th) 1, 391 DLR (4th) 383, [2016] 1 WWR 423, 477 NR 26, 467 Sask R 1, 651 WAC 1 (SCC) [*Lemare Lake*]. In *Lemare Lake*, the Supreme Court stated that delays to exercise secured rights provided by a provincial statute cannot be disregarded when appointing a receiver. The evidence showed a narrow purpose for s 243 of the *BIA*. It was determined

that a secured creditor, wishing to enforce its security against farm land, needed to wait 150 days under the provincial law, rather than the ten days imposed by the federal law: "General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation": *Lemare Lake* at para 68.

4 *Companies' Creditors Arrangement Act*, SC 1933, c 36.

5 *House of Commons Debates*, 17-4 (20 April 1933) at 4090-4091 (Hon CH Cahan).

6 *Senate Debates*, 17-4 (9 May 1933) at 474 (Rt Hon A Meighen).

7 Virginia Erica Torrie, *Protagonists of company reorganization: A history of Companies' Creditors Arrangement Act (Canada) and the role of large secured creditors* (PhD Thesis, University of Kent Law School, 2015) at 1.

8 *Ibid*.

9 *Farmers' Creditors Arrangement Act*, SC 1934, c 53.

10 *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75, 1934 CarswellNat 1, 16 CBR 1 (SCC); *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359, 1936 CarswellNat 1, [1936] 3 DLR 610 (SCC), affirmed [1937] AC 391, [1937] 1 DLR 695, 1937 CarswellNat 1, 18 CBR 217, [1937] 1 WWR 320 (Jud Com of Privy Coun).

11 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution*].

12 Torrie, *supra* note 7 at 2-3.

13 Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2005* (Toronto: Carswell 2006) at 481.

14 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 SCR 379, 12 BCLR (5th) 1, 72 CBR (5th) 170, 326 DLR (4th) 577, [2011] 2 WWR 383, 296 BCAC 1, 2011 DTC 5006 (Eng), [2010] GSTC 186, 2011 GTC 2006 (Eng), 409 NR 201, 503 WAC 1, [2010] SCJ No 60 (SCC) at paras 15-18 [*Century Services*]; see also *Chef Ready Foods Ltd v HongKong Bank of Canada* (1990), 51 BCLR (2d) 84, 1990 CarswellBC 394, 4 CBR (3d) 311, [1991] 2 WWR 136, [1990] BCJ No 2384 (BCCA) at paras 10, 22 [*Hongkong Bank*]: "The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business": *Hongkong Bank* at para 10.

15 *Century Services*, *ibid* at paras 59-60.

16 Senate, 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* (November 2003) (Chair: Hon Richard H Kroft) [Senate Report]: "From the perspective of fairness, the Committee too believes that the same priority rules should govern the distribution of the proceeds of realization of the debtor's assets, regardless of the insolvency legislation under which proceedings are occurring. For this reason, the Committee recommends that: The *Companies' Creditors Arrangement Act* be amended to incorporate the priority rules in the *Bankruptcy and Insolvency Act*" at 153.

17 Janis Sarra, "Reflections on a Decade of Financing Insolvency Restructurings", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 63.

18 For an in-depth comparison of liquidations under the *CCAA* and *BIA*, see Michelle Grant & Tevia R M Jeffries, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014).

19 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 9; *Lemare Lake*, *supra* note 3.

20 Senate Report, *supra* note 16, at 176-177.

21 Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone Awry?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) at 88.

22 Torrie, *supra* note 7 at 313, 315.

23 *Ibid* at 288.

24 *Ibid* at 5.

25 David Bish, "Judicial Discretion in Insolvency Law" (2018) 7 *J Insolvency Inst Canada* 9.

26 *Hongkong Bank*, *supra* note 14 at para 10.

27 *Banque Laurentienne du Canada c Groupe Bovac Ltée*, EYB 1991-63766, 1991 CarswellQue 39, 9 CBR (3d) 248, 44 QAC 19, [1991] RL 593, [1991] JQ No 2509 (CA Que) at para 26.

28 *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CarswellOnt 3346, 72 OTC 99, [1998] OJ No 3306 (Ont Gen Div [Commercial List]) at para 45, leave to appeal to ONCA refused (1998), 32 CBR (4th) 21, 1998 CarswellOnt 5967, [1998] OJ No 6562 (Ont CA).

29 *Re Fracmaster Ltd*, 1999 ABQB 379, 11 CBR (4th) 204, 1999 CarswellAlta 461, 245 AR 102, [1999] AJ No 566 (Alta QB), affirmed 1999 ABCA 178, 1999 CarswellAlta 539, 244 AR 93, 11 CBR (4th) 230, 209 WAC 93, [1999] AJ No 675 (Alta CA) at paras 40-43.

30 *Royal Bank v Fracmaster Ltd*, 1999 ABCA 178, 1999 CarswellAlta 539, 244 AR 93, 11 CBR (4th) 230, 209 WAC 93, [1999] AJ No 675 (Alta CA) at para 16.

31 *Re Papiers Gaspésia Inc (Faillite)*, 2004 CanLII 41522, 2004 CarswellQue 4113, REJB 2004-80394 (CS Que), leave to appeal refused 2004 CarswellQue 10014, REJB 2004-81503, 9 CBR (5th) 103, 42 CLR (3d) 137, [2004] JQ No 13392 (CA Que) [*Papiers Gaspésia*].

32 *Ibid* at paras 50-54.

33 *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, 2008 CarswellBC 1758, 83 BCLR (4th) 214, 46 CBR (5th) 7, 296 DLR (4th) 577, [2008] 10 WWR 575, 258 BCAC 187, 434 WAC 187, [2008] BCJ No 1587 (BCCA) at para 32.

34 *Century Services*, *supra* note 14.

35 As noted in *Montreal, Maine & Atlantic City Canada Co. (Arrangement relatif à)*, 2014 QCCS 737, 2014 CarswellQue 1559, EYB 2014-233970 (Que Bktcy) [*Lac Mégantic*].

36 *Re Fairmont Resort Properties Ltd*, 2012 ABQB 39, 532 AR 209 (Alta QB) at para 26 [*Fairmont*].

37 *Re Anvil Range Mining Corp*, 2001 CarswellOnt 1325, [2001] OJ No 1453, 25 CBR (4th) 1 (Ont SCJ [Commercial List]), affirmed on other grounds 2002 CarswellOnt 2254, [2002] OJ No 2606, 34 CBR (4th) 157 (Ont CA), additional reasons 2002 CarswellOnt 3687, 38 CBR (4th) 5, [2002] OJ No 4176 (Ont CA), leave to appeal refused 2003 CarswellOnt 730, 2003 CarswellOnt 731, 310 NR 200 (note), 180 OAC 399 (note) (SCC) [*Anvil*].

38 *Fairmont*, *supra* note 36 at para 17, citing *ibid* at para 11.

39 *Ibid* at para 20.

40 *Ibid* at para 26.

41 *Ibid* at para 22.

42 *Ibid* at para 30.

43 *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057, 2017 CarswellQue 7483, EYB 2017-284304, 52 CBR (6th) 45, 35 CCPB (2nd) 220 (CS Que), varied 2017 QCCA 1828, 2017 CarswellQue 10159, EYB 2017-287116, 54 CBR (6th) 255, 38 CCPB (2nd) 1 (CA Que), application/notice of appeal 2018 CarswellQue 1574 (SCC) [*Bloom Lake*].

44 *Ibid* at para 164.

45 *Ibid* at para 162.

46 *Ibid* at para 163.

47 *Ibid* at para 164.

48 *Ibid* at para 160.

49 *Ibid* at para 174.

50 *Lac Mégantic*, *supra* note 35 at paras 71, 104: "Bien que le soussigné aurait été porté à privilégier la thèse que la LACC et la LFI sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la LACC et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la LACC" at para 104.

51 *Arrangement de MPECO Construction Inc*, 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 CBR (6th) 87 (Que Bktcy) [*MPECO Construction*].

52 *Ibid* at paras 34-35, 44-45.

53 *Third Eye Capital Corporation v Ressources Dianor Inc*, 2019 ONCA 508, 2019 CarswellOnt 9683, 70 CBR (6th) 181, 435 DLR (4th) 416, 3 RPR (6th) 175 (Ont CA), additional reasons 2019 ONCA 667, 2019 CarswellOnt 13563 (Ont CA) at para 71.

54 *Re Sears Canada Inc*, Toronto, Ont SCJ [Commercial List] CV-17-11846-00CL.

55 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on 19 March 2019 and other measures,* 1st Sess, 42nd Parl (assented to 21 June 2019), SC 2019, c 29.

56 *Re Crystallex International Corp*, 2011 ONSC 7701, 2011 CarswellOnt 15034, 89 CBR (5th) 313 (Ont SCJ [Commercial List]) at para 26, affirmed 2012 ONCA 404, 2012 CarswellOnt 7329, 4 BLR (5th) 1, 91 CBR (5th) 207, 293 OAC 102 (Ont CA), additional reasons 2012 ONCA 527, 2012 CarswellOnt 9479 (Ont CA), leave to appeal refused 2012 CarswellOnt 11931, 2012 CarswellOnt 11932, 440 NR 395 (note), 303 OAC 398 (note), [2012] SCCA No. 254 (SCC) [*Crystallex*].

57 *Ibid* at paras 20-21, 26-27.

58 *Enterprise Capital Management Inc v Semi-Tech Corp*, [1999] OJ No 5865, 1999 CarswellOnt 2213, 10 CBR (4th) 133 (Ont SCJ [Commercial List]) [*Semi-Tech*].

59 *Ibid* at para 6.

60 *Ibid* at paras 23, 25.

61 *Re Le Groupe SMI Inc, et al* (24 August 2018), Montreal, Que SC 500-11-055122-184 [*SM Group*].

62 *Re Taxelco Inc, et al* (1 February 2019), Montreal, Que SC 500-11-055956-193 [*Taxelco*].

63 *Re Sural Inc, et al* (11 February 2019), Montreal, Que SC 500-11-056018-191 [*Sural*].

64 *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234, 2019 CarswellBC 2208, 71 CBR (6th) 250 (BCSC) at para 45 [*Miniso*].

65 *Ibid* at paras 47, 102.

66 *Ibid* at paras 52-53.

67 *Semi-Tech*, *supra* note 58 at para 25.

68 *Re BioAmber Canada Inc, et al* (31 July 2018), Montreal, Que SC 500-11-054564-188 [*BioAmber*].

69 *Re ILTA Grain Inc* (8 July 2019), Vancouver, BC SC S-197582 [*ILTA Grain*].

70 *Ibid* (16 July 2019) (Monitor's First Report).

71 *Ibid* (18 July 2019) (Order Made After Application).

72 *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)* (4 July 2019), Montreal, Que SC 500-11-049838-150, leave to appeal to QCCA granted (20 August 2019), Montreal, Que CA 500-09-028436-194, 500-09-028474-195, 500-09-028476-190 [*Aquadis*].

73 *Ibid* at paras 11-13.

74 *Ibid* at paras 11-13.

75 *Anvil*, *supra* note 37: "I would further point out that while secured creditors had the opportunity of filing a Plan, they did not so but rather they agreed amongst themselves that the authorized alternate, the IR, do so" at para 9.

76 *Ibid*.

77 *Ibid* at paras 11,12, 18, 20.

78 *Re 1078385 Ontario Ltd*, [2004] OJ No 6050, 2004 CarswellOnt 8034, 16 CBR (5th) 152, 206 OAC 17 (Ont CA) [*Bob-Lo Island*].

79 *Ibid* at para 3.

80 *Ibid* at paras 27, 30-31, 42.

81 *Caterpillar Financial Services v 360networks corporation et al*, 2007 BCCA 14, 2007 CarswellBC 29, 61 BCLR (4th) 334, 27 CBR (5th) 115, 279 DLR (4th) 701, 28 ETR (3d) 186, 235 BCAC 95, 10 PPSAC (3d) 311, 388 WAC 95, [2007] BCJ No 22 (BCCA) at para 46.

End of Document

TAB 16

Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N^o^ du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985,

[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to

[33] Si le législateur fédéral avait eu l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination, il aurait accordé à l'État une priorité applicable à la totalité des actifs du débiteur. Compte tenu de l'historique des dispositions législatives et des objectifs du processus de réorganisation, le fait que la priorité de l'État aux termes du par. 11.8(8) de la *LACC* soit limitée au bien contaminé et à certains biens liés m'amène à conclure qu'une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Aussi respectueux soient-ils des mesures prises par les organismes administratifs, les tribunaux sont tenus d'appliquer les règles générales.

[34] Contrairement à l'approche qui prévaut dans le contexte des procédures régies par la common law ou le droit civil, il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu (en common law, voir *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79, par. 17-18; en droit civil, voir les art. 1497, 1508 et 1513 du *Code civil du Québec*, L.Q. 1991, ch. 64). Ainsi, la définition générale de « réclamation » de la *LFI* englobe des réclamations éventuelles et *futures* qui seraient inexécutoires en common law ou en droit civil. En ce qui concerne les réclamations non liquidées, le tribunal chargé de l'application de la *LACC* a le même pouvoir d'évaluer leur montant qu'un tribunal saisi d'une affaire sous le régime de la common law ou du droit civil.

[35] C'est pour assurer l'équité entre les créanciers ainsi que, pour le débiteur, le caractère définitif de la procédure d'insolvabilité que la *LFI* et la *LACC* englobent un large éventail de réclamations. Dans le cadre de la liquidation d'une société, il est plus équitable de permettre au plus grand nombre possible de créanciers de participer au processus et de se partager le produit de la liquidation. Cela permet d'inclure les créanciers dont les réclamations ne sont pas venues à échéance lorsque le débiteur corporatif devient failli, et ainsi éviter que, ayant cessé ses activités, le débiteur ne puisse pas satisfaire à un jugement rendu en leur faveur. L'approche est quelque peu différente dans

ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

TAB 17

CITATION: Lydian International Limited (Re), 2019 ONSC 7473
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2019-12-24

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Applicants

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Elizabeth Pillon, Sanja Sopic,* and *Nicholas Avis*, for the Applicants

Pamela Huff, for Resource Capital Fund VI L.P.

Alan Merskey, for OSISKO Bermuda Limited

D.J. Miller, for Alvarez & Marsal Canada Inc. proposed Monitor

David Bish, for ORION Capital Management

Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

HEARD and DETERMINED: December 23, 2019

REASONS RELEASED: December 24, 2019

ENDORSEMENT

Introduction

[1] Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

[22] Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[23] Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

[24] Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[25] The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

[26] In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that

period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

[27] Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representativecounsel is required; and

(l) consultation and negotiation with key suppliers.

[28] This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

[29] Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

[30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

[42] I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

[43] The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

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

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

[50] The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

[52] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

[53] In *Jaguar Mining Inc., (Re)*, 2014 ONSC 494, 12 C.B.R. (6th) 290, I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

> (a) whether notice has been given to the secured creditors likely to be affected by the charge;
>
> (b) whether the amount is appropriate;
>
> (c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
>
> (d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

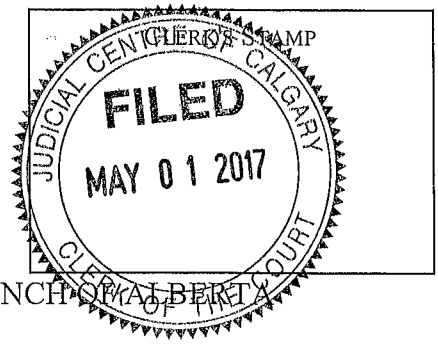
[54] Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

[55] The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

TAB 18

FORM 49
[RULE 13.19]



COURT FILE NUMBER	1701 – 05845
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF WALTON INTERNATIONAL GROUP INC., and the Applicants listed in Schedule "A"

DOCUMENT **CCAA INITIAL ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Chris Simard
Tel No.: 403-298-4485
Fax No.: 403-265-7219
Client File No. 41148.353

I hereby certify this to be a true copy of the original order
Dated this 1 day of May 2017
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: April 28, 2017

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Mme. Justice K.M. Horner

UPON the application of Walton International Group Inc. ("**WIGI**"), together with the entities listed in the attached **Schedule "A"** (collectively the "**Applicants**"), AND UPON having read the Originating Application, the Affidavit No. 1 of William K. Doherty, sworn on April 28, 2017 (the "**Doherty Affidavit No. 1**"), the Affidavit No. 2 of William K. Doherty, sworn on April 28, 2017 (the "**Doherty Affidavit No. 2**") and Confidential Exhibit "1" thereto, the consent of Ernst and Young ("**EY**") to act as Monitor and the Pre-Filing Report of EY, all filed; AND

UPON hearing counsel for the Applicants, and counsel for other interested parties; IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The need for service of the notice of application for this order is hereby dispensed with and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property; and

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to

retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order;

(d) be authorized to make inter-company transfers and advances to pay costs, expenses and amounts otherwise authorized in these proceedings, subject to the approval of the Monitor.

5. To the extent permitted by law, the Applicants shall be entitled but not required to pay the following expenses or make the following advances, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance;

(ii) Canada Pension Plan; and

(iii) income taxes;

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under

real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall subject to such requirements as are imposed by the CCAA have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $1,000,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate on such terms as may be agreed upon

between the relevant Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

(c) pursue all avenues of refinancing of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with Section 32 of the CCAA, the Applicants shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

12. If a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS, THE STAY LPs, AND THE PROPERTY

13. Until and including May 26, 2017, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants, those limited partnerships listed as numbers 1 to 8 in **Schedule "B"** to this Order (the "**Stay LPs**"), or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or the Stay LPs or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO PROCEEDINGS AGAINST THE NON-APPLICANT STAY PARTIES

14. During the Stay Period, no Proceeding shall be commenced or continued against or in respect of the parties listed as numbers 9 and 10 in **Schedule "B"** to this Order (the "**Non-Applicant Stay Parties**"), including, without limitation, terminating, making any demand, accelerating, amending or declaring in default or taking any enforcement steps under any agreement or agreements with respect to which any of the Applicants are a party, borrower, principal obligor or guarantor, and no default or event of default shall have occurred or be deemed to have occurred under any such agreement or agreements, by reason of :

(a) any of the Applicants having made an application to this Honourable Court under the CCAA;

(b) any of the Applicants being a party to these proceedings;

(c) any of the Applicants taking any step related to the these CCAA proceedings; or

(d) any default or cross-default arising from the matters set out in subparagraphs (a), (b) or (c) above, or arising from the Applicants breaching or failing to perform any contractual or other obligations;

without further order of this Honourable Court. For so long as the stay of proceedings granted herein is in place, the Monitor shall report regularly to the Court on the financial affairs and status of the Non-Applicant Stay Parties, and the Non-Applicant Stay Parties shall conduct their business only in the ordinary course of business without the approval of the Monitor and the Court. In addition the Non-Applicant Stay Parties shall give the Monitor full access to their property, premises, books, records, data, including data in electronic form and other financial documents to the extent that is necessary to allow the Monitor to adequately assess the Non-Applicant Stay Parties' property, business and financial affairs to allow the Monitor to report to the Court as above-noted.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor (or the Non-Applicant Stay Parties with respect to those matters set out in paragraph 14 of this Order), or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on;

(b) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment;

(c) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA;

(d) prevent the filing of any registration to preserve or perfect a security interest; or

(e) prevent the registration of a claim for lien.

16. Nothing in this Order shall prevent any party from taking an action against the Applicants or the Non-Applicant Stay Parties where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants.

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of

their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the making of this Order.

NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT

19. Notwithstanding anything else contained in this Order, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION

21. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and/or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any

officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or willful misconduct.

APPOINTMENT OF MONITOR

22. EY is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

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

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) advise the Applicants in their development of the Plan and any amendments to the Plan;

(d) advise the Applicants, to the extent required by the Applicants, with the holding and administering of meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Applicants' Property, Business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(g) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(h) perform such other duties as are required by this Order or by this Court from time to time.

24. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation.

25. The Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such

creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

26. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. The Monitor, the Monitor's counsel, the Applicants' counsel, and Note Holder Committee Counsel (as defined below), shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants, and the Note Holder Committee Counsel on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay the Monitor, counsel to the Monitor, counsel to the Applicants, and Note Holder Committee Counsel retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

28. The Monitor and its legal counsel shall pass their accounts from time to time.

APPOINTMENT OF NOTE HOLDER COMMITTEE AND NOTE HOLDER COMMITTEE COUNSEL

29. Randy Blott, Kyle Silverberg, John Malyk, Darren Lillies and Peter So (collectively, the "**Note Holder Committee**" and each a "**Committee Member**") are hereby appointed as the Note Holder Committee with respect to these CCAA proceedings.

30. Norton Rose Fulbright Canada LLP ("**Note Holder Committee Counsel**") is hereby appointed as counsel to the Note Holder Committee with respect to these CCAA proceedings.

31. The Note Holder Committee and Note Holder Committee Counsel are hereby authorized to develop and constitute guidelines in respect of the governance, constitution, matters of procedure and activities of the Note Holder Committee in these CCAA Proceedings and to seek the approval of this Honourable Court in relation to same.

32. The Applicants shall pay Note Holder Committee Counsel their reasonable fees based on their standard hourly rates in force from time to time, up to an initial amount of $100,000.00, plus applicable taxes and reasonable disbursements and out-of-pocket expenses of the Note Holder Committee and Note Holder Committee Counsel (the "**Note Holder Committee Allowance**"). Note Holder Committee Counsel shall provide its invoices to the Applicants and the Monitor from time to time, subject to such redactions to the invoices as are necessary to maintain solicitor/client privilege between Note Holder Committee Counsel and the Note Holder Committee.

33. The Note Holder Committee and Note Holder Committee Counsel shall have no personal liability or obligations as a result of the performance of their duties in carrying out the provisions of this Order or any further order granted by this Court in respect of the Note Holder Committee or the Note Holder Committee Counsel, save and except for liability arising out of gross negligence or wilful misconduct. No action or other proceeding may be commenced against such parties in respect of the performance of their duties under this Order without leave of the Court obtained on seven days' notice to Note Holder Committee Counsel, the Applicants, and the Monitor.

SEALING

34. Confidential Exhibit "1" to the Affidavit No. 2 of William K. Doherty sworn April 28, 2017 (the "**Confidential Exhibit**") shall be sealed on the Court file, kept confidential and not form part of the public record notwithstanding Division 4 of Part 6 of the *Alberta*

Rules of Court, and shall remain sealed for a period of three months following the termination of these proceedings.

35. The Clerk of the Court shall file the Confidential Exhibit in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states that:

> THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS FILED IN COURT FILE NO. 1701 – 05845 THE CONFIDENTIAL MATERIALS ARE SEALED PURSUANT TO THE SEALING ORDER ISSUED BY THE HONOURABLE MADAM JUSTICE HORNER ON APRIL 28, 2017.

SERVICE AND NOTICE

36. The Monitor shall, (i) without delay, publish in the Calgary Herald and the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, save and except creditors who are individuals, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

37. The Applicants and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor may post a copy of any or all such materials on its website at www.ey.com/ca/wigi, which shall be established for informational purposes.

GENERAL

38. All references to dollar amounts in this Order, unless indicated otherwise, are references to dollar amounts in Canadian currency.

39. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

40. Notwithstanding Rule 6.11 of the Alberta *Rules of Court*, unless otherwise ordered by this Court, this Monitor will report to the Court from time-to-time, which reporting is not required to be in Affidavit form and which reporting shall be considered by this Court as evidence.

41. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any or all of the Applicants, the Business or the Property.

42. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

43. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

44. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

45. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Time on the date of this Order.

Karen Horner

J.C.Q.B.A

TAB 19

Clerk's Stamp

~~COURT FILE NUMBER~~	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 - 7 Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Pantelis Kyriakakis / Nathan Stewart Phone: 403-260-3531 / 3536 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewar@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED:	**February 28, 2024**
NAME OF JUDGE WHO MADE THIS ORDER:	**Justice N.J. Whitling**
LOCATION OF HEARING:	**Edmonton, Alberta**

UPON the application of Razor Energy Corp., Razor Holdings GP Corp., and Blade Energy Services Corp. (collectively, the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Doug Bailey, sworn on February 20, 2024 (the "**Initial CCAA Affidavit**"), filed; **AND UPON** reading the consent of FTI Consulting Canada Inc. ("**FTI**") to act as the monitor of the Applicants (the "**Monitor**"); **AND UPON** having read the pre-filing report of the Monitor, filed; **AND UPON** hearing from counsel for the Applicants, counsel for the Monitor, and counsel to all other parties present;

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including March 8, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall

be commenced or continued against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court; provided that nothing in this Order shall:

    (a) empower the Razor Entities (including, for greater certainty, Razor Royalties LP) to carry on any business that they are not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

    (e) exempt the Razor Entities (including, for greater certainty, Razor Royalties LP) from compliance with statutory or regulatory provisions relating to health, safety or the environment.

16. Nothing in this Order shall prevent any party from taking an action against the Razor Entities (including, for greater certainty, Razor Royalties LP) where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

TAB 20

Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-04

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and H.M. Kay, Q.C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

(Calgary 0001-05071, 0001-05044)

May 4, 2000.

[1] PAPERNY J. [orally]: — Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

> 1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
>
> 2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

[2] Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

[3] The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured

[15] In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

[16] Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

[17] As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find… Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

[18] Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

[19] Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court *of* Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.

TAB 21

COURT FILE NO.: 09-CL-7950
DATE: 20090818

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

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

BEFORE: **MORAWETZ J.**

COUNSEL: **Alan Merskey, for Nortel Networks Corp. et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Leanne Williams, for Flextronics Inc.

J. Pasquariello, for Ernst & Young Inc., Monitor

B. Wadsworth, for CAW-Canada

Thomas McRae, for Recently Severed Calgary Employees

A. McKinnon, for the Former Employees

Mary Arzoymanidis, for Bell Canada

Alex MacFarlane, for the Unsecured Creditors' Committee

Gavin Finlayson, for the Noteholders

Tina Lie, for the Superintendent of Financial Services of Ontario

[21] It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

[22] As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

[23] Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

[24] Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

[25] Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

[26] Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

[27] It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Limited (Re)*, [2001] B.C.J. No. 2497 (S.C.).) Counsel to the Applicants and

the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

[28] Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

[29] It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

[30] Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Limited Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

[31] With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

[32] In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

[33] The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

[34] This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

[35] Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

[36] In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodwards Limited (Re)* (1993) 17 C.B.R. (3d) 236 (B.C.S.C.).)

[37] I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

[38] The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

[39] Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

[40] It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

TAB 22

2021 QCCS 2946
Quebec Superior Court

Arrangement relatif à Bloom Lake General

2021 CarswellQue 11345, 2021 QCCS 2946, 337 A.C.W.S. (3d) 436, 93 C.B.R. (6th) 285, EYB 2021-394691

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC. (PETITIONERS) and THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (MISES-EN-CAUSE) and FTI CONSULTING CANADA INC. (MONITOR) and TWIN FALLS POWER CORPORATION AND CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED (TWINCO MISES-EN-CAUSE)

Pinsonnault, J.S.C.

Heard: June 3, 2021
Judgment: July 14, 2021
Docket: C.S. Montréal 500-11-048114-157

Counsel: Me Bernard Boucher, Me Milly Chow, Me Cristina Cataldo, for the CCAA Parties
Me Sylvain Rigaud, for the Monitor FTI Consulting Canada Inc.
Me Douglas Mitchell, for the Mise-en-cause Twin Falls Power Corporation
Me Guy P. Martel, Me Nathalie Nouvet, for the Mise-en-cause Churchill Falls (Labrador) Corporation Limited
Me Gerry Apostolatos, for the Mises-en-cause Quebec North Shore & Labrador Railway Company and Iron Ore Company of Canada
Me Nicolas Brochu, for the Mise-en-cause for the Salaried/non-union employees and retirees

Subject: 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
Debtors sought protection under Companies' Creditors Arrangement Act (CCAA) and monitor was appointed — Debtors submitted plan of arrangement, which was judicially approved — Under supervision of monitor, debtors sold all of their assets other than interest held by debtors in company T — Proceeds of sale were distributed among creditors according to terms of plan of arrangement — As result, debtors' interest in T was last asset to realize in context of CCAA proceedings — Debtors brought motion seeking order granting additional powers to monitor to complete final distribution — Motion granted — Court had exclusive jurisdiction to determine scope of monitor's powers in furtherance of purposes of CCAA — This is especially true if such powers relate directly to asset or property of debtor that is part of previously approved plan — Hence, exercise of judicial discretion was appropriate to grant to monitor expanded powers sought by debtors — Circumstances and nature of issues confronting debtors and monitor to bring CCAA process to conclusion within reasonable delay were taken into consideration — Expanded powers sought were necessary and appropriate to enable monitor to fulfill its statutory duties to properly value assets and liabilities of debtors — Powers were also necessary to recover value from last significant asset in debtors' estate —

sufficiently material on a cost-benefit analysis to continue to pursue recovery of such amount, significantly narrowing the issues in dispute in the CBCA Motion.

70 Who knows? Should the Twinco Interest be disposed of on a consensual basis, Twinco and CFLCo could very well decide to forgo the wind down and the dissolution proceedings completely, a decision that would rest with them without any further involvement of the CCAA Parties (i.e., the Wabush shareholders).

71 Be that as it may be, the CCAA Parties are *only* seeking to expand the Monitor's powers in the CCAA Proceedings to enable the Monitor to obtain the Requested Twinco Information necessary to value the Twinco Interest, which is now the most significant asset of the CCAA Parties remaining to be realized in the CCAA Proceedings apart from tax refunds.

72 With all due respect, the proposed relief sought with the present Motion does not entail any compromission of the rights and recourses of Twinco and of its shareholder CFLCo vis-à-vis the Twinco Interest other than enabling the CCAA Parties and the Monitor to be aware of its potential estimated value without prejudice to the arguments that Twinco and/or CFLCo may want to put forward in connection therewith.

73 The Court finds that the Expanded Monitor Powers sought in the present Motion are necessary and appropriate to enable the Monitor to, among other things:

(i) fulfill its statutory duties to investigate and properly value the assets and the liabilities of the CCAA Parties;

(ii) further the valid purpose of the CCAA to maximize the recovery of Plan creditors, by assisting the CCAA Parties with the recovery of value for the CCAA Parties' creditors from the last significant asset remaining of the CCAA Parties' estate other than tax refunds; and

(iii) facilitate the winding up and termination of these CCAA Proceedings.

74 The Court bears in mind that the Monitor was appointed by this Court pursuant to the authority granted upon this Court under the CCAA [27] .

75 Therefore, subject to the provisions of the CCAA, this Court has the exclusive jurisdiction to determine, *inter alia*, the scope of the powers of the Monitor in furtherance of the purposes of the CCAA especially if such powers relate directly to an asset or the property of the CCAA Parties that is part of the Plan previously sanctioned.

Section 23(1)(c) of the CCAA

76 In *Ernst & Young Inc. v. Essar Global Fund Limited* [28] , the Court of Appeal for Ontario reminded us that section 23 of the CCAA sets out a basic framework of the minimum mandatory duties and functions of the monitor under the CCAA which may be augmented through the exercise of discretion by the Court, and that, not surprisingly, the monitor's role has evolved since then over time:

> [106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the CCAA supervising judge. This framework is reflected in s. 23 of the CCAA, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that 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". It is then to file a report on its findings.
>
> [107] Not surprisingly, as with the CCAA itself, the role of the monitor has evolved over time. [. . .]

88 In *Osztrovics (Trustee of) v. Osztrovics Farms Ltd.*. [30], the Ontario Court of Appeal dismissed the suggestion that the trustee's power to obtain information "*relating in whole or in part to the bankrupt, his dealings or property*" only extended to corporate documentation that pertained solely to the business and affairs of the corporation, and not another company in which the bankrupt held a significant interest.

89 The Ontario Court of Appeal also stated that applying a narrow interpretation of the trustee's investigatory powers only to the corporate documentation, that pertain solely to the business and affairs of the bankrupt, and not to information about another company in which the bankrupt has significantly invested, would frustrate the trustee's ability to discharge its duty to the bankrupt's creditors to value and realize upon the most significant asset in bankrupt's estate.

90 In *Osztrovics* , the bankrupt was a shareholder in a corporation, owning 48% of the company. The trustee requested that the company provides certain information that the trustee required to value the bankrupt's shares in that corporation. The latter refused and the trustee sought and obtained an order pursuant to sections 163 and 164 of the BIA requiring: (i) that company to disclose to it certain documents; and (ii) certain parties to submit to oral examinations.

91 While *Osztrovics* was decided in the context of bankruptcy proceedings under the *Bankruptcy and Insolvency Act* [31] , the Court believes that those principles apply equally to the CCAA proceedings [32] .

92 The Court may add that the fact that we find ourselves in the context of CCAA proceedings involving the liquidation of the CCAA Parties as opposed to their restructuring does not matter.

93 Liquidating CCAA proceedings have been accepted in practice and case law with an expanded view of the role of the monitor under such circumstances [33] .

94 All in all, in liquidating CCAA proceedings, the responsibilities and the powers of the Monitor remain essentially the same subject to any additional powers that may be granted by the Court at its discretion.

Section 23(1)(k) of the CCAA

95 Section 23(1)(k) of the CCAA expressly allows this Court to expand the list of duties and functions of the Monitor by directing the latter to "*carry out any other functions in relation to the debtor company that the court may direct*."

96 In previous decisions, Justices sitting in the Commercial Division of the Québec Superior Court expanded the monitor's powers to include the ability to compel *any person* reasonably thought to have knowledge relating to any of the debtors, their business or property to be examined under oath, and to disclose and produce to the monitor any books, documents, correspondence or papers in that person's possession or power. [34]

97 The counsel for the CCAA Parties pointed out, rightly so, to the Court that although CCAA courts have authorized relief similar to the Expanded Monitor Powers in respect to "any person" thought to have knowledge of the debtor, its business or property, the Expanded Monitor Powers here are narrower in that they are only directed at those persons reasonably thought to have knowledge relating to the Twinco Interest, the CFLCo Indemnity and the CFLCo Maintenance Obligations, including the Twinco Requested Information, and, subject to any further order of this Court, they are limited to a disclosure period of only 10 years, going back to 2010.

The broad judicial discretion conferred under Section 11 of the CCAA

98 Section 11 of the CCAA stipulates:

> 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,

transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007. [42] **Thus, the mere fact that the judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law**.

[71] **Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims**. **As such, they are third parties**. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] **The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute**:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
>
> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T] he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.
> >
> > (. . .)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (. . .). [43]

[73] **As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated**.

[Emphasis added]

110 Ultimately, Justice Schrager rejected the Appellants' argument that the objectives of the *CCAA* were being thwarted by allowing the Monitor to pursue a remedy to which it was not entitled. In so deciding, Justice Schrager upheld the position of the CCAA Judge who, in the exercise of his judicial discretion, had favoured a *practical resolution of the case* by expanding the powers of the monitor:

> [32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. **The judge accepted this course of action as the only practical resolution of this case**. As such, **he indicated that the solution chosen was a sensible use of judicial resources** since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. [. . .]

[Emphasis added]

111 In the present instance, the circumstances warrant the expansion of the Monitor's powers as it is also the only practical and most reasonable solution to obtain the Requested Information without necessarily compromising the rights and recourses of the parties.

TAB 23

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 139 O.R. (3d) 1, 286 A.C.W.S. (3d) 658, 420 D.L.R. (4th) 23, 54 C.B.R. (6th) 173, 76 B.L.R. (5th) 171

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Patricia D.S. Jackson, Andrew D. Gray, Jeremy Opolsky, Alexandra Shelley, Davida Shiff, for Appellants, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.
Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.5 Costs
XVII.5.b Award of costs
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.6 Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that 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". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*. [5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings. [6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241***o***f the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.

TAB 24

Arrangement relating to Groupe Sélection inc., 2022 QCCS 4284 (CanLII)

Date:	2022-11-21
File Number:	500-11-061657-223
Reference:	Arrangement relating to Groupe Sélection inc., 2022 QCCS 4284 (CanLII), <https://canlii.ca/t/jt3gx>, accessed 2024-11-11

Arrangement relating to Groupe Sélection inc. **2022 QCCS 4284**

SUPERIOR COURT
(Commercial Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT MONTREAL
OF

No: 500-11-061657-223

DATE: November 21, 2022

UNDER THE PRESIDENCY OF **THE HONOURABLE** **MICHEL A. PINSONNAULT, J.C.S.**

IN THE CASE THE *COMPANIES' CREDITORS ARRANGEMEN T ACT*, R.S.C. 1985, c. C-36:

NATIONAL BANK OF CANADA

Applicant

-and-

SELECTION GROUP INC.

-and-

THE OTHER CORPORATIONS LISTED IN SCHEDULE "A" O F THE PRESENT

Debtors

-and-

LIMITED PARTNERSHIPS LISTED IN SCHEDULE "B" OF TH ESE PRESENT

Third Party Claims

-and-

PRICEWATERHOUSECOOPERS INC.

Controller

INITIAL ORDER

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[1] **HAVING TAKEN KNOWLEDGE** of the Application *for an Initial Order, an Amended and Restated Initial Order and Other Relief* dated November 14, 2022 (the "**Application**") submitted by the Applicant and the Application entitled *Amended Application for the issuance of an Initial Order and an Amended Initial Order and restated* dated

perform its obligations under the and any related proceedings pursuant to this Order or CCAA;

(k) may act as a "foreign representative" of either of the CCAA Parties or any other similar capacity in any insolvency proceedings, foreign bankruptcy or restructuring;

l) can give all consent or any approval that may be affected by an order of this Tribunal or the CCAA;

(m) may hold and administering funds under arrangements between the CCAA Parties, any counterparty and the Monitor, or by order of this Tribunal; and

(n) be able to assume all other obligations under this Order or the CCAA or required by this Tribunal from time to time.

[45] **ORDERS** that, in addition to the powers set out in subsection [44] and subject to further orders of the Tribunal, the Monitor is authorized, but not obligated to do so, for and on behalf of the CCAA Parties, but after consultation with the latter:

(a) to direct and control the financial affairs and activities of the CCAA Parties and carry on the activities of any of the CCAA Parties;

(b) to carry out banking and other transactions on behalf of any of the CCAA Parties and to sign documents or take any other action that is necessary, or appropriate for the purpose of exercising that authority;

(c) to sign documents that may be necessary in any proceedings before this Tribunal or pursuant to an order of this Tribunal;

(d) take action to preserve and protect the Company and the Property;

(e) to take any action that any of the CCAA Parties may make under the CCAA or this Ordinance;

(f) enter into agreements with respect to the Business or the Property;

(g) to apply to the Tribunal any order that may be necessary or appropriate for the sale of the Goods to one or more purchasers of the same;

(h) to take any action to be made by the CCAA Parties under this Order or any other order of the Tribunal;

(i) to be exercised, for the purpose of the CCAA Parties, the rights and privileges that they may have prevail as shareholders, partners, members or otherwise;

(j) to provide information to the Applicant and the Temporary Lender about the Business and Property;

k) to be examined under oath any person who is reasonably believed to have information in respect of any of the CCAA Parties, the Company or the Property and to order to produce the books, records, correspondence or documents in its possession or control in relation to the CCAA Parties, to the Company or the Property;

(l) to take any action, enter into any agreement, sign any document, enter into any obligation or to take any other measure necessary, useful or incidental to the exercise of the above-mentioned powers.

[46] **DECLARES** that the Monitor is authorized and empowered, without be required to operate and control, on behalf of the CCAA Parties, all the existing accounts of the CCAA Parties maintained with any institution (individually, an "**Account**" and collectively, the "**Accounts**") in such manner as the Controller, in its sole discretion, deems necessary or appropriate, including, but not limited to:

(a) to exercise control over funds credited to or deposited in the Accounts;

(b) make any disbursements on Accounts authorized by this Order or any other order granted in these Proceedings;

(c) instructing with respect to the Accounts and the funds credited therein or in the deposited, including to transfer funds that are credited to any other account or deposited into any other account as the Monitor may direct; and

d) add or delete persons with signing authority for an Account or directing Closing an Account.

[47] **ORDERS** that the CCAA Parties and their Directors, officers, employees and agents, accountants, auditors and all Other Persons Notified of this Order are cooperating with the Controller in the exercise of its mandate and grant the Controller without delay unrestricted access to the entire Company and to all Goods, premises, books, records and data, including data on electronic format, and all other documents of the CCAA Parties.

[48] **DECLARES** that the Monitor is authorized to provide information to creditors and other relevant interested parties of the CCAA Parties who make a written request to the Monitor, with a copy to the Counsel for the CCAA Parties. In the case of information of which the CCAA Parties have notified the Confidential, proprietary or competitive monitor, the Controller shall not disclose such information to any Person without the consent of the CCAA Parties, unless otherwise authorized under the Order or unless otherwise directed by the Tribunal.

[49] **DECLARES** that if the Monitor, in his capacity as Controller, continues to operate the CCAA Parties Business or continues to employ employees of the CCAA Parties, the Monitor will benefit from the provisions of the under section 11.8 of the CCAA.

[50] **ORDERS** that neither the Comptroller nor any employee or agent of the Monitor shall not be deemed to (i) be a director, officer or fiduciary of the CCAA Parties, (ii) assume any obligations incumbent on the CCAA Parties or (iii) assume a fiduciary duty to the CCAA Parties or any other Person, including a creditor or shareholder of the Parties LACC.

[51] **ORDERS** and **DECLARES** that nothing herein imposes on the Monitor an obligation to take possession of or assume the control,

TAB 25

2020 QCCA 659
Court of Appeal of Quebec

Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)

2020 CarswellQue 4335, 2020 QCCA 659, 320 A.C.W.S. (3d) 373, 79 C.B.R. (6th) 165, EYB 2020-353637

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

HOME DEPOT OF CANADA INC. (Appellant-Impleaded Party) v. 9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.), RAYMOND CHABOT INC. (Respondents-incidental respondents) and HOME HARDWARE STORES LIMITED (Impleaded Party-Incidental Appellant-Impleaded Party) and RONA INC., ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, CATHAY CENTURY INSURANCE CO., LTD, JING YUDH INDUSTRIAL CO., LTD, GROUPE BMR INC. (Formerly known as Gestion BMR Inc.), GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.), MATÉRIAUX LAURENTIENS INC., DESJARDINS GENERAL INSURANCE INC., THE PERSONAL GENERAL INSURANCE INC., INTACT INSURANCE COMPANY, L'UNIQUE GENERAL INSURANCE INC., LA CAPITALE GENERAL INSURANCE INC., PROMUTUEL INSURANCE BAGOT, PROMUTUEL INSURANCE BORÉALE, PROMUTUEL INSURANCE BOIS-FRANCS, PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES, PROMUTUEL INSURANCE L'ESTUAIRE, PROMUTUEL INSURANCE DEUX-MONTAGNES, PROMUTUEL INSURANCE LAC AU FLEUVE, PROMUTUEL INSURANCE OUTAOUAIS, PROMUTUEL INSURANCE LA VALLÉE, PROMUTUEL INSURANCE MONTMAGNY-L'ISLET, PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN, PROMUTUEL INSURANCE RÉASSURANCE, PROMUTUEL INSURANCE RIVE-SUD, PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT, PROMUTUEL INSURANCE VAUDREUIL-SOULANGES, PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES, PROMUTUEL INSURANCE LANAUDIÈRE, AIG TAIWAN INSURANCE CO LTD, AVIVA INSURANCE COMPANY OF CANADA, SOVEREIGN GENERAL INSURANCE COMPANY, INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS, JYIC INDUSTRIAL CORPORATION, INSURANCE COMPANY OF NORTH AMERICA, IAPMO RESEARCH AND TESTING INC., FUBON INSURANCE CO. LTD, GEAREX CORPORATION, SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters (Impleaded Parties-Impleaded Parties)

GROUPE BRM INC. (Formerly known as Gestion BMR inc.), GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.), MATÉRIAUX LAURENTIENS INC., INTACT INSURANCE COMPANY (Appellants-Impleaded Parties) v. 9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.), RAYMOND CHABOT INC. (Respondents-incidental respondents) and HOME HARDWARE STORES LIMITED (Impleaded party-incidental appellant- impleaded party) and CATHAY CENTURY INSURANCE CO., LTD, JING YUDH INDUSTRIAL CO., LTD, DESJARDINS GENERAL INSURANCE INC., THE PERSONAL GENERAL INSURANCE INC., L'UNIQUE GENERAL INSURANCE INC., LA CAPITAL GENERAL INSURANCE INC., PROMUTUEL INSURANCE BAGOT, PROMUTUEL INSURANCE BORÉALE, PROMUTUEL INSURANCE BOIS-FRANCS, PROMUTUEL INSURANCE CHAUDIÈRES-APPALACHES, PROMUTUEL INSURANCE L'ESTUAIRE, PROMUTUEL INSURANCE DEUX-MONTAGNES, PROMUTUEL INSURANCE LAC AU FLEUVE, PROMUTUEL INSURANCE OUTAOUAIS, PROMUTUEL INSURANCE LA VALLÉE, PROMUTUEL INSURANCE MONTMAGNY-L'ISLET, PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN, PROMUTUEL INSURANCE RÉASSURANCE, PROMUTUEL INSURANCE RIVE-SUD, PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT, PROMUTUEL INSURANCE VAUDREUIL-SOULANGES, PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES, PROMUTUEL INSURANCE LANAUDIÈRE, RONA INC., ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, HOME DEPOT OF CANADA INC., AIG TAIWAN INSURANCE CO LTD, AVIVA INSURANCE COMPANY OF CANADA, SOVEREIGN GENERAL INSURANCE COMPANY, INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS, JYIC INDUSTRIAL CORPORATION, INSURANCE COMPANY OF NORTH

AMERICA, IAPMO RESEARCH AND TESTING INC., FUBON INSURANCE CO. LTD, GEAREX CORPORATION, SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters (Impleaded Parties-Impleaded Parties)

RONA INC., ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA (Appellants-Impleaded Parties) v. 9323-7055 QUÉBEC INC. (Formerly known as Aquadis International inc.), RAYMOND CHABOT INC. (Respondents-incidental respondents) and HOME HARDWARE STORES LIMITED (Impleaded Party-Incidental Appellant-Impleaded Party) and HOME DEPOT OF CANADA INC., CATHAY CENTURY INSURANCE CO., LTD, JING YUDH INDUSTRIAL CO., LTD, GROUPE BMR INC. (Formerly known as Gestion BMR Inc.), GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.), MATÉRIAUX LAURENTIENS INC., DESJARDINS GENERAL INSURANCE INC., THE PERSONAL GENERAL INSURANCE INC., INTACT INSURANCE COMPANY, L'UNIQUE GENERAL INSURANCE INC., LA CAPITALE GENERAL INSURANCE INC., PROMUTUEL INSURANCE BAGOT, PROMUTUEL INSURANCE BORÉALE, PROMUTUEL INSURANCE BOIS-FRANCS, PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES, PROMUTUEL INSURANCE L'ESTUAIRE, PROMUTUEL INSURANCE DEUX-MONTAGNES, PROMUTUEL INSURANCE LAC AU FLEUVE, PROMUTUEL INSURANCE OUTAOUAIS, PROMUTUEL INSURANCE LA VALLÉE, PROMUTUEL INSURANCE MONTMAGNY-L'ISLET, PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN, PROMUTUEL INSURANCE RÉASSURANCE, PROMUTUEL INSURANCE RIVE-SUD, PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT, PROMUTUEL INSURANCE VAUDREUIL-SOULANGES, PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES, PROMUTUEL INSURANCE LANAUDIÈRE, AIG TAIWAN INSURANCE CO LTD, AVIVA INSURANCE COMPANY OF CANADA, SOVEREIGN GENERAL INSURANCE COMPANY, INTERNATIONAL ASSOCIATION OF LUMBING MECHANICAL OFFICIALS, JYIC INDUSTRIAL CORPORATION, INSURANCE COMPANY OF NORTH AMERICA, IAPMO RESEARCH AND TESTING INC., FUBON INSURANCE CO. LTD, GEAREX CORPORATION, SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters (Impleaded Parties-Impleaded Parties)

Schrager, Healy, Fournier, JJ.A.

Heard: March 11, 2020
Judgment: May 21, 2020
Docket: C.A. Montréal 500-09-028436-194, 500-09-028474-195, 500-09-028476-190

Counsel: Mtre Hubert Sibre, Mtre Rosemarie Sarrazin, for Home Depot of Canada Inc.
Mtre Pierre Goulet, for Groupe BMR Inc., Groupe Patrick Morin Inc., Matériaux Laurentiens, Intact Compagnie d'assurance inc.
Mtre Julie Himo, Mtre Dominic Dupoy, Mtre Arad Mojtahedi, for Rona Inc., Royal & Sun Alliance Insurance Company of Canada
Mtre Jocelyn Perreault, Mtre Gabriel Faure, Mtre Antoine Melançon, for Raymond Chabot inc.
Mtre Éric Savard, for Desjardins General Insurance Inc., The Personal General Insurance Inc., Intact Insurance Company, L'unique General Insurance Inc., La Capital General Insurance Inc., Promutuel Insurance Bagot, Promutuel Insurance Boréale, Promutuel Insurance Bois-Francs, Promutuel Insurance Chaudières-Appalaches, Promutuel Insurance L'estuaire, Promutuel Insurance Deux-Montagnes, Promutuel Insurance Lac Au Fleuve, Promutuel Insurance Outaouais, Promutuel Insurance La Vallée, Promutuel Insurance Montmagny-L'islet, Promutuel Insurance Portneuf-Champlain, Promutuel Insurance Réassurance, Promutuel Insurance Rive-Sud, Promutuel Insurance Vallée Du Saint-Laurent, Promutuel Insurance Vaudreuil-Soulanges, Promutuel Insurance Verchères-Les-Forges, Promutuel Insurance Lanaudière, Royal Sun Alliance Insurance Company of Canada, Aviva Insurance Company of Canada
Mtre Alexandre Bayus, for Home Hardware Stores Limited

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court

Home Depot of Canada ("*Home Depot*"), Matériaux Laurentiens and Home Hardware Stores Limited ("*Home Hardware*"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:

1

17 It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019. [3]

18 Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

19 The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act* [4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces. [5]

20 On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

21 On November 9, 2016, the Monitor sought an order to amend its powers « to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors ». Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

22 On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above. [6]

23 That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

The Respondents plead that even if the Plan is set aside, the same powers subsist under the November 2016 Order. [24] As such, the Monitor maintains that the Appellants' contestation is an indefensible collateral attack [25] on the November 2016 Order or, alternatively, that the appeal raises a moot point, [26] because, as stated above, even if section 6.2(c) of the Plan is set aside, the power to sue the Retailers subsists under the November 2016 Order.

57 I would tend to think that, on the facts, no reviewable error is made out in the judge's conclusion that the attack is late. Moreover, the November 2016 Order would survive the Plan sanction and, in all events, the Appellants do not directly seek conclusions contrary to said order. However, as mentioned earlier, these questions do not require definite resolution given my answer to the primary point of the appeal, which is the validity of the power granted the Monitor in the Plan to sue on behalf of a group of creditors rather than in the exercise of the Debtor's rights. I now address that issue.

58 As indicated in the review of the facts above, parties in the distribution chain would in the normal course have recourse against those above them in the flowchart. The recourses (exercised or not) of the ultimate purchasers of the faucets (and their insurers) and the Retailers were stayed upon the initial insolvency filing in 2015. The November 2016 Order led to some negotiated settlements. The consumers (or their insurers) filed proofs of claim; the Retailers did not, nor did they settle any claims asserted by the Monitor. It is against this factual background that the Monitor was granted the power to sue the Retailers under the Plan of Arrangement.

59 The purpose of the proposed legal proceedings is consonant with a legitimate purpose under the *CCAA*, as the Monitor seeks to establish a "litigation pool" with a view to paying creditors of Aquadis on a *pro rata* basis. In itself, this more than satisfies the spirit of the *CCAA*, but is also supported by examples in the reported cases. Specifically, and of close resemblance is the arrangement in the matter of *Muscletech*, [27] where the debtor was a distributor of dietary supplements in the middle of a multi-tier distribution chain between the manufacturer at one end and ultimate consumers at the other. The plan of arrangement provided for releases from liability to be given to those in the chain who paid into the litigation pool as compensation arising from selling the defective product. The scheme was voluntary - i.e. the monitor was not given power to sue. However, the situation is similar to that in the case at bar. Other examples of voluntary litigation pools where contributors receive releases exist, but the precise factual matrix of the present plan, where the Monitor is empowered to sue, appears to be novel. [28]

60 The granting of releases for third parties in consideration of their contribution to a litigation pool to satisfy creditors' claims is now well entrenched in *CCAA* jurisprudence. [29]

61 The *CCAA* expressly provides for certain powers and duties of the monitor. [30] These powers and duties may be extended, because s. 23 *CCAA* provides that a monitor is required to « do anything in respect of the company that the court directs the monitor to do ». [31] Thus, while the law does provide the basic framework within which the monitor must act, the courts may use their discretion to grant additional powers considered appropriate. [32]

62 This discretion cannot be exercised arbitrarily; it must be exercised in a manner consistent with and directed toward the attainment of the objectives of the *CCAA*. In *Century Services Inc.*, Justice Deschamps observed for the Supreme Court that:

> [58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs". (References omitted)

She added that judicial discretion may be exercised in furtherance of the *CCAA*'s purposes, [33] which in the case at bar is the maximization of creditor recovery, since Aquadis has ceased carrying on business.

63 The courts, however, have expressed reservations regarding the imposition of third-party settlements under the *CCAA*, indicating that the purpose of the *CCAA* is not to settle disputes between parties other than the debtor and its creditors. [34]

Nonetheless, the precise point in issue - i.e. whether a judge may allow a monitor to exercise the rights and remedies of certain creditors against other persons or creditors of a debtor appears to be without precedent.

64 In *Urbancorp*, [35] the Ontario Superior Court of Justice refused to recognize the power of a monitor to claw back a payment in kind made by the debtor to a third party who was a creditor of a company related to the debtor. While Justice Myers acknowledged that " . . . Monitors can certainly be empowered to bring legal proceedings to act on behalf of *CCAA* debtors", [36] he disagreed that the monitor should act as a bankruptcy trustee to bring proceedings in the place of *CCAA* creditors. The latter could initiate their own proceedings outside of the insolvency or provoke a bankruptcy for a trustee to initiate those proceedings for them. It should be emphasized that a single payment was in issue in *Urbancorp*. Justice Myers distinguished *Essar*, [37] which is relied on by Respondents. In that case, the Ontario Court of Appeal confirmed the lower court's authorization of the monitor to institute oppression proceedings for the benefit of various creditors (or stakeholders) in the *CCAA* estate: "(. . .) the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors (. . .)". [38] The court noted as well that the debtor would also benefit from such proceedings, particularly in the sense that an impediment to restructuring would potentially be removed by the oppression remedy.

65 The result in *Urbancorp* was echoed in *Pacific Costal Airlines*, [39] where the British Columbia Supreme Court indicated that "proceedings under the *CCAA* are not intended to resolve disputes between a creditor and third parties":

> [24] It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the *CCAA* proceedings. The purpose of a *CCAA* proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in *CCAA* proceedings, it is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company. [40]

66 The *Stelco* [41] case, for its part, raised issues relating to a dispute between certain creditors near the end of the debtor's restructuring process over the distribution of certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. [42] (References omitted)

67 The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

68 What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA* [43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor". [44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

69 In my opinion, the Appellants objections are not well founded.

TAB 26

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 27

CITATION: Urbancorp Inc. (Re), 2016 ONSC 5426
COURT FILE NO.: CV-16-11389-00CL
DATE: 20160829

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

Court File No.: 31-2114850
Court File No.: 31-2114850

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BEFORE: Newbould J.

COUNSEL: *Lisa S. Corne and David P. Preger*, for the moving parties
Edmond F. B. Lamek, for the Urbancorp interests
Robin B. Schwill, for the KSV Kofman Inc., the Monitor and Proposal Trustee
Adam Slavens, for Tarion Warranty Corporation
Vern W. DaRe, for Stefano Serpa and Adrian Serpa
James M. Wortzman, for Atrium Mortgage Investment Corporation
Trent Morris, for several purchasers
Monique Sassi, for Mattamy Homes Limited
Dominique Michaud, for Terra Firma Capital Corporation.
Kenneth D. Kraft, for Guy Gissin, the Foreign Representative of Urbancorp Inc.

Chris Burr, for Laurentian Bank

HEARD: August 25, 2016

ENDORSEMENT

[1] This is a motion brought at the request of 40 different purchasers of residential units from Urbancorp (Lawrence) Inc. ("Lawrence"), Urbancorp (St. Clair Village) Inc. ("St. Clair"), Urbancorp (Woodbine) Inc. ("Woodbine"), and Urbancorp (Bridlepath) Inc. ("Bridlepath") for the appointment of Dickinson Wright LLP ("Dickinson Wright") as their representative counsel in the CCAA and BIA NOI proceedings and for an order that their legal fees and disbursements capped at $150,000 be paid and secured by an administrative charge against the four properties.

[2] The motion is supported by Tarion. It is opposed by KSV, the Monitor and Proposal Trustee, and by Mr. Gissin, the Foreign Representative of Urbancorp Inc. appointed by the Israeli Court. It is also opposed by the Urbancorp entities and with respect to the Bridlepath project by two purchasers of units and Atrium, a secured lender on that project.

[3] For the reasons that follow, the motion is granted in part.

[4] The four properties in question are vacant properties which Urbancorp intended to develop for residential use. No construction has been commenced and the properties consist of raw land. Each of the Urbancorp companies pre-sold freehold homes and received deposits from home buyers in connection with the home sales. The deposits were $3.7 million on the Lawrence property, $3.3 million on the St. Clair property, $1.9 million on the Woodbine property and $5.6 million on the Bridlepath property. The Urbancorp companies did not hold the deposits in trust and they have all been spent. As the projects involved the construction of freehold homes, there was no legislation requiring home buyer deposits to be segregated or held in trust.

construction homes who have lost their deposits. Some have retained other firms. Fogler Rubinoff has been retained by two purchasers of the Bridlepath property and Mr. Morris has been retained by five undisclosed purchasers of one or more of the four properties.

[9] The agreements of purchase and sale are in a standard form and provide that in the event that the construction of a dwelling has not been completed by the closing date, the vendor shall not be liable for any damages or costs other than the costs paid by Tarion, which has a maximum coverage of $40,000 per purchaser.

Legal framework

[10] The authority to appoint representative counsel in CCAA proceedings is undoubted under section 11 of the CCAA and rules 10.01 and 12.07 of the rules of practice in Ontario. See *Re Target Canada Co.* (2015), 22 C.B.R. (6th) 323 and *Re Nortel Networks Corporation*, 2009 CanLII 26603. I agree with Justice Wilton-Siegel in *Re Kitchener Frame Limited*, July 7, 2011 unreported, that there is no reason why the same should not pertain to a proposal under the BIA.

[11] In *Re CanWest Publishing Inc.* (2010), 65 C.B.R. (5th) 152, Pepall J. (as she then was) stated that factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just, including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

- the position of other stakeholders and the Monitor.

[12] As the issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but these factors need be considered.

[13] So far as granting a charge to secure the fees and disbursements of a representative counsel, this is covered by section 11.52 (1)(c) of the CCAA which provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of 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
>
> > (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.

[14] Thus the court must be satisfied that the security or charge is necessary for the effective participation of representative counsel in the proceedings. In considering this issue. Pepall J. in *Re CanWest Publishing Inc.* (2010), 63 C.B.R. (5th) 115 stated 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.

TAB 28

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

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 AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009 *
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees
Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Alan Mersky, Derrick Tay for Applicants
Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay
M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund
Leanne Williams for Flextronics Telecom Systems Ltd.
Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.
Gail Misra for Communication, Energy and Paperworkers Union of Canada
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Mark Zigler, S. Philpott for Certain Former Employees of Nortel
G.H. Finlayson for Informal Nortel Noteholders Group
A. Kauffman for Export Development Canada
Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

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 --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

> (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
>
> (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
>
> (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

TAB 29

SUPREME COURT OF NOVA SCOTIA
Citation: *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65

Date: 20190219
Docket: HFX484742
Registry: Halifax

In the Matter of:

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the *Companies' Creditors Arrangement Act*

REPRESENTATIVE COUNSEL DECISION

Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **March 14, 2019**.
Judge:	The Honourable Justice Michael J. Wood
Heard:	February 14, 2019, in Halifax, Nova Scotia
Counsel:	Maurice Chiasson QC and Sara Scott, for the Applicants
	Elizabeth Pillon, Lee Nicholson, and Sharon Hamilton for the Monitor
	Raj Sahni, Ben Durnford and John Stringer, for an informal committee of users of the Quadriga platform
	Jeremy Dacks, Evan Thomas, Robert Purdy QC, and Michael Scott, for an informal committee of users of the Quadriga platform
	Gregory Azeff and Gavin MacDonald, for Parham Pakjou
	Brendan O'Neill, for Goodmans LLP

[6] As stated in *Re Nortel Networks*, 2009 ONSC 3028, the Court has a wide discretion to appoint representatives under this provision. It is usually done where the affected group of stakeholders is large and, without representation, most members would be unable to effectively participate in the *CCAA* proceeding. Representative counsel can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders and avoiding a multiplicity of potentially conflicting retainers.

[7] In *Re Fraser Papers Inc.*, 2009 ONSC 6169, the Court described why it was prepared to appoint representative counsel for retirees and employees:

> 19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. ...

[8] In *Nortel Networks,* the Court appointed representative counsel for employees and retirees because that vulnerable group had little means to pursue a claim in the complex *CCAA* proceedings. The Court described the benefit of such an order as follows:

> 13 … In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

[9] There are two primary rationales given for the appointment of representatives and representative counsel in *CCAA* proceedings. The first is to provide effective communication with stakeholders and ensure that their interests are brought to the attention of the Court and other *CCAA* participants. The second is to bring increased efficiency and cost effectiveness to the proceeding as a whole. This latter objective can be attainted by streamlining notification to stakeholders through their representatives and eliminating the need for multiple counsel to be retained by individual stakeholders to represent their interests. The following judicial comments illustrate these principles:

> 53 … It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.
>
> (*Nortel Networks*)

> 24 ... It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.
>
> (*Re Canwest Publishing Inc.*, 2010 ONSC 1328)

> 38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.
>
> (*Re U.S. Steel Canada Inc.*, 2014 ONSC 6145)

[10] Representatives and representative counsel should not have an open-ended retainer to undertake any inquiry or investigation they may wish, particularly where the fees are to be paid out of the assets of the applicant company. The appointment is specifically for purposes of the *CCAA* proceeding and to ensure that the stakeholders' interests are effectively taken into account by the decision makers. In some cases there are specific limitations placed on the scope of the representative counsel appointment. For example, in *Canwest Publishing* the funding approved for representative counsel excluded any investigation of claims against the corporate directors of the applicant company.

[11] In cases, such as here, where there are competing applications for appointment of representatives, the Court must evaluate the proposals to determine which will best achieve the objectives described above. In *Fraser Papers* the Court considered factors such as proposed breadth of representation, the extent of counsel's mandate to act, their legal expertise, jurisdiction of practice, facility in French and English and estimated costs (see para. 12).

[12] In this case all counsel are members of local and national law firms, with extensive insolvency experience. Each has been contacted by a significant number

TAB 30

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes and Alex Cobb* for the Canwest LP Entities
Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Hilary Clarke for the Bank of Nova Scotia, Administrative Agent for the Senior Secured Lenders' Syndicate
Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group
M. A. Church for the Communications, Energy and Paperworkers' Union
Anthony F. Dale for CAW-Canada
Deborah McPhail for the Financial Services Commission of Ontario

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried

[19] In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

[20] No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

[21] Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;

- any benefit to the companies under CCAA protection;

- any social benefit to be derived from representation of the group;

- the facilitation of the administration of the proceedings and efficiency;

- the avoidance of a multiplicity of legal retainers;

- the balance of convenience and whether it is fair and just including to the creditors of the Estate;

- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

- the position of other stakeholders and the Monitor.

[22] The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

[23] The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

[24] In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and

the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

[25] The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

[26] I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

[27] In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here

TAB 31

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

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

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

TAB 32

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants

BEFORE: MORAWETZ J.

COUNSEL: A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants

D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: January 12, 2012
RELEASED: January 16, 2012
REASONS: February 2, 2012

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be

TAB 33

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

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

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

> (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

TAB 34

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1057863 B.C. Ltd. (Re),*
2020 BCSC 1359

Date: 20200914
Docket: S206189
Registry: Vancouver

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

and

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57

and

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	S. Collins W.W. MacLeod J. Roberts
Counsel for Province of Nova Scotia:	R.G. Grant, Q.C. M.P. Chiasson, Q.C.
Counsel for Paper Excellence Canada Holdings Corporation:	P.J. Reardon
Counsel for the Monitor, Ernst & Young Inc.:	E. Pillon L. Nicholson

Counsel for Unifor, Local 440:	R.A. Pink, QC
Counsel Pacific Harbor North American Resources Ltd, as the proposed interim lender:	B. Brammall
Counsel for Atlas Holdings LLC and Blue Wolf Capital Management, LLC:	N. MacParland
Counsel for Envirosystems Inc., dba Terrapure Environmental:	H. P. Whiteley
Counsel for Pictou Landing First Nation:	B. Hebert
Counsel for Nova Scotia Superintendent of Pensions:	S. Choo
Place and Date of Hearing:	Vancouver, B.C. July 31 and August 5, 2020
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. August 6, 2020
Place and Date of Written Reasons:	Vancouver, B.C. September 14, 2020

> the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].

[34] Section 11.2(4) of the *CCAA* sets out certain non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report…

[35] No one factor set out in s. 11.2(4) governs or limits the Court's consideration. The exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the "breathing room" said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court: *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176, at para. 33 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49.

[36] I will discuss the factors in turn.

[37] These proceedings were filed in mid-June 2020. Despite the Petitioners' initial intentions to undertake a restructuring process to mid-2022 under the Interim Lending Facility, their ambitions have been significantly curtailed, at least in the short term. Under the present proposal, the Petitioners seek only to extend these proceedings to December 2020, when hopefully there will be further clarity about how the restructuring may proceed. This shortened period will allow the Court, the

TAB 35

2013 ONSC 6167
Ontario Superior Court of Justice [Commercial List]

8440522 Canada Inc., Re

2013 CarswellOnt 13921, 2013 ONSC 6167, 233 A.C.W.S. (3d) 286, 8 C.B.R. (6th) 86

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

In the Matter of a Plan of Compromise or Arrangement of 8440522 Canada Inc., Data & Audio-Visual Enterprises Wireless Inc., and Data & Audio-Visual Enterprises Holdings Incorporation

Newbould J.

Heard: September 30, 2013
Judgment: October 4, 2013
Docket: 13-CV-16274-OOCL

Counsel: Robert Frank, Virginie Gauthier, Evan Cobb for Applicants
David C. Moore for Catalyst Capital Group Inc.
John Porter, Leanne M. Williams for Ernst & Young Inc, the proposed Monitor
Robert J. Chadwick for proposed DIP lender and the ad hoc Committee of Noteholders
Kevin P. McElcheran, James D. Gage for Quadrangle, a shareholder and, for subordinated note holders

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 — Miscellaneous
Applicants consisted of operating company and holding company who carried on business as Canadian wireless telecommunications carrier — Applicants raised in excess of $400 million in debt financing to fund capital expenditures and operations since 2008 — Indebtedness consisted of second lien notes, senior unsecured debentures and convertible unsecured notes — Cash interest payment under indebtedness was payment of over $9 million on first lien notes which became due on September 30, 2013, date of Initial Order — Applicants continued to engage with potential acquirers — In two weeks preceding application applicants developed transaction structure for proposed transaction with prospective purchaser, which was currently being considered by Industry Canada — Applicants applied for protection under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial Order signed — It was clear applicants were insolvent and that without protection of CCAA, shutdown of operations would be inevitable as applicants would cease to be able to pay trade creditors in ordinary course and would cease to be able to make interest payments on outstanding debt securities — As part of Initial Order, court approved debtor-in-possession financing and appointment of chief restructuring officer.
Table of Authorities
Cases considered by *Newbould J.*:
Crystallex International Corp., Re (2012), 2012 CarswellOnt 7329, 2012 ONCA 404, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — referred to
Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — distinguished
Sino-Forest Corp., Re (May 8, 2012), Doc. CV-12-9667-00CL (Ont. S.C.J.) — referred to

Timminco Ltd., Re (2012), 2012 ONSC 2515, 2012 CarswellOnt 5390 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

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

APPLICATION for protection under *Companies' Creditors Arrangements Act*.

***Newbould J.*:**

1 On September 30, the applicants ("Mobilicity Group") applied for protection under the CCAA. At the conclusion of the hearing I ordered that the application should be granted for reasons to follow, and an Initial Order was signed. These are my reasons.

Background facts

2 The Mobilicity Group consists of Data & Audio-Visual Enterprises Wireless Inc., the operating company ("Wireless" or "Mobilicity"), its holding company Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and 8440522 Canada Inc., wholly owned by Wireless and which has no material assets or liabilities.

3 Mobilicity carries on business as a Canadian wireless telecommunications carrier. It provides cellular service to Canadians in five urban markets: Ottawa, Toronto, Calgary, Edmonton and Vancouver and has roaming agreements with third party service providers to provide continuity of service outside of these markets. Mobilicity also offers hardware (handsets and accessories) to its customers.

4 Mobilicity was founded on the concept of offering low cost cellular services to value-conscious consumers seeking less expensive cellular services than those offered by the established players in the market, being Bell Canada Inc., TELUS Corporation and Rogers Communications Inc.

5 In addition to four corporately-owned stores, the Mobilicity dealer network consists of approximately 314 points of distribution which include approximately 94 "platinum-level" stores that exclusively sell Mobilicity-branded services and only offer wireless-related products at their stores, and approximately 150 "gold" and "silver" level stores that sell Mobilicity-branded services, but also sell non-wireless related products. With the exception of the four corporately owned stores, these points of distribution are operated independently from the Mobilicity Group and are compensated for sales on a commission basis 45 days after the end of the month in which a subscriber is signed on, subject to certain customer retention requirements. These dealers often operate with very low liquidity and any disruption to the stream of revenue derived from commissions would cause many of them to cease operations due to a lack of funding

6 Mobilicity operates on a "pay in advance" billing system which provides set monthly plans for its subscribers. Mobilicity has approximately 194,000 subscribers who together generate gross revenues of approximately $6.3 million per month.

7 Mobilicity's business model provides for outsourcing of certain business functions: network building and maintenance, real-time billing and rating, provisioning systems, handset logistics and distribution and call centre operations. Suppliers of such business functions include: Ericsson Canada Inc., Amdocs Canadian Managed Services Inc. and Ingram Micro Inc.

8 The single most significant capital expenditure made by Mobilicity was the acquisition of its 10 spectrum licenses from the Government of Canada effective in 2009. Mobilicity acquired the spectrum licenses for $243 million using funds contributed by Holdings.

9 After purchasing the spectrum licences, Mobilicity incurred significant costs by establishing an office, hiring a management team to develop the wireless carrier business, and contracting with Ericsson Canada Inc. to build a network system.

Outstanding indebtedness

10 In aggregate, the Mobilicity Group has raised in excess of $400 million in debt financing to fund capital expenditures and operations since 2008. A description of that indebtedness is below:

> a. Wireless is the borrower under certain first lien notes issued in a principal amount of $195,000,000 due April 29, 2018. Holdings is a guarantor of the first lien notes and each of Wireless and Holdings has entered into a general security agreement in connection with the first lien notes. The Catalyst Capital Group Inc. ("Catalyst") holds approximately 32% of the first lien notes.
>
> b. Wireless is the borrower of $43.25 million in second lien notes (the "Bridge Notes") due September 30, 2013. These Bridge Notes are also guaranteed by Holdings and the obligations thereunder are secured by the assets of Wireless and Holdings. The Bridge Notes rank behind the first lien notes in right of payment and the security on the Bridge Notes is subordinate to the first lien notes security.
>
> c. Holdings has issued 15% Senior Unsecured Debentures in the total principal amount of $95 million due September 25, 2018. As of July 31, 2013, the amount outstanding on the Unsecured Senior Notes (including payment in kind interest) was approximately $154.4 million.
>
> d. Holdings has also issued 12% Convertible Unsecured Notes due September 25, 2018. Initially, convertible notes in the principal amount of $59,741,000 were issued (the "Unsecured Pari Passu Notes"). Subsequently, additional convertible notes in the principal amount of $35,000,000 were issued (the "Unsecured Subordinated Notes"). The Unsecured Subordinated Notes rank subordinate in right of payment to the Unsecured Pari Passu Notes and the Unsecured Senior Notes and the Unsecured Pari Passu Notes rank pari passu in right of payment with the Unsecured Senior Notes. As of July 31, 2013, the amount outstanding on the Unsecured Pari Passu Notes and the Unsecured Subordinated Notes (including payment in kind interest) respectively, was approximately $88.4 million and approximately $38.6 million.

11 The cash interest payment under the above described indebtedness is a payment of over $9 million on the first lien notes which became due on September 30, 2013, the date of the Initial Order.

Mobilicity Group's financial difficulties

12 Wireless telecom start-ups are highly capital-intensive. As indicated by the substantial indebtedness incurred by the Mobilicity Group to date, significant fixed costs must be incurred before revenue can be generated. During the period where a wireless carrier is building its customer base, revenue is typically insufficient to cover previously incurred investments and ongoing operating costs. It can take several years for a customer base to be adequately built to provide profitability. The applicants submit that Mobilicity ran out of "financial runway" before profitability was achieved and it now faces an imminent liquidity crisis.

13 For the seven months ended July 31, 2013, the Mobilicity Group recognized revenue of $46,864,490. During that period, the Mobilicity Group recorded a net loss of $71,958,543. As of July 31, 2013, the Mobilicity Group had on a consolidated basis accumulated a net deficit of $431,807,958.

14 In July 2012, the Mobilicity Group engaged National Bank and Canaccord Genuity (together, the "financial advisors") as their financial advisors in an effort to raise additional financing.

15 With the assistance of the financial advisors, the Mobilicity Group solicited more than 30 potential investors in an attempt to raise financing. In this regard, an investor roadshow was completed in August and September of 2012 without success.

16 The Bridge Notes facility was entered into on February 6, 2013 to allow Mobilicity to continue operations while it pursued strategic alternatives. The Bridge note lenders are the first lien note holders other than Catalyst, and certain existing holders of Unsecured Senior Notes. Catalyst has started oppression proceedings attacking the Bridge Notes facility.

17 Mr. William Aziz was retained in late April of 2013 through BlueTree Advisors II Inc. as Chief Restructuring Officer to provide assistance in dealing with restructuring matters. Mr. Aziz has extensive experience in the area of corporate restructuring.

18 The Mobilicity Group proposed alternative plans of arrangement earlier this year. During the course of those proceedings, a transaction was agreed to sell the Mobilicity Group to TELUS Corporation for $380 million pursuant to a plan of arrangement under the *Canada Business Corporations Act*. The plan of arrangement was approved on May 28, 2013. However, On June 4, 2013, the Minister of Industry announced that TELUS Corporation's application to transfer the spectrum licenses would not be approved at that time. Accordingly, the TELUS transaction was not completed.

19 The Mobilicity Group has continued to engage with potential acquirers. As part of those efforts, the Mobilicity Group solicited and received an expression of interest and engaged in detailed discussions with a significant U.S.-based wireless service provider. However, after significant due diligence these discussions did not ultimately result in a binding offer due to uncertainty surrounding the Government's upcoming spectrum auction.

20 In the two weeks preceding this application the Mobilicity Group developed a transaction structure for a proposed transaction with a prospective purchaser, which is currently being considered by Industry Canada. The government's assent to the proposed transaction was not obtained prior to this application being made.

Analysis

21 It is clear from the affidavit of Mr. Aziz that the Mobilicity Group is insolvent and that without the protection of the CCAA, a shutdown of operations would be inevitable as the Mobilicity Group will cease to be able to pay its trade creditors in the ordinary course and will cease to be able to make interest payments on its outstanding debt securities. Thus the applicants are entitled to relief under the CCAA.

22 The Initial Order contained provisions permitting a charge for directors and an administration charge. These were not opposed except as to part of the administrative charge discussed below. The applicants also sought authorization to continue the engagement of the financial advisors who had initially been retained in 2012, which was not opposed, and approval of KERP agreements for a small number of employees, also not opposed. The Monitor supported these provisions and they appeared to be reasonable, and were approved.

23 I will deal with issues that were raised by Catalyst, not in opposition to the Initial Order, but in opposition to certain parts of it.

DIP financing

24 The Mobilicity Group has obtained a $30 million DIP facility available in five tranches, to be used only in accordance with the cash flow forecasts of the applicants. They seek approval of this facility and a charge to secure the facility. The facility was obtained after a solicitation process undertaken by the Mobilicity Group and its financial advisors, described in some particularity in Mr. Aziz's affidavit. The lenders are the holders of the second lien notes under the Bridge Loan and other unsecured lenders of the Mobilicity Group.

25 The DIP financing ranks pari passu with the Bridge Notes, and subordinate to the first lien notes, with the exception of cash interest payments under the DIP Financing. Since the DIP financing ranks subordinate to the first lien notes, the holders of the first lien notes, including Catalyst, will not be adversely affected by the DIP Financing.

26 In the solicitation process, the Mobilicity Group received DIP financing proposals from not less than four parties, including existing creditors as well as third parties with no prior financial involvement with the Mobilicity Group. One such proposal was

provided by the holders of the Bridge Notes and another was provided by Catalyst. The Mobilicity Group engaged its financial advisors and legal counsel to assist in the evaluation of the DIP Financing options that were presented.

27 Upon review, the Mobilicity Group determined, with advice from its advisors, that the proposals provided by the non-creditor third parties likely could not be implemented. Therefore, the financial advisors held discussions with the holders of the Bridge Notes and Catalyst to obtain what the Mobilicity Group believed to be the best available offer from each party either in the form of a final definitive term sheet or definitive agreements. These discussions occurred over the course of several weeks.

28 The financial advisors and counsel to the Mobilicity Group evaluated these DIP financing options, including the Catalyst DIP term sheet, based upon, among other things, quantum, conditions, price, ranking and execution risk and provided their expert views to the board of directors of the Mobilicity Group. After consideration of the DIP financing options, and after considering the advice of its legal and financial advisors, the board of directors of the Mobilicity Group concluded that the DIP financing option presented by the holders of the Bridge Notes was the best available option.

29 Catalyst contends that the DIP lending should not be approved at this time. It points to the cash flow forecast of the applicants that indicates that no DIP borrowing will be required until the week ending November 8, 2013 and says that there is time to give consideration to other DIP facilities that might be available. Mr. Moore said that he expects to obtain instructions from Catalyst to propose DIP financing that will rank equally as the DIP lending proposed by the applicants but provide more money and on better terms than that provided for in the proposal before the court.

30 Mr. Moore relies on the statement of Blair. J. (as he then was) in *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) that extraordinary relief such as DIP financing with super priority status should be kept in the Initial Order to what is reasonably necessary to meet the debtor's urgent needs during the sorting out period. Each case, of course, depends on its particular facts. Unlike *Royal Oak Mines Inc.*, the proposed DIP financing does not give the DIP lender super priority of the kind in *Royal Oak Mines Inc.*. It will rank behind the first lien notes held by Mr. Moore's client. The issue is whether approval of DIP financing is necessary at this time.

31 As to that question, I accept the position of Mobilicity that it is important that now that the CCAA proceedings have commenced, approving a DIP facility will provide some assurance of stability to the market place, including the customers of Mobilicity and its suppliers and dealers. If no DIP financing were approved, there is a serious risk that customers of Mobilicity, who do not have long term contracts, will go elsewhere. That would negatively affect the cash flow of Mobilicity and the assumption that advances under the DIP loan would not be required until November.

32 Should this DIP facility be approved with its proposed security? In my view it should. On the record before me, the facility was approved by the board of directors of the Mobilicity Group with the benefit of expert advice after a process undertaken to obtain bids for the loan. I recognize that board approval is a factor that may be taken into account but it is not determinative. See *Crystallex International Corp., Re* (2012), 91 C.B.R. (5th) 207 (Ont. C.A.) at para. 85.

33 The factors in s.11.2 (4) of the CCAA must be considered. I will deal with each of them.

(a) The period during which the company is expected to be subject to the CCAA proceedings.

34 Mobilicity hopes to be able to enter into a transaction with a proposed purchaser within a relatively short period of time. The applicants submit that it is reasonable to estimate that the proceedings could last to February, 2014 and that subject to its conditions, the DIP facility can provide funding until that time.

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

35 The Mobilicity Group retained Mr. Aziz in April, 2013 as its CRO, and he will continue in that capacity. He is a person of known ability. The business will continue to be run on a day to day basis by management who are looking for stability to enable it to keep its customer base.

(c) Whether the company's management has the confidence of its major creditors.

36 Catalyst, as the holder of approximately 34% of the first lien notes, says it has no confidence in Mr. Aziz or the way that it alleges the Mobilicity Group has ignored the different interests of Mobilicity and its holding company. That is the subject of its claim for oppression. However, the balance of first lien note holders, all of the Bridge Note holders, approximately 92% of the unsecured debenture holders and all of the holders of the pari passu notes support the company's management and the approval of the DIP facility. That is, holders of $444 million of the Mobilicity Group's debt, or 88% of that debt, support management and the DIP facility.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement.

37 The Mobilicity Group's preferred course is to achieve a going concern transaction that will be of benefit to all stakeholders, including the first lien note holders. The DIP facility permits some stability and breathing room to enable this to happen.

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

38 The earlier TELUS deal was for $380 plus assumption of obligations of the company. If the value of the Mobilicity Group is anywhere near that size, the $30 million DIP facility appears reasonable, particularly as it is to be drawn down in tranches when needed.

(f) Whether any creditor would be materially prejudiced as a result of the security.

39 No creditors will be materially prejudiced as a result of the DIP facility charge. The secured creditors likely to be affected by the charge have consented to it. The charge is junior to the security granted to the holders of first lien notes and is subordinate to any encumbrances that may have priority over the first lien notes either by contract or by operation of law.

(g) The position of the Monitor as set out in its report.

40 In its pre-filing report, E & Y, the proposed Monitor, has reviewed the process leading to the DIP facility and its terms. It states that it is of the view that the DIP facility charge is required and is reasonable in the circumstances in view of the applicants' liquidity needs.

41 In all of the circumstances, I approved the DIP facility and its charge. There is a come-back clause in the Initial Order, which Catalyst may or may not wish to utilize. I would observe that if Catalyst seeks to have a DIP facility proposed by it to replace the approved DIP facility, some consideration of the *Soundair* and *Crown Trust Co. v. Rosenberg* principles may be appropriate.

Stay of oppression action

42 The Initial Order sought by the applicants contained a usual stay order preventing the commencement or continuance of proceedings against or in respect of the applicants and the Monitor. Included in the protection were the DIP lenders, the holders of Bridge Notes and the Collateral Agent under the Bridge notes. The applicants submitted, and I agree with them, that this expanded group was appropriate in the circumstances as the holders of Bridge Notes and the Trustee have each been named in the oppression application brought by Catalyst. The holders of the Bridge Notes and the Trustee are parties to the oppression application by Catalyst solely due to their lending arrangements with the applicants and, as a result, the applicants are central parties to that litigation and would need to participate actively in any steps taken in that litigation. Further, any continuation of the oppression application against the holders of the Bridge Notes and the Trustee would distract from the goals of these proceedings and also result in unwarranted expenditure of resources by the holders of the Bridge Notes and the Trustee, each of which are indemnified in a customary manner by the applicants for these types of expenditures. As the DIP lenders are also Bridge Note holders and as such parties are stepping into a similar financial position as the Bridge Note holders, the extension of the stay to those parties is appropriate and reasonable. See *Sino-Forest Corp., Re* (May 8, 2012), Doc. CV-12-9667-00CL (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]) at paras. 23 and 24.

43 Catalyst contended, however, that the stay provisions should exclude its oppression application. Why this is so is not clear. Mr. Moore said there had been no steps taken in the application since the August cross-examination of Mr. Aziz, and that

Catalyst would undertake not to take further steps until the come-back date. I see no reason why the oppression application should be excluded from the stay contained in the Initial Order. It may be that Catalyst will be paid out in the near future if the transaction now on the table can be concluded. In any event, it is open to any party to apply to lift a stay on proper grounds. Catalyst is no different.

Ad hoc committee charge

44 The Initial Order contains an administration charge to cover fees and disbursements to be paid out to the Monitor and its counsel, counsel to the applicants, counsel to the DIP lenders and counsel to the ad hoc committee of Noteholders. Catalyst contends that there is no basis for counsel for the ad hoc committee of Noteholders to be included in this charge or to be paid by the applicant.

45 In this case, counsel to the DIP lenders is also counsel to the ad hoc committee of noteholders. That committee includes the balance of the first lien noteholders other than Catalyst who are the Bridge Note holders. It was the Bridge Notes that permitted the Mobilicity Group to continue since February of this year. Those noteholders making up the ad hoc committee have been working in a supportive capacity in an attempt to have the Mobilicity Group re-organized in a constructive way. I am satisfied that the ad hoc committee has been of assistance to the process and that the charge is appropriate and necessary. I would also note that the administrative charge is junior to the first lien notes and thus the security position of Catalyst is not affected by the charge. As well the administrative charge is supported by the proposed Monitor.

Appointment of chief restructuring officer

46 The Initial Order authorizes the applicants to continue the engagement of William Aziz as the chief restructuring officer of the Mobilicity Group on the terms set out in the CRO engagement letter. This letter has been sealed as confidential. Catalyst said it should see the letter and until then no order should be made. On the day before this application was heard, counsel for the Mobilicity Group offered to send the complete record to counsel for Catalyst if an undertaking was given that the material would be kept confidential prior to the hearing. Mr. Moore objected to such a pre-condition and was served shortly before the hearing with the application record without the confidential documents.

47 Catalyst contends that no order should be made until it has had a chance to see the terms of the engagement letter. I do not think this wise. To proceed with the CCAA process without the continuation of Mr. Aziz as the chief restructuring officer would send the entirely wrong signal to all stakeholders, let alone the Government of Canada with whom Mr. Aziz has been dealing regarding a proposed transaction.

48 Mr. Aziz has a thorough knowledge of the affairs of the Mobilicity Group, having been its chief restructuring officer since April of this year. He has been central to the efforts of the applicants to restructure. He is very knowledgeable and experienced. In is appropriate that his engagement now be continued. The proposed Monitor has reviewed the engagement letter and is of the view that the fee arrangement is reasonable and consistent with the fee arrangements in other engagements of similar size, scope and complexity.

49 Counsel for the applicants and Catalyst were agreeable to working out an appropriate confidentiality arrangement. Once Catalyst has seen the engagement letter for Mr. Aziz, it will be entitled if so advised to bring whatever come-back motion it thinks appropriate.

50 The Initial Order as signed contains provisions as discussed in this endorsement.

Application granted.

End of Document

TAB 36

In the Court of Appeal of Alberta

Citation: BG International Limited v. Canadian Superior Energy Inc., 2009 ABCA 127

Date: 20090407
Docket: 0901-0048-AC
Registry: Calgary

Between:

BG International Limited

Respondent
(Plaintiff)

- and -

Canadian Superior Energy Inc.

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Whole of the Interim Orders by
The Honourable Madam Justice B.E.C. Romaine
Dated the 11th day of February, 2009
Filed on the 11th day of February, 2009
(Docket: 0901-02012)

Memorandum of Judgment

The Court:

[1] This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

[2] The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

[3] There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

[4] When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

[5] The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

[6] Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 107; ***Medical Laboratory Consultants Inc. v. Calgary Health Region,*** 2005 ABCA 97, 43 Alta. L.R. (4th) 5 at para. 3.

Appointment of the Receiver

[7] The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

[8] The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia. He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

[9] Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

[10] The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led

to irreparable damage to all parties.

[11] We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

[12] The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

[13] The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

[14] The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and

indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

[15] The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in ***Royal Bank of Canada v. W. Got & Associates Electric Ltd.,*** [1999] 3 S.C.R. 408 without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

[16] We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

[17] In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in ***Swiss Bank Corp. (Canada) v. Odyssey Industries Inc***. (1995), 30 C.B.R. (3d) 49 (Ont. C.J. G.D.) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

[18] The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that

the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

[19] The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

[20] The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal heard on March 10, 2009

Memorandum filed at Calgary, Alberta
this 7th of April, 2009

Berger J.A.

Slatter J.A.

Rowbotham J.A.

Appearances:

V.P. Lalonde and M.A. Thackray, Q.C.
for the Appellant

C.L. Nicholson and M.E. Killoran
for the Respondent

T.S. Ellam
for interested/affected party Challenger Energy Corp.

H.A. Gorman
for the interested/affected party Canadian Western Bank

L.B. Robinson, Q.C.
for the receiver Deloitte & Touche Inc.

TAB 37

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

TAB 38

BENNETT on RECEIVERSHIPS

Fourth Edition

2021

by

Frank Bennett
L.S.M., LL.M.
Toronto, Canada

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c. The need for the appointment in view of the alternatives;
d. The nature of the property;
e. The likelihood of maximizing the return to the parties;
f. The costs involved;
g. The need to preserve the property pending realization;
h. The effect of an order on other creditors and other stakeholders.[71]

There are many factors and variations in determining whether it is just or convenient to appoint a receiver. The court should look at all the facts and review the matter "holistically" or on the "whole of the circumstances" to determine whether it is just or convenient to appoint a receiver.[72] These facts include the following:[73]

---

71 *Central 1 Credit Union v. UM Financial Inc.*, 2011 ONSC 5612, 84 C.B.R. (5th) 315 (Ont. S.C.J. [Commercial List]) where the court dismissed an application by a third party to intervene on an application to appoint a receiver.

72 *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.) at paras. 22-24 where the court refers to the holistic approach and refers to two lines of authority for the test, namely the appointment as of right where there is default under a security agreement and where the court should nonetheless in addition to the default under the security agreement still consider whether the appointment is just or convenient..

73 These factors were considered in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 46 C.B.R. (4th) 95, 2002 ABQB 430 at paragraph 27, 2002 CarswellAlta 1531 (Alta. Q.B.); in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142 at para. 25, 2009 BCSC 1527, 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]); in *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, 99 C.B.R. (5th) 178 (Alta. Q.B.) at para. 13.

See also *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, 2021 ABQB 137 (Alta. Q.B.) where in reviewing these factors, the court appointed a receiver. The court reviewed several defences including whether the security holder made misrepresentations about restructuring the loans, the lack of good faith in the enforcement proceedings, the credibility of the parties, misleading the debtor about restructuring the loans, and the lack of opportunity to negotiate the forbearance agreement.

In *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) at para. 9, leave to appeal to the Divisional Court dismissed 2009 CarswellOnt 1128 (Ont. S.C.J.) where the court considered the four following factors in dismissing a motion for the appointment of an interim receiver:

"(1) Since the appointment of a receiver is very intrusive, it should only be used sparingly with due consideration for the effect on the parties as well as a consideration of conduct of the parties. (See: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.));

(2) Since an appointment of a receiver is tantamount to execution before judgment, it should not be granted unless there is strong evidence that the creditor will not recover. (See: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.));

(3) When the security interest permits the appointment of a receiver — and the circumstances of default justify the appointment — the extraordinary nature of the remedy is less essential to the consideration of the court. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]))

(4) Where there is default which is not caused by the moving party where a loan had matured and there was no other means to protect the party's interest, then a receivership order should issue. (See *Royal Bank v. 605298 Ontario Inc.*, 1998 CarswellOnt 4436 (Ont. Gen. Div. [Commercial List])).

In *Lindsey Estate v. Strategic Metals Corp.* (2010), 67 C.B.R. (5th) 88, 2010 ABQB 242, 2010 CarswellAlta 641 (Alta. Q.B.), appeal dismissed (2010), 27 Alta. L.R. (5th) 241, 69

(1) whether irreparable harm might be caused if no order were made, although it is not essential that the creditor establish that it will suffer irreparable harm if a receiver is not appointed;[74]

C.B.R. (5th) 42, 2010 ABCA 191 (Alta. C.A.), the motion court considered the following factors in determining "just or convenient":

"In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;
b. the risk to the parties;
c. the risk of waste debtor's assets;
d. the preservation and protection of property pending judicial resolution; and
e. the balance of convenience."

See also *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477, 2010 CarswellBC 855 (B.C. S.C. [In Chambers]) and *Kumra v. Luthra*, 2010 ABQB 772, 79 C.B.R. (5th) 77 (Alta. Q.B.)

See also *Elleway Acquisitions Ltd. v. The Cruise Professionals Limited*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), where the court reviewed several other related cases in considering whether to appoint a receiver:"(a) the potential costs of the receiver;(b) the relationship between the debtor and the creditors;(c) the likelihood of preserving and maximizing the return on the subject property; and(d) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.)."

See also *Re Alexis Paragon Limited Partnership*, 2014 ABQB 65, 9 C.B.R. (6th) 43 (Alta. Q.B.) where the court considered the following factors in making the order:

1. the secured creditor's contractual right to appoint a receiver;
2. the risk of harm to the secured creditor if a receiver is not appointed;
3. the risk to the secured creditor from a sizeable deficiency;
4. the nature of the property;
5. the length of the receivership process; and
6. costs to the parties minimized if a receiver is appointed.

See also *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 (N.S. S.C.) where the court reviewed most of the factors in granting the appointment.

See also *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, 61 C.B.R. (6th) 322 (N.S. S.C.), additional reasons following debtor's redeeming bank before order was taken out 2018 NSSC 182, 62 C.B.R. (6th) 283 (N.S. S.C.).

See also *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243, 72 C.B.R. (6th) 118 (N.S. S.C.) following *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* above.

See also *Re Schendel Management Ltd.*, 2019 ABQB 545 (Alta. Q.B.) where the debtor's proposal was doomed fail.

See also *White Oak Commercial Finance, LLC v. Nygard Holdings (USA) Limited*, 2020 MBQB 58, 79 C.B.R. (6th) 44 (Man. Q.B.) where the debtor had not been acting in good faith and with due diligence, and had not provided the proposal trustee with accurate and timely information.

74 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) referring to *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. H.C.). In the *Odyssey* case, there was no evidence of the loans being in jeopardy of repayment while being in default.

See *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) where the court focused on (1) the effect of an appointment on the parties including costs, maximizing the return and preserving the property, (2) the parties' conduct and (3) the nature of the debtor's property and the rights and interest of the parties in relation to the property referring to the *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

(2) the risk to the security holder. In considering the risk factor, the court considers the size of the debtor's equity in the assets and the need for protection or safeguarding the assets while the litigation takes place. If the security holder can readily establish that there is going to be a sizeable deficiency in relation to the size of the loan, then the court will lean in favour of making the appointment as there is clear prejudice to the security holder. On the other hand, the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will adequately protect the security holder;[75]

(3) the nature of the property;

(4) the rights of the parties thereto;[76] If the secured creditors lose confidence in the debtor's ability to manage the business, then the court will consider this factor in favour an appointment.[77]

The *Swiss Bank* case has been distinguished and not followed in Alberta: *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that the debtor does not to prove any special hardship, much less "undue hardship" to resist an application for the appointment of a receiver.

See also *Lakeside Colony of Hutterian Brethren v. Hofer* (1993), 87 Man. R. (2d) 216, 19 C.B.R. (3d) 190, 1993 CarswellMan 30 (Man. Q.B.) where the court also took into consideration the fact that the plaintiffs had a strong *prima facie* case and that the balance of convenience favoured the appointment.

75 If there is no danger to the debtor's property, and the appointment will have a devastating effect on the debtor, the court will not appoint a receiver: *HMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 95 Sask. R. 211, 7 C.B.R. (3d) 216, 1991 CarswellSask 42 (Sask. Q.B.)

See also *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186, 1985 CarswellOnt 206 (Ont. H.C.) where the court, after considering that the debtor's financial situation was desperate, appointed a receiver and manager.

In *Churchill (Local Government District) v. Costa Cartage Ltd.* (1994), 94 Man. R. (2d) 216, 1994 CarswellMan 286 (Man. Q.B.) where the debtor threatened to remove the furniture and furnishings of a hotel.

See also *Wilson v. Marine Drive Properties Ltd.* (2008), 51 C.B.R. (5th) 74, 2008 BCSC 1431, 2008 CarswellBC 2240 (B.C. S.C.).

Sequestre de Bouvidard limitee c. 3184277 Canada inc., 2017 QCCS 2293, 53 C.B.R. (6th) 162 (C.S. Que.).

See also *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189, 2009 CanLII 12803, [2009] O.J. No. 1228 (Ont. S.C.J.), where the unsecured creditor's right to recovery money in a fraud situation is in serious jeopardy. In this case, the court appointed an "investigatory receiver" to locate, investigate and monitor the debtor.

See also *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* 2011 ONSC 4704 (Ont. Div. Ct.), refusing leave to appeal, additional reasons as to costs 2011 ONSC 5699 (Ont. Div. Ct.) where the court appointed an "investigative receiver" to review transfers between interconnected entities.

See *Business Development Bank of Canada v. Royal Green Enterprises Ltd.*, 2012 ONSC 478 (Ont. S.C.J. [Commercial List]), where the court appointed a receiver as security holder's collateral was eroding.

76 *Nat. Trust Co. v. Yellowvest Holdings Ltd. et al.* (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.); applied in *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366, 1991 CarswellOnt 469 (Ont. Gen. Div.). See also *Royal Trust Corp. of Can. v. D.Q. Plaza Holdings et al.* (1984), 36 Sask. R. 84, 53 C.B.R. (N.S.) 18, 1984 CarswellSask 38 (Sask. Q.B.).

(5) the apprehended or actual waste of the debtor's assets;[78]
(6) the preservation and protection of the property pending the judicial resolution;[79] If the business is operating, the court considers the amount of carrying costs needed to preserve the business for re-sale.

See also *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that an appointment should not lightly be granted and that the rights of both parties should be carefully balanced before an appointment is made.

In *MTM Commercial Trust v. Statesman Riverside Quays Ltd.* (2010), 70 C.B.R. (5th) 233, 2010 ABQB 647 (Alta. Q.B.) the court reviewed the test for the appointment of a receiver as being comparable to the test for an injunction, namely whether there is a serious issue to be tried, irreparable harm if not granted, and the balance of convenience: *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.).

77 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851, 81 C.B.R. (5th) 47 (Ont. S.C.J.).

78 *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) where the court appointed a receiver as the debtor was dissipating its assets and its property was deteriorating. However, the court stayed the appointment pending the return of an application by the debtor under the *Companies' Creditors Arrangement Act*. The court held, at para. 14, that if a debtor is in default under a security agreement, then it is a matter of course that a receiver should be appointed unless there are compelling reasons to the contrary.

Compare *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.) where the court refers to two lines of authority on the test to appoint a receiver.

79 For example, the court has the discretion to appoint a receiver in a mortgage action where the mortgagor fails to manage the buildings properly and make repairs: *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Company* (1978), 23 N.B.R. (2d) 261, 1978 CarswellNB 96 (N.B. C.A.); *J.P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301, 1996 CarswellOnt 430 (Ont. Gen. Div.); *Farallon Investments Ltd. v. Bruce Pallet Fruit Farms Ltd.*, 1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.).

See also *McLennan Ross v. Paramount Life Ins. Co.* (1986), 44 Alta. L.R. (2d) 375, 63 C.B.R. (N.S.) 265, 1986 CarswellAlta 448 (Alta. Q.B.). When a mortgagee applies for a court appointment, the order does not create any new rights; it only protects existing rights. In this case, the court held that the receiver is entitled to collect rent arrears after the appointment, but the receiver cannot collect rent already collected by the mortgagor.

See also *Standard Trust Co. v. Pendygrasse Hldg. Ltd.* (1988), 71 C.B.R. (N.S.) 65, 1988 CarswellSask 27 (Sask. Q.B.) where the court, in referring to many of these factors, refused the appointment on the basis that the mortgagee already had significant control over the management board of a condominium complex and, therefore, its security was not in danger.

See also *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613, 1991 CarswellOnt 1511 (Ont. Gen. Div.), where the court, in referring to many of these factors, appointed a receiver to complete a large construction project of an office building and to lease out space. Here, the debtor had no substantial equity in the project, its loans were in default and they had matured. The right to appoint a receiver becomes even less extraordinary when dealing with a default under a mortgage.

See also *Bank of N.S. v. Marbeck Well Servicing Ltd.; Bank of N.S. v. Becker* (1986), 43 Alta. L.R. (2d) 453 (M.C.) (headnote only).

See also *Yukon v. B.Y.G. Natural Resources Inc.* (2007), 31 C.B.R. (5th) 100, 2007 YKSC 2, 2007 CarswellYukon 1 (Y.T. S.C.) where the court concluded that an interim receiver was needed where there were dangerous and unsafe conditions in a mine site that had been abandoned.

See also *Bacic v. Millennium Educational & Research Charitable Foundation*, 2013 ONSC 4545, 17 C.B.R. (6th) 162 (Ont. S.C.J.) where after an initial appointment of a receiver to

On the other hand, if the business is closed at the time of the application or motion, the court will be less concerned about these costs, but will be focused on the costs to moth-ball the business.

(7) the balance of convenience to the parties;

(8) the fact that the creditor has the right to appoint a receiver under its security upon the debtor's default is an important factor. Where this clause is present, the extraordinary nature of the remedy is less essential as a determining factor in the consideration.[80] However, the

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protect the assets against dissipation, the applicants obtained an order expanding the powers of the receiver to mirror the appointment within bankruptcy proceedings.

See also *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905, 17 C.B.R. (6th) 169 (Ont. S.C.J. [Commercial List]) where the court appointed a receiver in order to preserve the continuity of a retirement residence as a going concern.

If the property is not in peril or the creditor is unable to demonstrate that, the court will not appoint a receiver: *Tim v. Lai and Harry Invts. Ltd.* (1984), 53 C.B.R. (N.S.) 80, 1984 CarswellBC 575 (B.C. S.C.).

See also *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 13 C.B.R. (6th) 136 (Ont. S.C.J. [Commercial List]) at paras. 59-62, additional reasons as to costs 2014 ONSC 3480, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]) where in competing interests, the court appointed a receiver rather than allow the debtor protection under the *CCAA*.

See also *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (Ont. S.C.J. [Commercial List]) where the court in choosing between a receivership or a *CCAA* process, must balance the competing interests of the various stakeholders to determine which process is more appropriate. The court will consider the following factors:

"a) Payment of the Receivership Applicants

b) Reputational damage

c) Preservation of employment

d) Speed of the process

e) Protection of all stakeholders

f) Cost

g) Nature of the business."

See also *Re 2607380 Ontario Inc.*, March 6, 2020 - referred to in *BCIMC Construction Fund Corp. Clover on Yonge Inc.*, [2020] O.J. No. 1615 (Ont. S.C.J.) - where the court granted an order under the *CCAA* rather than appointing a receiver. In this case, the debtor was supported by two of the three security holders and had a plan to present to the creditors.

But see *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437, 93 C.B.R. (5th) 57 (B.C. S.C. [In Chambers]) where the court appointed a receiver but stayed the appointment pending the return of an application by the debtor under the *Companies' Creditors Arrangement Act*.

See also RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205, 18 C.B.R. (6th) 300 (Ont. S.C.J. [Commercial List]) where in appointing a receiver, the applicant was prepared to fund the receivership thereby preserving the debtor's enterprise value.

Instead of appointing a receiver, the security holder can request an injunction and a preservation order against the debtor pending a declaration that the security holder is entitled to enforce its security.

80 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

See *Alexander v. 2025610 Ontario Ltd.*, 2012 ONSC 3486, [2012] O.J. No. 2721 (Ont. S.C.J. [Commercial List]) where the parties agreed to the appointment of a receiver in a side agreement if they defaulted under a forbearance agreement.

court still has to decide on reviewing other factors whether an appointment is just or convenient and necessary to enable the receiver to carry out its work and duties more efficiently. As a result, the court should not ordinarily interfere with the contract between the parties, but it should still review other factors;[81]

(9) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;[82]

(10) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;[83] however, the fact that a creditor has the right to appoint a receiver by instrument under its security makes the "extraordinary" nature of the remedy less essential in the consideration, but the applicant must still demonstrate that the appointment is just or convenient;[84]

There are many cases following this factor.

81 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

There are many cases that adopt this principle: See Appendix to this Chapter.

On the other hand, there is *dicta* to the effect that the appointment of a receiver should be a matter of course in the context of a foreclosing mortgagee and that there is no need to satisfy the just or convenient test: *First West Credit Union v. 687830 B.C. Ltd.*, 2012 BCSC 908, 92 C.B.R. (5th) 198 (B.C. S.C.) referring to *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347, 2003 BCSC 640, 2003 CarswellBC 1084 (B.C. S.C. [In Chambers]).

See also below in text (10) extraordinary relief.

82 *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 68 C.B.R. (5th) 287, 2010 ONSC 3042, 2010 CarswellOnt 3588 (Ont. S.C.J.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.).

See also *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348, 42 C.B.R. (6th) 290 (B.C. S.C.).

But see *Visser v. Godspeed Aviation Ltd.*, 2020 BCSC 1241, 2020 CarswellBC 2070 (B.C. S.C.) where the court denied the appointment as there was no risk to the security or any potential irreparable harm. In this case, there was already a privately appointed receiver in place. The debtor had sued the creditor for misrepresentation arising out of the sale of the business to the debtor.

83 *Canadian Imperial Bank of Commerce v. Jack*, 1990 CarswellOnt 3055, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416 (Ont. Gen. Div.) referring to *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.).

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.),See also *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*, 2003 CarswellOnt 3598 (Ont. S.C.J.), appeal dismissed 2004 CarswellOnt 810 (Ont. C.A.).

See also *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), *WestLBAG v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 3510 (Ont. S.C.J. [Commercial List]) where the receiver was initially appointed under subsection 47(1) of the *Bankruptcy and Insolvency Act* and sections 68(1) and (2)(b)(c) and (d) of the *Construction Lien Act*.

84 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]).

(11) whether a court appointment is necessary to enable a private receiver to carry out its duties more efficiently;[85]

(12) the effect of the order on the parties. If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price;[86]

(13) the conduct of the parties;[87]

(14) the length of time that a receiver may be in place. Usually, a receiver appointed by the court remains in place until after judgment and realization of assets. This could last several years depending upon the nature of the business. However, where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties;[88]

(15) costs to the parties;

(16) the likelihood of maximizing the return to the parties. As set out in Chapter 7, Realization, a court-appointed receiver has a higher standard in maximizing the return to all parties whereas a privately appointed receiver has a duty to the initiating creditor to obtain a fair price for the debtor's business. The receiver, whether court or privately appointed, can close the business, operate it for a short term and ultimately liquidate its assets if it cannot be sold as a going concern

(17) facilitating the duties of the receiver;[89] and

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85 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]); referred to in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1 (Ont. S.C.J.); and followed in *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 (Ont. S.C.J.).

86 *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). In this case, the court was also concerned about the receiver's capabilities as the proposed receiver lacked experience in operating a nursing home. See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

See *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

87 *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.) where the court in rejecting the appointment of a receiver reviewed the effect of the order on the parties as well as their conduct.

88 In Ontario, the security holder seldom obtains judgment before the receiver sells the debtor's business. But see *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145, 56 C.B.R. (N.S.) 7, 16 D.L.R. (4th) 181 (B.C. C.A.) where the court commented about the creditor first obtaining judgment before it could sell.

89 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) where the court reviewed many of the above circumstances. In this case, the debtor had been attempting to re-finance real properties for one and a half years and was at odds with the security holder as to marketing them. In postponing the appointment for a short time to give the debtor a further opportunity to re-finance, the court concluded that a court-appointed receiver could resolve that impasse.

(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.[90]

(19) the appointment will facilitate a cross border sale transaction giving the receiver power to apply to the United States Bankruptcy Court for recognition and enforcement of orders.[91]

In many cases, a security holder whose instrument charges all or substantially all of the debtor's property provides for a court-appointed receivership if the debtor is in default and fails to pay following a demand for payment.[92] *Prima facie*, the security holder is entitled to enforce its security by applying for a court-appointed receiver and manager.

If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that:

1. there is a serious issue to be tried,
2. that irreparable harm will occur if an appointment is not made, and
3. that the balance of convenience must be in the creditor's favour.

In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[93]

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90 *Priority 1 Security Inc. v. Phasys Ltd.* (2006), 9 P.P.S.A.C. (3d) 203, 22 C.B.R. (5th) 258, 2006 ABQB 332 (Alta. Q.B.).

See also section 4.2 of the *Bankruptcy and Insolvency Act* which provides that any interested person in any proceedings under this Act shall act in good faith. If an interested person fails to act in good faith, the court has the power to "make any order that it considers appropriate in the circumstances."

91 *Callidus Capital Corp. v. Xchange Technology Group LLC*, 2013 ONSC 6783 (Ont. S.C.J. [Commercial List]).

92 The above passage as it was written in the first edition was cited in *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343 (Alta. Q.B.).

See *Royal Bank v. Brodak Construction Services Inc.* (2002), 34 C.B.R. (4th) 107, 2002 CarswellOnt 1774 (Ont. S.C.J. [Commercial List]) referring to *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]).

93 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.). In *Anderson v. Hunking*, 2010 ONSC 4008, 2010 CarswellOnt 5191 (Ont. S.C.J.), additional reasons 2010 ONSC 4920, the Ontario court summarized the factors in dismissing an application for the appointment of a receiver where the creditors were neither judgment creditors nor secured creditors at paras. 15 and 16:

"[15] Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order 'where it appears to a judge of the court to be just or convenient to do so.' The following principles govern motions of this kind:

(a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);

(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);

(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Limited v. 663789 Ontario Ltd.*, [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. S.C.J.);

(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

(ii) it must be determined that the moving party would suffer 'irreparable harm' if the motion is refused, and 'irreparable' refers to the nature of the harm suffered rather than its magnitude — evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits — that is, the 'balance of convenience' See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214(S.C.) at paras. 7 and 11;

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton* (2009), 78 C.P.C. (6th) 189 (S.C.J.). [*Degroote v. DC Entertainment Corp.* (2013), 7 C.B.R. (6th) 232, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List])].

[16] The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As the court observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, at para. 6:

[T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is 'just' or 'convenient' or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)]."

Followed in *Schembri v. Way* (2010), 76 B.L.R. (4th) 147, 2010 ONSC 5176, 2010 CarswellOnt 8675 (Ont. S.C.J.) and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2011 ONSC 4704, 2011 CarswellOnt 8054 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10661 (Ont. Div. Ct.), additional reasons 2011 CarswellOnt 10375 (Ont. S.C.J. [Commercial List]), followed in *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759, 86 C.B.R. (5th) 49 (Alta. Q.B.) where the court extended the appointment of a receiver having been previously appointed over real estate to take possession of related companies operating a hotel on the mortgaged lands.

See also *Eaglewood Specialty Products et al v. Royal Bank*, 2017 NBQB 136, 50 C.B.R. (6th) 246 (N.B. Q.B.) where the debtor unsuccessfully applied to restrain the privately appointed receiver.

See *Murphy v. Cahill*, 2013 ABQB 335 (Alta. Q.B.) where the court dismissed an application to appoint a receiver on the basis that the applicant did not meet the triparte test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, that the parties were ready for trial,

TAB 39

Court of Queen's Bench of Alberta

Citation: Lindsay Estate v. Strategic Metals Corp., 2008 ABQB 602

Date: 20080930
Docket: 0801 08351
Registry: Calgary

Between:

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsay, as Representative Plaintiff

Plaintiff

- and -

Strategic Metals Corp. and Capital Alternatives Inc.

Defendants

Memorandum of Reasons
of the
Honourable Mr. Justice G.C. Hawco

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[1] The Defendant has brought 5 applications:

1. An application for summary judgment.
2. An application to strike the statement of claim.
3. An application for timing order.
4. An application for an order finding Michael Quilling in contempt of Court.
5. An application to remove Mr. Quilling as an Inspector of the Defendant, Strategic Metals Corp. ("Strategic")

[2] The Plaintiff has brought an application for the appointment of a Receiver.

[3] The Defendant's applications are denied.

[4] The Plaintiff's application is granted.

I. Summary Judgment Application

[5] The Defendant argues that the relief requested by the Plaintiff is barred by virtue of the *Survival of Actions Act*, RSA 2000, c. S-27 and the *Limitations Act*, RSA 2000, c. L-12.

[6] The *Survival of Actions Act* may prevent the Plaintiff or Plaintiffs from recovering punitive damages which have been sought, but that is only one of the three heads of damage being sought.

[7] The *Limitations Act* may, depending upon evidence led at a trial, bar the action, but the evidence obtained through cross-examination on the Plaintiff's affidavit does not convince me that the action must fail or that there is a strong likelihood that the Plaintiff would not be successful at trial. That application is therefore denied.

II. Whether the Statement of Claim should be struck

[8] The Defendant argues that the Statement of Claim should be struck because the Plaintiff has alleged fraud but has not provided any specifics about any particular fraudulent activity.

[9] As was the case in ***Continental Lime Limited v. Med Finance Co.*** (1991), 15 C.B.R. (3d) 136, I am satisfied that there are sufficient particulars set forth in the Statement of Claim to make it clear in what manner fraud has occurred. The allegations are sufficient to enable the Defendant to file a Statement of Defence. While the Statement of Claim does state that the Plaintiff is not aware of "the precise mechanism and full extent of the investment scheme" that is not sufficient to warrant striking the Statement of Claim. Such particulars are not in the Plaintiff's knowledge at this time and need not be.

[10] That application is denied.

III. Timing Order

[11] Given the Plaintiff's success on its application, there is no requirement at this time for a Timing Order.

IV. Application to Find Mr. Quilling in Contempt

[12] The Defendant alleges that Mr. Quilling has, by forwarding a copy of his interim report of August 26, 2008 to the Alberta Securities Commission (the "ASC"), breached Section 231(5) and 231(6) of the *Business Corporations Act*, RSA 2000, c. B-9.

[13] Section 231(5) states:

> No person may publish anything relating to proceedings under this section or section 232 except with the authorization of the Court or the written consent of the corporation being investigated.

[14] Section 231(6) states:

> Documents in possession of the Courts relating to an application under this section or Section 232 are confidential unless the Court otherwise orders.

[15] The Plaintiff's response is that the ASC has conducted an investigation into the Defendant's activities and continues to remain interested. The ASC itself asked to be provided with copies of Mr. Quilling's reports. It was, in fact, Mr. Dearlove who forwarded the report to the ASC.

[16] Section 233(2) of the *Business Corporations Act* states:

> In addition to the power set out in the Order appointing the inspector, an inspector appointed to investigate a corporation may furnish information to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is authorized to exercise investigatory powers and who is investigating, in respect of the corporation, any allegation of improper conduct that is the same as or similar to the conduct described in Section 231(2).

[17] I am satisfied that Mr. Quilling's report was not improperly forwarded to the Alberta Securities Commission. I find Mr. Quilling not to be in contempt.

V. Application to Remove Mr. Quilling as an Inspector

[18] The primary basis for this application is the allegation that Mr. Quilling is biased against the Defendant and is in a conflict of interest position.

[19] In support of these allegations, the Defendant points to the use by Mr. Quilling of Sgt. Fuller's information and his reliance upon many of the opinions and statements in that information, which the Defendant says is based upon hearsay and therefore ought not be admissible. The Defendant points to sworn affidavit evidence by Ms. Carol Weeks, Mr. Ryan Jones, and Mr. Graham Blaikie which contradict much of the so-called evidence of Mr. Quilling. In addition, the Defendant maintains that Mr. Quilling is obviously taking directions from Plaintiff's counsel and is providing information to Plaintiff's counsel prior to giving such information to the defence or the Court.

[20] I am satisfied with the explanation given by Mr. Dearlove with respect to the first report having been produced on paper from the offices of Bennett Jones. Mr. Quilling asked if counsel could generate the report as a favour to him. Mr. Dearlove acceded to the request. Copies, once

made, were forwarded to the Plaintiff as well as to the Defendant and the Court. To characterize this as favouring the Plaintiff is unwarranted.

[21] To argue that the statements of Ms. Weeks, Mr. Jones and Mr. Blaikie should be accepted because those people have not been cross-examined on their affidavits and to argue that there is no evidence which contradicts them is to ignore totally the information of Sgt. Fuller and the hearing and decision of the ASC.

[22] I appreciate that much of the information relied upon by Sgt. Fuller and the ASC was hearsay. While it was hearsay, it was admissible before the ASC and may be considered by this Court. Care, of course, must be taken with respect to such evidence. However, by the same token, consideration must be given to the nature of the investigations and the opportunity which the respondents at the ASC hearing had to rebut the evidence. The respondents, including the Defendant and Ms. Weeks, were given an opportunity to present evidence to the Commission. None of the respondents in that hearing elected to do so.

[23] The "gem" which was being held out to the Plaintiff and other investors was the Tulameen Mine. Its potential for gold and platinum was said to be huge: proven gold reserves of 2.5 million ounces and proven platinum reserves of 2.5 million ounces. This was not hearsay evidence. It was the evidence of the Defendant, as set forth in its offering memorandum. The finding of the Securities Commission was that all of the respondents, including the Defendant, Ms. Weeks and Mr. Sorensen, Mr. Blaikie's superior, were "engaged in a course of conduct that amounted to a fraud upon the shareholders of Strategic."

[24] Mr. Quilling has stated in his second report dated September 17, 2008 that he fully understands what is expected of him, having been appointed to serve as an officer of the Court. He goes on to state:

> While it may seem that I have chosen to take one side over the other, my investigation to date has centred around the only things currently available to me which are publicly filed papers generated by governmental agencies which are uniformly in agreement that Strategic has not properly operated its affairs. To date, other than blanket denials and very little documentation, I have not been provided anything by Strategic to indicate otherwise. There has been no rush by Strategic to show me exculpatory materials to the extent they exist, nor has there been any attempt to meet with me to explain Strategic's side of the story. Until I can visit offices, mine sites, and interview employees/officers and review financial records, I can only report what I do find, all of which is negative. To the extent I am involved in any court proceedings, beit this one or others, I report both sides of the story if I have the information available to me.

[25] Mr. Quilling will not be removed as an inspector.

VI. Appointment of a Receiver

[26] When this Application originally came before me, I declined to appoint a receiver because of my concern that such an appointment may have a deleterious effect on the joint venture in which Strategic had an interest. As a result, although I had a concern about Strategic because of the allegations set forth in this Statement of Claim and the Plaintiff's brief, which included the decisions of the ASC, I was persuaded by the Defendant to appoint Mr. Quilling as an Inspector rather than as a receiver.

[27] My concerns about Strategic have not been allayed following the Inspector's two reports. They have been heightened. The Plaintiff's ability to recover her or, more properly, her father's investment and the ability of other investors to recover their money appears to be in serious jeopardy.

[28] The appointment of a receiver usually takes place when a company is shown to be insolvent and usually is initiated by a secured creditor whose security is at risk.

[29] There is, however, the right under the *Judicature Act*, RSA 2000, c.J2, Section 8, for the Court to grant "any remedies which a party may appear to be entitled in respect to any legal or equitable claim." Thus, if it would appear to be just and equitable, the Court may appoint a receiver.

[30] I am satisfied that it is just and equitable that a receiver be appointed in this case.

[31] The investigation and hearing by the ASC and the investigation carried out thus far by Sgt. Fuller and the RCMP raise very real concerns as to the legitimacy of the Offering Memorandum proffered by Strategic to the Plaintiff and other investors.

[32] As stated above, at least one of the Offering Memoranda held out that Tulameen Mine, a property owned by Stone Mountain and its primary asset, was laden with gold and platinum. The acquisition of their property, the value of their property and the present management of that property are all seriously suspect.

[33] The Defendant's own geologist, Theodore Reichem, believes that Tulameen Mine does not have precious metals, yet the business plan prepared by Mr. Ryan Jones projects income from gold production from the Tulameen Mine to be some $700,000.00 in the first year. To achieve that and to achieve the recovery of $2.2 million of magnetite, the company will have to spend a minimum of $1,183,000.00. It is not indicated where that will come from other than a vague plan to sell stockpiled magnetite. Mr. Jones acknowledges that there is presently no production permit in place.

[34] The information and belief of Sgt. Fuller is that Tulameen Mine is a sham. Sgt. Fuller concludes, as did the ASC, that the funds invested in Strategic have been misappropriated.

[35] The value of the Ecuador property in which Strategic holds a 10% royalty interest is suspect as well.

[36] The ASC has determined that Strategic and Weeks and others perpetrated a fraud on the shareholders of Strategic.

[37] The Defendant takes issue with the Plaintiff using the reasoning of the ASC to support its application. It argues that a decision of Justice Winkler in ***Edwards v. Law Society of Upper Canada*** (1995), 40 C.P.C. (3d) 316 should be applied.

[38] At paragraph 9, Justice Winkler stated:

> The fact of the conviction is admissible in a subsequent civil proceeding. The reasons for conviction and findings, however, are not, especially where, as in the case at bar, the parties and issues are not identical with those in civil proceedings.

[39] I have reviewed ***Edwards*** and find that it is not particularly on point. The primary defendant in ***Edwards***, the Law Society of Upper Canada, was not a party in the previous proceedings and the primary issue was different.

[40] In ***Hill v. Gordon-Daly Grenadier Securities***, [2001] 14 C.P.C. (5th) 55, the Court was faced with the parties suing a number of brokers for fraud and breach of fiduciary duty. There had been a prosecution before the Ontario Securities Commission which resulted in the finding against the brokers. The Plaintiff (representative Plaintiff) was seeking to have the reasons of the Commission included in her action. Mr. Justice Talinao, on behalf of the Court, upheld the decision of the Chambers Judge which allowed the reasons to be a part of the Court record, choosing to distinguish ***Edwards***. The Court preferred the reasons of Krindle, J in ***Simpson v. Geswein***, (1995) 6 W.W.R. 233 wherein the reasoning of the trial judge in a criminal trial involving the same parties was admissible in the subsequent civil trial. In ***Simpson***, Krindle, J, determined that the conviction and the reasons were not conclusive of the facts, but they were strong *prima facie* proof of the facts.

[41] In this case, the Plaintiff herself was not a party to the hearing before the Securities Commission in this province, but the ASC clearly was concerned with her rights and the rights of other investors. Strategic was a party. The issues were much the same as are before this Court.

[42] I therefore find that the ASC's decision and its reasons are admissible in this matter. The decision and the reasons are significant in as far as the reports of Mr. Quilling are concerned.

[43] I also find that the information of Sgt. Fuller, which was relied upon to a large extent by Mr. Quilling, is admissible.

[44] The ASC decisions have been upheld by our Court of Appeal. Those decisions, together with the RCMP investigations to date and the conclusions of the Inspector, indicate that Strategic

Metals has been involved in a large, complex and well-planned fraud on its investors. It would be completely inappropriate to allow it to attempt to pursue a return of the funds when its very position is that there has been simply a case of inadequate disclosure. As the Commission found, "this profoundly misinterprets our findings in the Merits Decision".

[45] In the end result, Mr. Quilling will be and is hereby appointed as a Receiver of Strategic with the usual powers, excepting that he may not sell any asset of the company without further order of this Court.

Heard on the 22nd day of September, 2008.
Dated at the City of Calgary, Alberta this 25th day of September, 2008.

G.C. Hawco
J.C.Q.B.A.

Appearances:

Mr. Frank Dearlove
for the Plaintiff

Mr. Glenn Solomon
for the Defendant

TAB 40

I.I.C. Ct. Filing 383840867024

Re Shire International Real Estate Investments Ltd. — Court File No. 0901-11866
49. — **Order, June 30, 2010**

Shire International Real Estate Investments Ltd., Shire Capital Ltd., Halama Gardens LLC, Shire Asset Management Ltd., Winn River Resort Ltd., Fort McMoney Properties II Ltd., Halama Gardens Ltd., Maples and White Sands Investment Ltd., Fort McMoney Properties Ltd., Chemainus Properties Ltd., Skaha Lake Developments Ltd., Tsehum Harbour Ltd., Bearspaw at 144th Bonds Inc., Tsehum Harbour Equities Ltd., Tsehum Harbour Bonds Ltd, and Orillia Investments Ltd., Court File No. 0901-11866 (Court of Queen's Bench of Alberta, Judicial Centre of Calgary)

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended, the *Judicature Act*, R.S.A. 2000, c. J-2, as Amended and the *Business Corporations Act*, R.S.A. 2000, c. B-9, as Amended and In the Matter of a Plan of Compromise or Arrangement of Shire International Real Estate Investments Ltd., Shire Capital Ltd., Halama Gardens LLC, Shire Asset Management Ltd., Winn River Resort Ltd., Fort McMoney Properties II Ltd., Halama Gardens Ltd., Maples and White Sands Investment Ltd., Fort McMoney Properties Ltd., Chemainus Properties Ltd., Skaha Lake Development Ltd., Tsehum Harbour Ltd., Bearspaw at 144th Avenue Ltd., Bearspaw at 144th Equities Ltd., Bearspaw at 144th Bonds Inc., Tsehum Harbour Equities Ltd., Tsehum Harbour Bonds Ltd., Orillia Investments Ltd., 0726028 B.C. Ltd., 0675816 B.C. Ltd. and Bosun's Holdings Ltd.

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE OF CALGARY

BEFORE THE HONOURABLE MADAM JUSTICE C. L. KENNY IN CHAMBERS	)))	ON THE 30th DAY OF JUNE, 2010.

UPON the application of Romspen Investment Corporation ("*Romspen*") of the Court having read the Notice of Motion, the Affidavit of Edith A. Ryan, the Report of Ernst & Young and other materials and pleadings filed herein; AND UPON reading the consent of Ernst & Young to act as interim receiver and receiver and manager ("*Receiver*") of Shire Capital Ltd. and 0726028 B.C. Ltd. (the "*Debtors*"); AND UPON hearing counsel for Romspen and counsel for Ernst & Young; IT IS HEREBY ORDERED AND DECLARED THAT:

Service

1. The time for service of the notice of application for this order is hereby abridged and service thereof is deemed good and sufficient.

Appointment

2. Pursuant to the *Judicature Act*, R.S.A. 2000, c.J-2, the *Business Corporations Act*, R.S.A. 2000, c.B-9 and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 Ernst & Young is hereby appointed Receiver, without security, of the Debtors' properties with the following legal descriptions:

Sorrento

PARCEL IDENTIFIER: 008-545-944

LOT 1 SECTION 16 TOWNSHIP 22 RANGE 11 WEST OF THE 6TH MERIDIAN

KAMLOOPS DIVISION YALE DISTRICT PLAN 16715

PARCEL IDENTIFIER: 003-654-770

LOT 6 SECTION 16 TOWNSHIP 22 RANGE 11 WEST OF THE 6TH MERIDIAN

KAMLOOPS DIVISION YALE DISTRICT PLAN 31558

OK Falls

PARCEL IDENTIFIER: 012-907-073

LOT 7 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-081

LOT 8 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-090

LOT 9 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-111

LOT 10 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-120

LOT 11 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-138

LOT 12 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-154

LOT 13 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-162

LOT 14 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-171

LOT 15 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-189

LOT 16 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-197

LOT 17 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-201

LOT 18 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-219

LOT 19 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

PARCEL IDENTIFIER: 012-907-235

LOT 20 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

(collectively, the "*Property*").

Receiver's Powers

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtors;

(d) to engage managers and counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

(e) to purchase or lease inventories, supplies, premises or other items to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtors;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court.

(k) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(l) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(m) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(n) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(o) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and

(p) to take any steps reasonably incidental to the exercise of these powers;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

Duty to Provide Access and Co-Operation to the Receiver

4. (i) The Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependant on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

No Proceedings against the Receiver

7. 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 this Court.

No Proceedings against the Debtors or the Property

8. No Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8.

No Exercise of Rights of Remedies

9. All rights and remedies (including, without limitation, set-off rights) against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

No Interference with the Receiver

10. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an "eligible financial contract" (as defined in section 11.1(1) of the *Companies' Creditors Arrangement Act*) with the Debtors from terminating such contract or exercising any rights of set-off, in accordance with its terms.

Continuation of Services

11. All Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

Receiver to Hold Funds

12. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "*Post Receivership Accounts*") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

Employees

13. Subject to employees' rights to terminate their employment, all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay,

and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

14. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

Limitation on Environmental Liabilities

15.

(a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to subparagraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

Nothing in this Order shall derogate from the protection afforded to the Receiver by Section 14.06 of the BIA or any other applicable legislation.

Receiver's Accounts

16. Any expenditure or liability which shall properly be made or incurred by the Receiver (except on account of the fees of the Receiver and the fees and disbursements of its legal counsel which, for greater certainty, are dealt with in the immediate following paragraph 17), shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "*Receiver's Charge*").

17. 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 secured by a charge in the amount of $50,000 ranking *pari passu* with the Receiver's Charge.

18. The Receiver and its legal counsel shall pass their accounts from time to time.

19. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

Funding of the Receivership

20. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $30,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "*Receiver's Borrowings Charge*") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

21. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "*Receiver's Certificates*") for any amount borrowed by it pursuant to this Order.

23. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

Allocation

24. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

General

25. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

26. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

27. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

28. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

29. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

J.C.C.Q.B.A.

ENTERED this ..... day of ....., ...

CLERK OF THE COURT

Schedule "A" — Receiver Certificate

CERTIFICATE NO. .....

AMOUNT $.....

I. THIS IS TO CERTIFY that [RECEIVER'S NAME], the interim receiver and receiver and manager (the "Receiver") of all of the assets, undertakings and properties of [DEBTORS'S NAME] appointed by Order of the Court of Queen's Bench of Alberta and Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (collectively, the "Court") dated the ..... day of ....., 2010 (the "Order") made in action numbers ....., has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $....., being part of the total principal sum of $..... which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly not in advance on the ..... day of each month] after the date hereof at a notional rate per annum equal to the rate of ..... per cent above the prime commercial lending rate of Bank of ..... from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at *.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ..... day of ....., ...

[RECEIVER'S NAME], solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: .....

Name:

Title:

End of Document

TAB 41

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.,* 2014 BCSC 1855

Date: 20141002
Docket: S-139627
Registry: Vancouver

Between:

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd.

Petitioners

And

P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Receiver, Ernest & Young Inc.:	J.D. Schultz J.R. Sandrelli
Counsel for the Petitioners:	D.E. Gruber
Counsel for Valiant Trust Company:	J.D. Shields
Counsel for 0964502 B.C. Ltd.:	C.K. Wendell

Counsel for Interior Savings Credit Union:	S.A. Dubo (by telephone)
Counsel for Maynards Financial Ltd.:	R.H. Harrison
Place and Date of Hearing:	Vancouver, B.C. September 24, 2014
Place and Date of Judgment:	Vancouver, B.C. October 2, 2014

e) engagement of Colliers for SH Process:	$50,000
f) other consulting fees:	$75,000
g) office, utility and operating expenses:	$52,500
h) contingency:	$55,000
TOTAL	$1,357,500

[49] The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

[50] The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

[51] I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

[52] I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

[53] The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

[54] The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court

TAB 42

COURT FILE NO.	1801-04745
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	HILLSBORO VENTURES INC.
DEFENDANT	CEANA DEVELOPMENT SUNRIDGE INC.
	IN THE MATTER OF THE RECEIVERSHIP OF CEANA DEVELOPMENT SUNRIDGE INC.
APPLICANT	ALVAREZ & MARSAL CANADA INC. in its capacity as Court-appointed Receiver and Manager of CEANA DEVELOPMENT SUNRIDGE INC.
DOCUMENT	**ORDER (Approval of General Contractor, Increase Receiver's Borrowing Charge, Approval of Receiver's Actions and Fees)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Torys LLP
4600 Eighth Avenue Place East
525 - Eighth Ave SW
Calgary, AB T2P 1G1

Attention: Kyle Kashuba
Telephone: +1 403.776.3744
Fax: +1 403.776.3800
Email: kkashuba@torys.com
File No. 39108-2003

I hereby certify this to be a true copy of the original Order dated this 29 day of October 2019
for Clerk of the Court

DATE UPON WHICH ORDER WAS PRONOUNCED:	Tuesday, October 29, 2019
NAME OF JUSTICE WHO MADE THIS ORDER:	Madam Justice K.M. Eidsvik
LOCATION OF HEARING:	Calgary, Alberta

UPON THE APPLICATION by Alvarez & Marsal Canada Inc., in its capacity as Court-appointed receiver and manager (the "**Receiver**") of the assets, undertakings and properties of Ceana Development Sunridge Inc. ("**Ceana**"); **AND UPON HAVING READ** the Receivership

Order filed in this matter on July 3, 2019 (the "**Receivership Order**"), the Application and the First Report of the Receiver (the "**First Report**"), both filed October 22, 2019, and any other material and evidence filed to date in the within proceedings; **AND UPON HEARING** the submissions of counsel for the Receiver, and from any other interested parties who may be present, with no one appearing for any other person on the service list, although properly served as appears from the Affidavit of Service; **AND UPON IT APPEARING** that all interested and affected parties have been served with notice of this Application;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this Application, and the time for service of this Application is abridged to that actually given.

2. The Receiver's selection and engagement of Executive Flight Centre Developments Ltd. as the general (prime) contractor in respect of the Ceana project located at 2255 - 32nd Street NE, Calgary, Alberta, is hereby approved.

3. The amount that the Receiver is permitted to borrow pursuant to paragraph 21 of the Receivership Order and covered by the Receiver's Borrowings Charge shall be and is hereby increased from the principal amount of $4,500,000 to the principal amount of $6,000,000.

4. The actions, activities, recommendations and conduct of the Receiver, and the fees and disbursements of the Receiver and the Receiver's counsel, as set out and described in the First Report, are hereby approved.

5. Notwithstanding anything to the contrary in the Receivership Order, the Receiver's Borrowing Charge shall rank subordinate in priority and payment to the security interests of Connect First Credit Union Ltd. and the Receiver's Charge and the fees and costs related thereto

MISCELLANEOUS

6. The Receiver shall be at liberty to reapply for further advice, assistance and direction from this Honourable Court as may be required to enforce or to carry out the terms of this Order.

7. This Order must be served only upon those interested parties attending or represented at the within Application and service may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following the transmission or delivery of such documents.

8. Service of this Order on any party not attending this Application is hereby dispensed with.

K. M. Eidsvik

Justice of the Alberta Court of Queen's Bench

TAB 43

Court File No. CV-23-00705215-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 29th
	)	
JUSTICE OSBORNE	)	DAY OF AUGUST, 2023

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 VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

INITIAL ORDER

THIS APPLICATION, made by Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., Kap Power Corp., Validus Hosting Inc. and Kingston Cogen GP Inc. (each, a "**Company**" and collectively, the "**Companies**"), each by their court appointed receiver and manager, KSV Restructuring Inc. ("**KSV**" and in such capacity, the "**Receiver**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an Initial Order, was heard this day via videoconference.

ON READING the First Report of KSV as receiver and manager of the Companies and Kingston Cogen Limited Partnership ("**Kingston LP** and together with the Companies, the "**Validus Entities**") and the Report of KSV as proposed Monitor dated August 23, 2023, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel to the Receiver, Macquarie Equipment Finance Limited, and those other parties present, no one else on the Service List appearing although duly served as appears from the affidavit of service of Katie

Parent sworn August 23, 2023 and on reading the consent of KSV to act as the Monitor of the Validus Entities,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that each Company is a company to which the CCAA applies. Although not an Applicant, Kingston LP shall have the benefits of the protections and authorizations provided by this Order.

RECEIVERSHIP ORDER

3. THIS COURT ORDERS that nothing in this Order shall operate to interfere, stay or limit the provisions of the Order of this Court made on August 10, 2023 (the "**Receivership Order**"), pursuant to which KSV was appointed receiver and manager of the Property (defined below) or the powers given to the Receiver pursuant to the Receivership Order including, for greater certainty, (a) organizational control and executory authority in respect of the Validus Entities and the Business (as defined below); (b) the ability of the Receiver to borrow funds pursuant to paragraphs 23-26 of the Receivership Order including to fund the administrative costs of this proceeding; and (c) the granting and enforceability of the Receiver's Charge and the Receiver's Borrowing Charge (as defined below in the Receivership Order).

PLAN OF ARRANGEMENT

4. THIS COURT ORDERS that the Validus Entities, by the Receiver, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. THIS COURT ORDERS that, subject to paragraph 3 above, the Validus Entities shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the

"**Property**"). Subject to paragraph 3 above, and further Order of this Court, the Validus Entities shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Validus Entities, by the Receiver, are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. THIS COURT ORDERS that the Validus Entities, by the Receiver, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Validus Entities in respect of these proceedings, at their standard rates and charges.

7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Validus Entities, by the Receiver, shall be entitled but not required to pay all reasonable expenses incurred by the Validus Entities, by the Receiver, in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Validus Entities or the Receiver following the date of this Order.

8. THIS COURT ORDERS that the Validus Entities, by the Receiver, shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be

deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Validus Entities in connection with the sale of goods and services by the Validus Entities, but only where such Sales Taxes are accrued or collected after the date of the Receivership Order, or where such Sales Taxes were accrued or collected prior to the date of the Receivership Order but not required to be remitted until on or after the date of the Receivership Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Validus Entities.

9. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the Validus Entities, by the Receiver, shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Validus Entities, by the Receiver, and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. THIS COURT ORDERS that, except as specifically permitted herein or in the Receivership Order, the Validus Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Validus Entities to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. THIS COURT ORDERS that the Validus Entities, by the Receiver, shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations, and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $1,000,000 in the aggregate;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate; and

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Validus Entities, by the Receiver, to proceed with an orderly restructuring of the Business (the "**Restructuring**").

12. THIS COURT ORDERS that the Validus Entities, by the Receiver, shall provide each of the relevant landlords with notice of the Validus Entities' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Validus Entities' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Validus Entities, by the Receiver, or by further Order of this Court upon application by the Validus Entities, by the Receiver, on at least two (2) days notice to such landlord and any such secured creditors. If the Validus Entities, by the Receiver, disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Validus Entities' claim to the fixtures in dispute.

13. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Receiver, on behalf of the Validus Entities, and the Monitor 24 hours' prior

written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Validus Entities in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE VALIDUS ENTITIES OR THE PROPERTY

14. THIS COURT ORDERS that until and including September 8, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process, which for greater certainty shall not include the Receivership Order, in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Validus Entities or the Monitor, or affecting the Business or the Property, except with the written consent of the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Validus Entities or their employees or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Validus Entities or the Monitor, or affecting the Business or the Property, including, without limitation, licences and permits, are hereby stayed and suspended except with the written consent of the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Validus Entities to carry on any business which the Validus Entities are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Validus Entities, except with the written consent of the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Validus Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, construction management service, project management services, permit and planning management services, accounting services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Validus Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Validus Entities, and, subject to the Receivership Order, that the Validus Entities shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Validus Entities, by the Receiver, in accordance with normal payment practices of the Validus Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Validus Entities, by the Receiver, and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Validus Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

APPOINTMENT OF MONITOR

19. THIS COURT ORDERS that KSV is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Validus Entities with the powers and obligations set out in the CCAA or set forth herein, and the Validus Entities and their officers and directors, if any, and employees shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

20. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Validus Entities' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Validus Entities, to the extent that is necessary to adequately assess the Validus Entities' business and financial affairs or to perform their duties arising under this Order;

(d) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(e) perform such other duties as are required by this Order or by this Court from time to time.

21. THIS COURT ORDERS that KSV, in its capacity as Monitor, shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

22. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall

exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

23. THIS COURT ORDERS that that the Monitor shall provide any creditor of the Validus Entities with information of the Validus Entities as may be available 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 determines is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor may agree.

24. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

25. THIS COURT ORDERS that the Monitor and counsel to the Monitor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Validus Entities as part of the costs of these proceedings. The Validus Entities, by the Receiver, are hereby authorized and directed to pay the accounts of the Monitor and counsel for the Monitor on such terms as they may agree.

26. THIS COURT ORDERS 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.

SERVICE AND NOTICE

27. THIS COURT ORDERS that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Validus Entities of more than $1000, and (C) prepare a list

showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

28. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL https://www.ksvadvisory.com/experience/case/validus-power-corp.

29. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Validus Entities and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Validus Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Validus Entities and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

30. THIS COURT ORDERS that the Validus Entities, by the Receiver, the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Validus Entities' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 8100-2-175 (SOR/DORS).

GENERAL

31. THIS COURT ORDERS that the Validus Entities, by the Receiver, or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

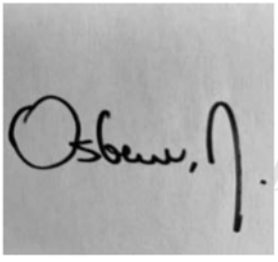
32. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as a trustee in bankruptcy of the Validus Entities, the Business or the Property.

33. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Validus Entities, by the Receiver, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Validus Entities, by the Receiver, and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Validus Entities, by the Receiver, and the Monitor and their respective agents in carrying out the terms of this Order.

34. THIS COURT ORDERS that each of the Validus Entities, by the Receiver, and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

35. THIS COURT ORDERS that any interested party (including the Validus Entities, by the Receiver, and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

36. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order, without any need for entry and/or filing.



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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 VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC. EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

Court File No. CV-23-00705215-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

INITIAL ORDER

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