

2024



Hfx No. 538745

**SUPREME COURT OF NOVA SCOTIA**

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

**AND IN THE MATTER OF** an application by Blue Lobster Capital Limited, 3284906 Nova Scotia Limited, 3343533 Nova Scotia Limited and 4318682 Nova Scotia Limited, collectively, the "**Applicants**" for creditor protection under s.11 of the CCAA and other relief.

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**Book of Authorities of the Applicants**

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**TO:** Service List attached hereto as **SCHEDULE "A"**

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TAB 1

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

v.

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

and

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

- and -

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

v.

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

and

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

c.

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

et

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

- et -

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

c.

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

et

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

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

**2020 SCC 10**

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

**ON APPEAL FROM THE COURT OF APPEAL  
FOR QUEBEC**

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

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

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

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

**2020 CSC 10**

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

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

**EN APPEL DE LA COUR D'APPEL DU QUÉBEC**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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



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

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

### Cases Cited

By Wagner C.J. and Moldaver J.

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

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

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

### Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

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

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

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

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

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

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

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

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

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

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

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



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

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

## I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

## I. Aperçu

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

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

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

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

## II. Facts

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

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

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

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

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

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

## II. Les faits

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

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

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

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

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

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

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

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

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

<sup>1</sup> Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

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

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

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

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

<sup>1</sup> Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).



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

*B. The Initial Competing Plans of Arrangement*

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

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

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

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

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

*B. Les premiers plans d'arrangement concurrents*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. Decisions Below

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

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

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

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

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

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

### III. Historique judiciaire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

#### IV. Issues

[37] These appeals raise two issues:

- (1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?
- (2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the CCAA?

#### V. Analysis

##### A. *Preliminary Considerations*

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

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

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

#### IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

- (1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?
- (2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la LACC?

#### V. Analyse

##### A. *Considérations préliminaires*

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

(1) The Evolving Nature of CCAA Proceedings

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

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

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

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

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

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

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

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

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

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

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

[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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

### Good faith

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

### Good faith — powers of court

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

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

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

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

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

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

### Bonne foi

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

### Bonne foi — pouvoirs du tribunal

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

(Voir aussi *LFI*, art. 4.2; *Loi n° 1 d’exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Related creditors

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

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

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

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

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

#### Créancier lié

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

#### General power of court

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

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

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

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

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

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

#### Pouvoir général du tribunal

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Interim financing

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

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

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

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

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

### Financement temporaire

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

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

<sup>5</sup> Une autre exception a été codifiée dans les modifications apportées en 2019 à la LACC qui créent le par. 11.2(5) (voir *Loi n° 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

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

**Priority — secured creditors**

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

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

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

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

**Priorité — créanciers garantis**

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

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

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

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

#### Factors to be considered

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company’s business and financial affairs are to be managed during the proceedings;
- (c) whether the company’s management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company’s property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor’s report referred to in paragraph 23(1)(b), if any.

(CCAA, s. 11.2(4))

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

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

#### Facteurs à prendre en considération

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

- a) la durée prévue des procédures intentées à l’égard de la compagnie sous le régime de la présente loi;
- b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d) la question de savoir si le prêt favorisera la conclusion d’une transaction ou d’un arrangement viable à l’égard de la compagnie;
- e) la nature et la valeur des biens de la compagnie;
- f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l’un ou l’autre des créanciers de la compagnie;
- g) le rapport du contrôleur visé à l’alinéa 23(1)b).

(LACC, par. 11.2(4))

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>6</sup> L’ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor “keep the lights on” (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in CCAA proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the CCAA. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. *Crystallex* eventually became insolvent and (similar to *Bluberi*) was left with only a single significant asset: a US\$3.4 billion arbitration claim against Venezuela. After entering CCAA protection,

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n’y a aucune raison de principe qui permet d’empêcher les juges surveillants d’approuver ce type d’accord à titre de financement temporaire dans les cas qui s’y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l’espèce, lorsqu’il existait un seul élément d’actif susceptible de monétisation au bénéfice des créanciers, l’objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l’objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d’actif.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la LACC lorsque le juge surveillant estime qu’il serait juste et approprié de le faire, compte tenu de l’ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la LACC. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d’autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d’instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d’appel de l’Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l’espèce. Cette affaire mettait en cause une société minière ayant le droit d’exploiter un grand gisement d’or au Venezuela. *Crystallex* est finalement devenue insolvable, et (comme *Bluberi*) il ne lui restait plus qu’un seul élément d’actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the CCAA prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the CCAA. In fact, the CCAA does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la LACC, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la LACC » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la LACC avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La LACC ne définit pas le plan d'arrangement. En fait, la LACC ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

[TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than “compromise” and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors’ rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not “compromise the terms of [the creditors’] indebtedness or take away . . . their legal rights” (para. 93). The Court of Appeal adopted the following reasoning from the lower court’s decision, with which we substantially agree:

A “plan of arrangement” or a “compromise” is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between *Crystallex* and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n’a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l’égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l’accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d’arrangement parce qu’il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d’appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l’essentiel :

[TRADUCTION] Le « plan d’arrangement » et la « transaction » ne sont pas définis dans la LACC. Il doit toutefois s’agir d’un arrangement ou d’une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre *Crystallex* et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d’obtenir un jugement et à faire exécuter ce jugement. S’ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la LACC, ils ont le droit de voter sur un plan d’arrangement ou une transaction. La facilité de DE Tenor ne les prive d’aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n’est pas nécessaire de définir exhaustivement les notions de plan d’arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d’arrangement doivent au



some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the CCAA.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la LACC.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of CCAA proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's CCAA proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's CCAA proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la LACC en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la LACC, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la LACC ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains “how the company’s business and financial affairs are to be managed during the proceedings” (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi’s submission that approval of the LFA would assist it in finalizing a plan “with a view towards achieving maximum realization” of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.’s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the “nature and value” of Bluberi’s property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that “[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch” (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor’s reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d’importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l’AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d’avis que l’AFL favoriserait la conclusion d’un plan viable, car il a accepté (1) le fait que Bluberi avait l’intention de présenter un plan et (2) l’argument de Bluberi selon lequel l’approbation de l’AFL l’aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d’actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l’action que vont tenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s’est appuyé sur le plus récent d’entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l’approbation de l’AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l’accent sur l’équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu’il a approuvé l’AFL à titre de financement temporaire. Nous ne pouvons affirmer qu’il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi’s creditors as it might have been — to some extent, it does prioritize Bentham’s recovery over theirs — we nonetheless defer to the supervising judge’s exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge’s decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing “transcended the nature of such financing” (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi’s creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors’ rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi’s litigation claim is akin to a “pot of gold” (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to “compromise” those rights. When the “pot of gold” is secure — that

dans l’exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l’AFL était aussi favorable aux créanciers de Bluberi qu’il aurait pu l’être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l’exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] Dans la mesure où la Cour d’appel a conclu le contraire, en toute déférence, nous ne sommes pas d’accord. De façon générale, nous estimons que la Cour d’appel a encore une fois omis de faire preuve de la déférence nécessaire à l’égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu’aurait décelées la Cour d’appel dans la décision du juge surveillant.

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d’appel a eu tort de conclure que l’approbation de l’AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Deuxièmement, à notre avis, la Cour d’appel a eu tort de conclure que l’AFL était un plan d’arrangement, et qu’il était possible d’établir une distinction entre l’espèce et les faits de l’affaire *Crystallex*. La Cour d’appel a conclu que l’AFL et la charge relative au financement de litige super prioritaire s’y rattachant constituaient un plan parce qu’ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] Nous souscrivons à l’opinion du juge surveillant selon laquelle l’AFL ne constitue pas un plan d’arrangement parce qu’il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu’a employée la Cour d’appel dans *Crystallex*, la réclamation de Bluberi s’apparente à une [TRADUCTION] « marmite d’or » (par. 4). Les plans d’arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n’indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d’argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi’s total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge’s reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

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

The facts of this case are unusual: there is a single “pot of gold” asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge’s exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

...

... While the approval of the Tenor DIP Loan affected the Noteholders’ leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

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

l’existence de leurs droits d’avoir accès à la marmite une fois qu’elle est remplie, pas plus qu’on ne saurait dire qu’il s’agit d’une « transaction » à l’égard de leurs droits. Lorsque la « marmite d’or » aura été obtenue — c’est-à-dire dans l’éventualité d’une action ou d’un règlement — les sommes nettes seront distribuées aux créanciers. En l’espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d’arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s’est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C’est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

[TRADUCTION] Les faits de l’espèce sont inhabituels : la « marmite d’or » ne contient qu’un seul élément d’actif qui, s’il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J’estime que l’exercice par le juge surveillant de son pouvoir discrétionnaire d’approuver le prêt de DE Tenor était raisonnable et approprié, bien qu’il ait eu pour effet de limiter la position de négociation des créanciers.

...

... L’approbation du prêt de DE Tenor a certes amoindri l’influence que pouvaient exercer les détenteurs de billets lors de la négociation d’un plan, et rendu plus complexe la négociation d’un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l’un de leurs droits reconnus par la loi. Il ne s’agit donc pas d’un arrangement, et un vote des créanciers n’était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l’opinion de la Cour d’appel selon laquelle il y a lieu d’établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d’un seul moyen de recouvrement (c.-à-d. l’arbitrage) tandis que, dans la



Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

## VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

*Appeals allowed with costs in the Court and in the Court of Appeal.*

*Solicitors for the appellants/intervenors 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.*

*Solicitors for the appellants/intervenors IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.*

*Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.*

*Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.*

*Solicitors for the intervenor Ernst & Young Inc.: Stikeman Elliott, Montréal.*

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

## VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

*Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.*

*Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.*

*Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.*

*Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.*

*Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.*

*Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.*

*Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.*

*Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.*

TAB 2

**CITATION:** BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.  
2020 ONSC 1953

**COURT FILE NO.:** CV-20-00637301-00CL & CV-20-00637297-00CL

**DATE:** 2020-03-30

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**[Commercial List]**

**BETWEEN:** )  
)  
BCIMC CONSTRUCTION FUND ) *David Bish, Adam M. Slavens, Jeremy*  
CORPORATION AND BCIMC ) *Opolsky* Counsel for the Applicants  
SPECIALTY FUND CORPORATION )  
)  
Applicants )  
)  
**- and -** )  
)  
)  
)  
THE CLOVER ON YONGE INC., THE ) *Steven Graff, Ian Aversa, Jeremy Nemers* for  
CLOVER ON YONGE LIMITED ) the Respondents  
PARTNERSHIP, 480 YONGE STREET )  
INC. AND 480 YONGE STREET )  
LIMITED PARTNERSHIP )  
)  
Respondents )  
)  
)  
**AND BEWTWEEN** )  
)  
)  
BCIMC CONSTRUCTION FUND ) *David Bish, Adam M. Slavens, Jeremy*  
CORPORATION AND OTERA CAPITAL ) *Opolsky* Counsel for BCIMC Construction  
INC. ) Fund Corporation  
)  
Applicants ) *Virginie Gauthier, Allan Merskey and Peter*  
) *Tae-Min Choi* counsel for Otera Capital Inc.  
**- and -** )  
)  
)



33 YORKVILLE RESIDENCES INC. AND ) *Steven Graff, Ian Aversa, Jeremy Nemers* for  
33 YORKVILLE RESIDENCES LIMITED ) the Respondents  
PARTNERSHIP )  
Respondents ) See Schedule A for complete list of counsel

**Heard:** March 27, 2020

**KOEHNEN J.**

**Overview**

[1] This proceeding involves competing applications for the appointment of a receiver and manager pursuant to subsection 243(1) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended and an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[2] The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

[3] At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

[4] In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact

on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

## **A. The Parties**

[5] The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

[6] The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

[7] The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

[8] The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

[9] The Debtors are special-purpose, project-level entities for the development of each of the three projects.

[10] Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

[11] Clover and Halo object to the receivership application and have brought their own application to seek protection under the CCAA. The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

### **(a) The Clover Project**

[12] The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It is comprised of two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. The Clover project is the most advanced of the three projects. Construction is well underway with the higher floors now under construction.

[13] The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of \$172,616,007 and \$37,450,668 and a non-revolving letter of credit facility of up to \$3,000,000.

[14] As of March 2, 2020, the Receivership Applicants had advanced \$107,668,017.82 under the Clover Facilities. In addition, \$3,000,000 in letters of credit have been extended. The

Receivership Applicants also extended a mezzanine mortgage on Clover, with \$34,035,878.69 in principal outstanding.

[15] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[16] There are 499 purchasers of units in Clover who have paid a total of approximately \$49 million in deposits.

**(b) The Halo Project**

[17] The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

[18] The Halo Commitment Letter provides for two non-revolving construction loans in amounts of \$156,850,7747 and \$29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to \$2,000,000.

[19] As of March 2, 2020, the Receivership Applicants have advanced \$47,429,211.83 in principal. In addition, \$1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with \$25,725,159.27 in principal outstanding.

[20] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[21] There are 388 purchasers of units in Halo who have paid a total of approximately \$43 million in deposits.

**(c) The Yorkville Project**

[22] The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

[23] The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to \$571,300,000 and \$83,000,000, respectively.

[24] As of March 2, 2020, the Receivership Applicants had advanced \$122,432,764.85 under the Facilities. In addition, \$79,592,744.24 in letters of credit have been extended.

[25] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

[26] There are 918 purchasers of units in Yorkville who have paid a total of approximately \$160 million in deposits.

[27] There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction lien holders have liens of approximately \$38,000,000 registered against the properties.

## **B. Deterioration of the Relationship**

[28] In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

[29] First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had “skin in the game” in order to align Cresford’s interests with those of the lenders.

[30] Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as “equity” in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its “equity”. Approximately \$10.668 million of the lenders’ funds have been diverted from the three projects to service the interest on Cresford’s “equity”.

[31] Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately \$ X of increased costs were hidden in this manner.

[32] In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was

recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

[33] Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over \$ X in discounted sales fall into this category.

[34] The agreements between the Receivership Applicants and the Debtors require the Debtors to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

[35] Cost overruns on the three projects come to more than \$ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately \$ X were construction costs that were hidden from the lenders. The amount hidden on Clover was \$ X; on Halo \$ X and on 33 Yorkville, \$ X.

[36] Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is \$ X over budget. The Debtors say PWC's number is overstated by \$ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by \$ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

[37] In addition to the foregoing breaches, approximately \$3.5 million in interest payments to the Receivership Applicants are overdue.

[38] On February 20, 2020, the Applicants made demand on the Debtors and sent notices under section 244 of the BIA giving notice of the Receivership Applicants' intention to enforce against security.

[39] The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

[40] Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the



allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

[41] In referring here to allegations of financial irregularity I am not referring to the allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

### **C. The Prima Facie Right to a Receivership**

[42] A receiver may be appointed where it is just and convenient equitable to do so.

[43] Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27.

[44] The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J.(Commercial List) at para. 20.

[45] In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

- (a) The lenders' security is at risk of deteriorating;
- (b) There is a need to stabilize and preserve the debtors' business;
- (c) Loss of confidence in the debtors' management;
- (d) Positions and interests of other creditors.

[46] All four factors apply here.

[47] **Security at risk of deteriorating:** There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over \$38,000,000 in construction liens have been registered since March 2. \$3.5 million of interest is overdue. The

lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

[48] **The need to stabilize the business:** The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

[49] **Loss of confidence in management:** Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

[50] **Position and interests of other creditors:** No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

[51] In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

## **D. The Debtors' Proposal**

[52] The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

[53] The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

[54] The share sale to Concord would close on payment of one dollar. An additional \$38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

- (a) Court approval of CCAA protection for Clover and Halo.
- (b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo
- (c) Completion of construction financing either with the existing lenders or new lenders.

[55] As part of the CCAA process Concord states that it will

- (a) provide \$20,000,000 of debtor-in-possession financing at a rate of 5%. \$7,000,000 would be advanced during the first 10 days.
- (b) Negotiate the resolution of creditors' claims.
- (c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

[56] The Receivership Applicants oppose the CCAA application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

[57] With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

[58] Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a CCAA proceeding.

[59] I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a CCAA application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

## **E. Receivership or CCAA?**

[60] In choosing between a receivership or a CCAA process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781 at para. 61.

[61] The factors addressed in argument relevant to this exercise were as follows:

- (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
- (a) Payment of the Receivership Applicants**

[62] During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having “Pulled a rabbit out of the hat.” Unfortunately, I cannot agree.

[63] It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

[64] Despite the assertion that the Debtors have “pulled a rabbit out of the hat,” the CCAA proposal does not address the Receivership Applicants’ concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as “technical issues”. Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

[65] Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

[66] The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

[67] As the applicants point out however, Concord is not prepared to make any of its “significant capital liquidity and credit lines” available to pay out the Receivership Applicants.

Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

[68] Finally, the HSBC letter goes on to state:

In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

[69] From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

[70] I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

[71] At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

**(b) Reputational Damage**

[72] The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

[73] One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses \$10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.



[74] This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

[75] In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

[76] The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

**(c) Preservation of Employment**

[77] The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

[78] There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

[79] The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

[80] The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

[81] As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

**(d) Speed of the Process**

[82] The Debtors submit that the CCAA is faster than a receivership.

[83] During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

[84] In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financier would probably want to see a certain percentage of units sold before committing to financing.

[85] It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

[86] If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

**(e) Protection of all Stakeholders**

[87] The Debtors submit that their CCAA application will protect all stakeholders. The only stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive \$38,000,000 in a transaction beyond the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive \$38,000,000 in cash.

[88] There has been no explanation in the materials before me to justify the receipt of \$38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

[89] In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

[90] Although the Debtors and Concord submit that their CCAA proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of “discount” and of “current market value” are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a CCAA proceeding over a receivership.

**(f) Costs**

[91] The Debtors submit that a CCAA proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC’s fees. Regardless of whether Concord does or does not charge fees, the risk of PWC’s fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

[92] The costs of financing a receivership or a CCAA proceeding are similar. Concord has offered a DIP loan of \$20,000,000 at 5% interest. The Receivership Applicants have offered a loan of \$29,000,000 at 5% interest.

[93] CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC’s work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a CCAA proceeding.

[94] Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a CCAA transaction that would put \$38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

**(g) Nature of the Business**

[95] During the hearing before me there was considerable debate about the degree to which a CCAA proceeding was even available for a single-purpose land development company. There was some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

[96] In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

[97] More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

[98] In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 the British Columbia Court of Appeal stated at paragraph 36:

Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[99] Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

[100] The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61; *Dondeb Inc., Re*, 2012 ONSC 6087 (Commercial List), at para.16; *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), at para. 17.

[101] The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to

compromise. They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

[102] As Justice Kent pointed out in *Octagon*, as para 17,

...if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[103] Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

[104] Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

[105] In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

[106] The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

[107] By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

[108] In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier.

Similarly, the state of development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

[109] More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

[110] The Debtors also point to *Re 2607380 Ontario Inc.*, a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that 260 is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

[111] In my view *Re 2607380 Ontario Inc.* does not assist the Debtors. In that case Conway J recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.*, two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

[112] With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

[113] For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

[114] For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

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Koehnen J.



**SCHEDULE A – COUNSEL SLIP**

David Bish, Adam Slavens, Jeremy Opolsky, for the Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation

Alan Mersky, Virginie Gauthier, Peter Choi, for the Applicants, Otéra Capital Inc.

Steven L. Graff, Ian Aversa, Jeremy Nemers for the Respondents

Geoff Hall, Heather Meredith, and Alex Steele for PricewaterhouseCoopers Inc.

Sean Zweig and Danish Afroz for KingSett Mortgage Corporation

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Haddon Murray for Tarion Warranty Corporation

David Gruber for Concord Group

Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority

Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.

Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc., Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Brandon Mattalo for certain limited partnership interests

Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.

Brandon Mattale for certain limited partnership investors

Matthew Gottlieb for KingSett Real Estate Growth LP 4

George Benchetrit for Ernst & Young as proposed Monitor

Maria Konyukhova for PJD Developments

DJ Miller for investors in YSL

**CITATION:** BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.  
2020 ONSC 1953

**COURT FILE NO.:** CV-20-00637301-00CL & CV-20-00637297-00CL

**DATE:** 2020-03-30

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

BCIMC CONSTRUCTION FUND CORPORATION  
AND BCIMC SPECIALTY FUND CORPORATION

Applicants

– and –

THE CLOVER ON YONGE INC., THE CLOVER ON  
YONGE LIMITED PARTNERSHIP, 480 YONGE  
STREET INC. AND 480 YONGE STREET LIMITED  
PARTNERSHIP

Respondents

**AND BEWTWEEN**

BCIMC CONSTRUCTION FUND CORPORATION  
AND OTERA CAPITAL INC.

Applicants

- and -

33 YORKVILLE RESIDENCES INC. AND  
33 YORKVILLE RESIDENCES LIMITED  
PARTNERSHIP

Respondents

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**REASONS FOR JUDGMENT**

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Koehnen, J.

**Released: March 30, 2020**

TAB 3



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION  
In Bankruptcy and Insolvency**

**Citation:** *Roman Catholic Episcopal Corporation of St. John's (Re)*, 2022 NLSC  
81

**Date:** May 10, 2022

**Docket:** 20220124092

**IN THE MATTER OF** the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “*BIA*”);

**AND IN THE MATTER OF** the Notice of Intention to Make a Proposal of the Roman Catholic Episcopal Corporation of St. John’s

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**Before:** Justice Garrett A. Handrigan

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**Place of Hearing:** St. John’s, Newfoundland and Labrador

**Date of Hearing:** April 29, 2022

**Summary:**

On December 21, 2021, the Roman Catholic Episcopal Corporation of St. John’s gave Notice of Intention to make a proposal under the *Bankruptcy and Insolvency Act* to Claimants for damages because of abuse they suffered while

living at Mount Cashel Orphanage. On April 14, 2022, the Corporation filed an Interlocutory Application to convert the proceedings to the *Companies' Creditors Arrangement Act* and to seek protection under that legislation while it evaluated and liquidated its assets, and the Claimants completed a claims process. The Corporation also asked for ancillary, but related, relief. The Claimants opposed the Application arguing that it was premature and that it would increase costs, thereby diminishing the funds available to distribute to them.

The Court allowed the Application in the main and granted the ancillary relief the Corporation sought. It also stated dates when the conversion from the *BIA* to the *CCAA* takes effect and to consider continuing the proceedings under the *CCAA*.

### Appearances:

Geoffrey L. Spencer  
and Meghan M. King

Appearing on behalf of the Applicant, the Roman Catholic Episcopal Corporation of St. John's (the "Corporation")

Clifton P. Prophet, Geoffrey  
E. Budden, Q.C., Thomas  
Gertner, Paul A. Kennedy

Representative Counsel appearing on behalf of claimants, anonymous claimants / creditors of the Corporation (the "Claimants")

Maurice Chiasson, Q.C.,  
Joseph J. Thorne

Appearing on behalf of Ernst & Young Inc., Trustee of the Corporation

### Authorities Cited:

**CASES CONSIDERED:** *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60, rev'd 2020 NLCA 27, leave to appeal refused [2020] S.C.C.A. No. 309, 2021 CarswellNfld 12; *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522; *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238; *Stokes Building Supplies Ltd., Re* (1992), 100 Nfld. & P.E.I.R. 114, 318 A.P.R. 114 (Nfld. S.C.(T.D.)); *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222; *AbitibiBowater Inc., Re*, 2012 SCC 67; *Fisher Oil & Gas Corp. v. Guaranty*



*Bank & Trust Co.* (1982), 40 O.R. (2d) 548, 142 D.L.R. (3d) 43 (C.A.); *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 41 O.A.C. 282

**STATUTES CONSIDERED:** *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; *Schools Act*, 1997, S.N.L. 1997, c. S-12.2

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

## **REASONS FOR JUDGMENT**

**HANDRIGAN J.:**

### **INTRODUCTION**

[1] The Roman Catholic Episcopal Corporation of St. John's (the "Corporation") was incorporated on May 12, 1897, by a special act of the legislature of the Province of Newfoundland. The Corporation is the legal owner of all the property, both real and personal, of the Archdiocese of St. John's which administers thirty-four parishes on the Avalon and Burin Peninsulas, in eastern and southeastern Newfoundland.

[2] Four Claimants sued the Corporation in December 1999 for damages because of the harm they suffered while living at Mount Cashel Orphanage in the 1940s and 1950s. The Christian Brothers operated the Orphanage at the time and members of the Order abused the Claimants both physically and sexually. The Newfoundland and Labrador Court of Appeal found that the Corporation was vicariously liable for the actions of the Christian Brothers, and the Supreme Court of Canada confirmed that the Corporation was liable in January 2021 by dismissing its application for leave to appeal (*John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60, rev'd 2020 NLCA 27, leave to appeal refused [2020] S.C.C.A. No. 309, 2021 CarswellNfld 12).

[3] This Court, from whose decision the Corporation appealed, assessed the damages of the four Claimants who sued the Corporation even though it dismissed their claims. It quantified their total at \$2,611,113.96. The Court of Appeal modified the Claimants' damages slightly by adjusting the prejudgment interest the Claimants received, but otherwise confirmed this Court's award. On April 15, 2021, the four Claimants filed a judgment at the Sheriff's Office for \$2,395,312.45.

[4] Filing the judgment precipitated two other actions: Four other law firms notified the Corporation that they represent more than one hundred other former residents of Mount Cashel Orphanage, and the Corporation anticipates that those claims, based on the damages awarded to the first four Claimants, may exceed \$50,000,000; and a class action proposed in the Supreme Court of British Columbia, against the Christian Brothers, named the Corporation as a co-defendant in that proceeding.

[5] The Corporation, faced with overwhelming claims, filed a Notice of Intention to Make a Proposal under section 50.4 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") at the Office of the Superintendent of Bankruptcy on December 21, 2021. This Court stayed proceedings against the Corporation under section 50.4 (9) of the *BIA* on January 20, 2022, and has extended that stay three times since then so that it will expire on May 27, 2022, unless it is extended again.

[6] However, the stay may not be extended beyond June 20, 2022, so that the Corporation will be deemed to have made an assignment in bankruptcy unless it makes a proposal to its creditors before then, as it declared it would do when it filed its Notice of Intention on December 21, 2021. The Corporation says that it is unlikely to make a proposal before June 20, 2022, because of several compelling contingencies that I will discuss later in these reasons.

[7] To that end, the Corporation filed an Interlocutory Application on April 14, 2022, asking generally for an Order converting the Notice of Intention proceedings it started under the *BIA* to proceedings under section 11.6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). More particularly, the Corporation asks in its Interlocutory Application:

- (a) to abridge time periods under section 11 of the *CCAA* and the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “*Rules*”);
- (b) to direct that it may serve its Application as it proposes in it;
- (c) to declare that it is a “debtor company” to which the *CCAA* applies;
- (d) to stay all proceedings against it under the *CCAA* for an initial ten days;
- (e) to appoint Ernest & Young Inc. (“EY”) as its monitor in the *CCAA* proceedings;
- (f) to grant an administration charge in an initial amount of \$400,000 to secure payment of the professional fees and disbursements that EY, EY’s counsel, the Corporation’s counsel, and Deloitte Restructuring Inc. (the Financial Advisor to Representative Counsel) will incur in the *CCAA* proceedings (the “Administration Charge”); and finally
- (g) to continue the role of Representative Counsel in the *CCAA* proceedings.

[8] I set the Corporation’s Interlocutory Application for April 20, 2022, but adjourned it until April 29, 2022, because Representative Counsel, who opposed it, required time to file its objection and a Memorandum of Fact and Law in support. However, I proceeded with the Interlocutory Application as planned on April 29, 2022, and reserved my judgment until now.

## **THE ISSUES**

[9] The Corporation’s Interlocutory Application raises these issues:

- (a) Does the Corporation meet the criteria for protection under the *CCAA*?
- (b) If it does, should I appoint EY as its monitor in the *CCAA* proceedings?
- (c) Should I approve the Administration Charge that the Corporation requests?

## THE LAW

### Statute – Application to Convert

[10] Section 3(1) of the *CCAA* provides:

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

[11] Section 2(1) of the *CCAA* defines “company” as “... 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 it excludes other agencies, not applicable here.

[12] Section 2(1) also says that “debtor company” means, as relevant here, any company that:

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the *[BIA]* ...,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the *[BIA]*....

[13] While the *CCAA* does not define “insolvent”, courts generally defer to the definition of “insolvent person” that section 2 of the *BIA* provides. It is,

... [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....

[14] Section 11.6 of the *CCAA* allows a court to convert a Part III *BIA* proceeding into a *CCAA* proceeding. It provides:

11.6 Notwithstanding the Bankruptcy and Insolvency Act,

- (a) proceedings commenced under Part III of the [*BIA*] may be taken up and continued under this Act only if a proposal within the meaning of the [*BIA*] has not been filed under that Part; and
- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the [*BIA*] but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
  - (i) the operation of subsection 50.4(8) of the [*BIA*], or
  - (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the [*BIA*].

[15] Section 10(2) of the *CCAA* indicates what an applicant must file initially to convert a proceeding from the *BIA* to the *CCAA*:

10 (2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

### Case Law – Application to Convert

[16] Brown J., then of the Ontario Superior Court, stated a “three-part test” in paragraph 9 of *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522, that a company seeking to convert from the *BIA* to the *CCAA* must meet:

9 It strikes me that on a motion to continue under the *CCAA* an applicant company should place before the court evidence dealing with three issues:

- (i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;
- (ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,
- (iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

[17] Orsborn J., formerly of this Court, also discussed the onus on a company wishing to convert from the *BIA* to the *CCAA* in *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238. As counsel for the Corporation notes in the Memorandum of Fact and Law that he filed for the Corporation in this matter, “... [Orsborn J. considered that] the threshold to gain access to the *CCAA* is not high”:

14. ... On an initial application, section 11.02(3)(a) [of the *CCAA*] requires an applicant to satisfy the court that “circumstances exist that make the order appropriate”. When a continuation is sought in circumstances where, as here, the *BIA* proposal process has already been engaged, case authorities suggest the section 11.02(3)(b) criteria of good faith and diligence also come into play....



[18] The learned justice cited, amongst other authorities, Brown J.’s decision in *Clothing for Modern Times* that I referred to above.

[19] It is worth noting that, despite Orsborn J.’s view of how low the bar was for an applicant to convert proceedings from the *BIA* to the *CCAA*, the applicant in *Norcon* failed:

35 Assessing the matter as objectively as I can, the evidence does not disclose a germ of a reasonable possibility of reorganizing or restructuring Norcon to a position from which it can either continue its operations or be sold as a going concern or otherwise. The evidence discloses no potentially viable thread with which to begin the process of weaving a plan that will fulfill the objectives of the *CCAA*. The threshold of appropriate circumstances has not been crossed. [Emphasis Added]

### **Statute – Appointing a Monitor**

[20] Section 11.7 (1) of the *CCAA* provides for the appointment of a monitor. It reads:

11.7 (1) 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 [*BIA*].

[21] Section 2(1) of the *BIA* simply says that a “trustee” “... means a person who is licensed or appointed under this Act”.

## Case Law – Appointing a Monitor

[22] This Court discussed the qualifications of monitors and the Court’s expectations for them in *Stokes Building Supplies Ltd., Re* (1992), 100 Nfld. & P.E.I.R. 114, 318 A.P.R. 114 (Nfld. S.C.(T.D.)). Of both, Halley J. stated:

- The monitor must be able to discharge its duties, including and most importantly, it must have expertise in insolvency, for which trustees in bankruptcy are uniquely qualified;
- The monitor must be able to negotiate and mediate with the parties to the insolvency, towards preparing a compromise or arrangement between the shareholders and creditors of the insolvent company;
- The monitor must analyze the insolvent’s financial status during reorganization, project that data into the future and assist the Court in assessing and weighing the proposed compromise or arrangement that is recommended; and
- The monitor must be independent of all parties to the insolvency.

(Generally, paragraphs 18-22 of *Stokes*, but with reference to other portions of Halley J.’s judgment and paragraph 16 in particular).

[23] Halley J. inserted this strong caveat in paragraph 15 of his judgment: “It is essential for the court to ensure that neither the shareholders nor the creditors have any influence on the monitor. As an agent of the court, the monitor must not be in a ‘conflict of interest’ situation. The monitor’s sole responsibility is to the court” [emphasis added]; and then he dismissed Stokes Building Supplies Ltd.’s request to appoint its auditor as monitor:

23 While the auditor of the applicant possesses the necessary qualifications, there is a lack of the necessary “independence”. The application to appoint the company’s auditor as monitor is dismissed.

## Statute – Approving Administration Charge

[24] Section 11.52 (1) of the CCAA allows this Court to grant an administration charge. It provides:

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

- (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.

## Case Law – Approving Administration Charge

[25] In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, Pepall J. set out six factors a court may consider when it decides whether to grant an administration charge. She proposed the following (paragraph 54):

- (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.

[26] Pepall J. noted that “[t]his is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence” (paragraph 54).

[27] This is the law I will apply to the issues I stated earlier in these reasons. I turn now to analyze those issues, starting with the background to them.

## **ANALYSIS**

### **Background**

[28] The Corporation applies to convert these proceedings from the *BIA* to the *CCAA*. It filed its application on April 14, 2022, and asked for an “Initial Order” under the *CCAA* which will, amongst other things, stay “... all actions, suits or proceedings and remedies taken or that might be taken against ... [it] ...for an initial ten (10) days...”. If granted, the Corporation will ask at the end of those 10 days for an order under section 11.02 (2) of the *CCAA* to extend that stay “... until otherwise ordered by the court, for any period that the court considers necessary”.

[29] In effect, the Corporation anticipates that it will run out of time to make a proposal to its creditors (the Claimants) and that it will be deemed to have made an assignment in bankruptcy under section 50.4 (8) (a) of the *BIA* for its failure to make a proposal. The Corporation notes that it cannot extend the time to make a proposal beyond June 20, 2021, six (6) months beyond the date it filed its Notice of Intention to make a proposal.

[30] The Corporation says that there is much unfinished work that it and the Claimants must do before it can make a proposal and that too little time remains under the *BIA* to get that work done. Matters remaining include:

- Quantifying the damages that the Claimants seek to recover from the Corporation, including confirming the number of Claimants and the particulars of their individual claims;
- Ascertaining in August 2022 whether a proposed class action in the Supreme Court of British Columbia, in which the Corporation has been named as a co-defendant, will be certified;
- If the British Columbia class action is certified, quantifying the damages that may be payable in it;
- Developing and executing plans to realize on the Corporation's assets, including its real properties which are widely dispersed, some of which may be uniquely situated, as well as difficult to value and ultimately to market;
- Ascertaining what, if anything, it will recover on an insurance policy with Guardian Insurance, which is set for trial in November 2022; and
- Ascertaining what the Corporation will recover, if anything, from the Government of Newfoundland and Labrador for properties it owns that the Department of Education now occupies under the *Schools Act, 1997*, S.N.L. 1997, c. S-12.2, with the Claimants' application to deal with this issue now set for hearing in November 2022.

[31] In paragraph 38 of the Memorandum of Fact and Law the Corporation filed with its Interlocutory Application, it stated its dilemma this way:

38. Without the requested protection under the CCAA, the Applicant [Corporation] will have to cease operations within the near future and will be unable to complete the Tender Process and further realizations on its assets for the benefit of its stakeholders and creditors.

[32] These notes, together with my comments in the Introduction to these reasons, provide the background to the issues I stated above, to which I turn now for discussion.

## Discussion

### *Protection under the CCAA*

[33] There are some aspects of the Interlocutory Application that are not controversial. For example, there is no doubt that the Corporation is a “company” as defined in Section 2 (1) of the *CCAA*. As I noted earlier, the Roman Catholic Episcopal Corporation of St. John’s was incorporated on May 12, 1897, by a special act of the legislature of the Province of Newfoundland. It is the civil and working arm of the Archdiocese of St. John’s; and to paraphrase the definition of “company” in section 2 (1) of the *CCAA*, the Corporation was both incorporated by or under an Act of the legislature of a province and it has assets and does business in Canada.

[34] Additionally, the Corporation is a “debtor company” as that phrase appears in Section 2 (1) of the *CCAA*, in that it is an “insolvent person” as defined in section 2 of the *BIA*. Again, to paraphrase the definition of “insolvent person”, the Corporation is not bankrupt, it carries on business in Canada, its liabilities exceed one thousand dollars, and it is either unable to meet those obligations or the aggregate of its property would not be sufficient for it to pay all its obligations, due and accruing due.

[35] Section 3 (1) of the *CCAA* sets \$5,000,000 as the entry-level indebtedness that a company must have before it is eligible for protection under the *Act*. Presently, the only confirmed and quantified indebtedness that the Corporation has is the \$2,395,312.45 judgment the four Claimants registered at the Sheriff’s Office on April 15, 2021.

[36] When Representative Counsel filed its Memorandum of Fact and Law for the Claimants on this application, it noted that “... at the April 20, [2022] hearing the RCECSJ and the Proposal Trustee [EY] took the position that there may not be proven claims against the RCECSJ in excess of the amounts owing to the Mount Cashel Plaintiffs” (paragraph 46). Representative Counsel condemned what it characterized as the Corporation’s disavowal of its liability to the Claimants and construed those comments as an effort “... to continue the abhorrent historic trend



of the RCECSJ seeking to minimize the claims of abuse victims”. Counsel for the Corporation claimed that Representative Counsel misconstrued his remarks about indebtedness when he responded to this comment during oral arguments on April 29, 2022.

[37] While I acknowledge the fervour with which Representative Counsel condemned the suggestion that counsel for the Corporation claimed the only proven claims were those the four original claimants have brought, nothing particularly turns on that issue just now so I will leave it extant. I do want to note, however, that Representative Counsel then seems itself to have adopted the suggestion, perhaps a tad facetiously and possibly only for the sake of argument, for it says thus at the end of paragraph 47 of its Memorandum: “The RCECSJ and the Proposal Trustee’s view (however misguided) appears to be that the RCECSJ may not have provable claims against it that exceed the threshold [of \$5,000,000]. By the word of its own counsel and counsel to the Proposal Trustee, the RCECSJ is not eligible for protection under the CCAA”.

[38] Let me say definitively that the Corporation will not be precluded from protection under the CCAA because it does not meet the \$5,000,000 threshold that section 3(1) of the Act prescribes. I acknowledge that this Court has certified only the damage claims of the four original claimants. However, the number of Claimants has grown considerably in the year that has elapsed since those claimants filed their judgment in the Sheriff’s Office.

[39] I have not been advised conclusively of the number of potential Claimants but estimates that have been provided indicate there may be as many as 150 or more and their claims may exceed \$50,000,000. The ultimate number of Claimants and the global value of their claims awaits the claims process that Representative Counsel is developing. Without liquidating all its assets, and even after it has done so, the Corporation may not be able to satisfy all those claims.

[40] The Supreme Court of Canada made it clear in *AbitibiBowater Inc., Re*, 2012 SCC 67, that “... provable claims in an insolvency ... may be [monetary in nature], even if the amounts involved are not quantified at the outset of the proceeding”

(paragraph 3). I find the court’s reasoning in *AbitibiBowater* helpful and will examine the decision more closely, if only briefly.

[41] In 2008, AbitibiBowater announced that it was closing its last paper mill in the Province of Newfoundland and Labrador. It filed for insolvency protection in the United States and petitioned for a stay of proceedings under the *CCAA* in the Superior Court of Quebec because its head office was in Montreal. Meanwhile, within two weeks of the company’s announcement that the mill was closing, the Province of Newfoundland and Labrador passed legislation immediately transferring most of the property AbitibiBowater owned in this Province to itself. It also denied the company any legal remedy for the expropriation.

[42] About six months after the Province expropriated the property, its Minister of Environment and Conservation issued environmental protection orders (“EPA orders”) directing the company to submit remediation plans to the Province for the five industrial sites from which it had operated. Simultaneously, the Province brought a motion in the Superior Court of Quebec that a claims procedure order under the *CCAA* did not bar the Province from enforcing its EPA orders.

[43] AbitibiBowater contested the motion and applied for orders staying the Province’s EPA orders and confirming they were subject to the claims’ procedure order under the *CCAA*. At issue was whether the EPA orders were “truly financial and monetary in nature”. The Superior Court of Quebec found that they were and confirmed they were subject to the *CCAA* process. The Quebec Court of Appeal dismissed the Province’s appeal.

[44] Deschamps J. of the Supreme Court of Canada, with six other judges concurring, also dismissed the Province’s appeal. About the EPA orders she noted, “I agree with the Chief Justice [of Quebec] that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor” (paragraph 59).

[45] Apropos of this matter, the as yet unascertained and unquantified claims of the other Claimants are “contingent claims” for which they are certain to make monetary claims against the Corporation. I include those claims in the *CCAA* process against the Corporation so that its indebtedness clearly exceeds the \$5,000,000 threshold.

[46] More generally, the Claimants do not object so much to the substance of the Corporation’s application to convert the proceedings from the *BIA* to the *CCAA*, as they do the timing of its request. That said, they do suggest that other procedures may be more appropriate. In that behalf, they offer two possible alternatives, a holding proposal or a receivership, both under the *BIA*. I will consider the other options subsequently, but first want to discuss the timing of the Corporation’s application to convert.

[47] The Claimants say that the application to convert is premature for two reasons: When the Corporation filed the application on April 14, 2022, it still had more than 60 days available to it to make a proposal to its creditors through its Notice of Intention under the *BIA*; otherwise, the Claimants say the Corporation is ignoring the significance of June 2, 2022, the date it set for the return of tenders for the 26 parcels of properties it is selling in the St. John’s region. Let me deal with these objections in that order.

[48] It is true that the Corporation still has some time available to it in the Notice of Intention process. It filed its Notice on December 21, 2022, and the six (6) months that the *BIA* allows for extensions of the stay of proceedings that this Court put in place then and has extended several times since, may be extended further but not beyond June 20, 2022. The Corporation feels that it is not acting fecklessly by applying now. It believes that the *BIA* process does not offer a long-term solution, so it will gain nothing by simply deferring the inevitable.

[49] I agree with the Corporation that the Notice of Intention process under the *BIA* will not allow it to liquidate its assets in the structured and orderly way that will likely maximize their returns from them. Earlier in these reasons, I enumerated matters outstanding for the Corporation that it must address before it may value, sell, and realize on its assets so it will be certain of what it will have available for the Claimants.

[50] Aside from the claims process, the creation and administration of which lies largely with the Claimants, there will be a further tender process for properties that the Corporation owns elsewhere on the Avalon Peninsula than in the St. John's region, as well as on the Burin Peninsula. The Corporation also needed to know what impact, if any, the class action in British Columbia will have on its liquidity, as well as what, if anything, it will recover by its claim against Guardian Insurance. While it is too soon to realistically assess when these collateral matters will happen, there is no doubt they will take more time than is currently available under the *BIA*.

[51] As to the importance of the June 2, 2022 closing date for the first tender package, the Claimants overstate its significance by a good measure. It is true that the returns from the tender process will indicate the market for and values of some of the properties available for sale. It may even show that the tender process is not especially effective for selling the properties, either at all or for obtaining their best values. However, the efficacy of the tender process is only one part of the overall exercise on which the Corporation is engaged, and it applies to only a portion of the properties, albeit possibly the most valuable ones, that the Corporation will sell. Overall, June 2, 2022, is no more than an arbitrary date on which the Claimants are conferring too much importance.

[52] As I noted above, the Claimants also suggest that continuing the *BIA* proceedings under the *CCAA* may not be the only or best option available to the Corporation to liquidate its assets. They submit that a “holding proposal” is also available under the *BIA*.

[53] They describe “holding proposal” in paragraph 33 of the Memorandum of Fact and Law they filed in this matter as:

... a proposal submitted to a debtor's creditors that provides that the Debtor will file a substantive proposal at a later date. A "holding proposal" effectively tolls the time period available to make a proposal under the *BIA*. It provides a debtor with sufficient time to complete its restructuring and/or liquidation, in the expectation that all stakeholders of the debtor, will derive a greater benefit from the tolling of the time period under the *BIA* than from any immediate bankruptcy.

[54] The Claimants rely on a dated authority, *Fisher Oil & Gas Corp. v. Guaranty Bank & Trust Co.* (1982), 40 O.R. (2d) 548, 142 D.L.R. (3d) 43 (C.A.), to submit that a holding proposal under the *BIA* is available to the Corporation.

[55] I disagree with the Claimants that the Corporation may resort to a holding proposal in this matter. As described by the Claimants, a "holding proposal" is a promise by the Corporation to make a proposal. If the term has any relevance now, "holding proposal" is actually the Notice of Intention process on which the Corporation is currently engaged. The Notice of Intention process simply cannot be extrapolated further, for to do as the Claimants suggest would require the Corporation to make another promise to make a proposal beyond what it did on December 21, 2021; and a fair reading of section 50.4 (1) of the *BIA* does not support that kind of duplicity.

[56] The Claimants also submit in paragraph 42 of their Memorandum of Fact and Law that the results the tender process bears on June 2, 2022 "... may require a re-evaluation of whether the RCECSJ remains the best steward of its property, assets, or undertakings, or whether in the alternative the appointment of an independent receiver may be more appropriate". In effect, the Claimants are suggesting by this that it may be appropriate to consider switching the "debtor-driven" process that is now operating, to a "creditor-driven" process whereby the Claimants would have more control over how the Corporation's assets are called in, valued, and disposed of. They also suggest that a receivership would likely cost less. As to that, they note the reporting obligations that are built into the *BIA-CCAA* processes.

[57] Let me address first the relevance of who "drives" the process. I favour neither a creditor – nor a debtor – driven process, but whatever works to the best interests of the Claimants, the ultimate beneficiaries of this undertaking. Thus far, I find that

the initiative the Corporation has displayed, encouraging. It assiduously meets (and generally beats) its deadlines and it seems fully committed to deriving the maximum value from its assets for the Claimants.

[58] I offer this simple example: The parties have not yet sought my approval for the settlement they reached over the “Chase The Ace” funds from St. Kevin’s Parish, nor have they apprised me of its terms. However, very early in the discussion of that issue the Corporation took, the perhaps uncomfortable stance, that the funds belonged to the Corporation and should be available for it to distribute amongst the Claimants.

[59] I also find that the Corporation states and works methodically towards its goals and continually looks toward future eventualities it will have to contend with. No doubt this anticipation lies behind the present application to convert from the *BIA* to the *CCAA*. I believe that the efforts the Corporation have shown to date also garner support from the lay members of the 34 parishes under the auspices of the Archdiocese of St. John’s. Counsel for the Corporation reports that parishioners still give generously to the Church. We ought not to underestimate the importance of that support since those same parishioners will likely be involved in acquiring the assets the Corporation will sell by the tender process or howsoever the properties are sold.

[60] As to how the costs of the *CCAA* proceedings compare to the costs of a receivership, the latter would also be court-ordered since there is no private means for appointing a receiver here, so the reporting and accounting requirements (and the associated costs) would likely mirror each other.

[61] Overall, I find that the Corporation is discharging the duties it has under the Notice of Intention proceedings that it instituted on December 21, 2021. It has met its timelines; it shows a determined interest in maximizing the value of the assets it has available for distribution; it is putting the interests of the Claimants first; and it is committed to liquidating its assets and meeting all other contingencies that affect the recovery of funds to settle the claims outstanding against it.

[62] Timelines under the *BIA* are too restrictive to allow the Corporation to complete the process on which it is engaged. However, the *CCAA* offers greater flexibility and is more conducive to the undertaking. I note the comments of Deschamps J. of the Supreme Court of Canada in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60.

[63] The learned justice highlighted the “remedial nature” of the *CCAA* and expressed it with this quotation from paragraph 57 of Doherty J.A.’s dissenting judgment in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 41 O.A.C. 282:

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. (*Century Services* at para. 59).

[64] Elsewhere in *Century Services*, Deschamps J. compared and contrasted the restrictiveness of the *BIA* and the flexibility of the *CCAA*. In paragraph 15, she noted:

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.

[Emphasis added.]

[65] Otherwise, I note that the Corporation filed the documentation required under section 10 (2) of the *CCAA*, in that it submitted with its Interlocutory Application, a statement indicating its projected cash flow; its prescribed recommendations for preparing the cash-flow statement; and copies of appropriate financial statements.



[66] Overall, I find the Corporation satisfies the three-part test that Brown J. set out in *Clothing for Modern Times*. To summarize and paraphrase Brown J.'s test:

- It has not filed a proposal under the *BIA*;
- It is maximizing its recovery from its assets for the benefit of the Claimants and enabling the Claimants to complete a claims process; and
- It has filed all documentation that section 10(2) of the *CCAA* specifies.

[67] In the result, I will allow its application to convert proceedings from the *BIA* to the *CCAA* and stay the Claimants' proceedings against it under the *CCAA*.

#### *Appointing EY as Monitor*

[68] The Corporation asks to appoint Ernst & Young Inc. to monitor its activities under the *CCAA*. In paragraph 42 of the Memorandum of Fact and Law the Corporation filed to support its Interlocutory Application to convert, it states succinctly the reasons it believes EY is a suitable monitor:

42. EY is a trustee within the meaning of s. 2(1) of the *BIA* and is not subject to any of the restrictions as to who may be appointed as monitor under section 11.7(2) of the *CCAA*. EY has a significant amount of experience acting as a court-appointed monitor in *CCAA* proceedings. EY also has been engaged by the Applicant to help with its restructuring since January, 2021. In addition, EY has acted as Proposal Trustee for the Application under the Part III *BIA* proposal process and has therefore gained significant knowledge that would be of assistance during the *CCAA* proceedings.

[69] The Corporation notes in paragraph 43 of its Memorandum that "EY has consented to acting as Monitor in these *CCAA* proceedings"; and I also note that the Claimants do not challenge EY's appointment.

[70] In the result, I order that EY will be Monitor of the Corporation in the CCAA proceedings.

### *Administration Charge*

[71] The Corporation requests an Administration Charge of \$400,000 under section 11.52 of the CCAA. It relies on the criteria that Pepall J. identified in *Canwest Publishing* and offers three factors that justify granting the Administration Charge it asks for under the CCAA. While the Claimants are clearly concerned that converting to CCAA proceedings will increase costs, thereby reducing the funds available for distribution, they do not oppose the Administration Charge *per se*; nor do they specify how costs might increase.

[72] As to the criteria Pepall J. stated in *Canwest Publishing*, I find that the CCAA proceedings are likely to be complex and involved, they may be of long duration and all parties to this process will surely benefit from the professional services the Administration Charge will be directed to. In addition to the professional fees and disbursements that the Corporation will incur for its counsel, the Monitor and the Monitor's counsel, the Charge covers the fees and disbursements of Deloitte Restructuring Inc., Financial Advisor to Representative Counsel.

[73] In the result, I grant an Administration Charge against the property of the Corporation in an initial amount of \$400,000 to secure the payment of the professional fees and disbursements already incurred and to be incurred in the CCAA proceedings by the Monitor, counsel to the Monitor, counsel to the Corporation, and Deloitte Restructuring Inc., and to rank as a super-priority charge on all assets of the Corporation.

## **SUMMARY AND DISPOSITION**

[74] On December 21, 2021, the Roman Catholic Episcopal Corporation of St. John's gave Notice of Intention to make a proposal under the *Bankruptcy and*

*Insolvency Act* to Claimants for damages because of abuse they suffered while living at Mount Cashel Orphanage. On April 14, 2022, the Corporation filed an Interlocutory Application to convert the proceedings to the *Companies' Creditors Arrangement Act* and to seek protection under that legislation while it evaluated and liquidated its assets, and the Claimants completed a claims process. The Corporation also asked for ancillary, but related, relief. The Claimants opposed the Application, arguing that it was premature and that it would increase costs, thereby diminishing the funds available to distribute to them.

[75] The Court allowed the Application in the main and granted the ancillary relief the Corporation sought. It also stated dates when the conversion from the *BIA* to the *CCAA* takes effect and to consider continuing the proceedings under the *CCAA*.

## **ORDER**

[76] In the result, I order that:

- (1) The Corporation may convert its proceedings from the *BIA* to the *CCAA* and I stay the Claimants' proceedings against the Corporation under the *CCAA*;
- (2) Ernst & Young Inc. will be Monitor of the Corporation in the *CCAA* proceedings;
- (3) I grant an Administration Charge against the property of the Corporation in an initial amount of \$400,000 to secure the payment of the professional fees and disbursements already incurred and to be incurred in the *CCAA* proceedings by the Monitor, counsel to the Monitor, counsel to the Corporation, and Deloitte Restructuring, to rank as a super-priority charge on all assets of the Corporation;
- (4) This order takes effect on May 17, 2022, and the Corporation may file its Amended and Restated Initial Order, in substantially the same form that it submitted with its Interlocutory Application, subject to any changes that may be warranted by this Judgment;

- (5) The stay of proceedings ordered previously under the *BIA* remains in effect until May 17, 2022, when the stay of proceedings under the *CCAA* takes effect; and
- (6) This matter returns to Court on Friday, May 27, 2022, to consider the continuation of the proceedings under the *CCAA*.

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**GARRETT A. HANDRIGAN**  
Justice

TAB 4

**CITATION:** Canwest Publishing Inc., 2010 ONSC 222  
**COURT FILE NO.:** CV-10-8533-00CL  
**DATE:** 20100118

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR  
ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST  
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

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

**PEPALL J.**

**REASONS FOR DECISION**

**Introduction**

[1] Canwest Global Communications Corp. (“Canwest Global”) is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the “CMI Entities”), obtained protection from their creditors in a

*Companies' Creditors Arrangement Act*<sup>1</sup> (“CCAA”) proceeding on October 6, 2009.<sup>2</sup> Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. (“CPI”), Canwest Books Inc. (“CBI”), and Canwest (Canada) Inc. (“CCI”) apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the “Limited Partnership”). The Applicants and the Limited Partnership are referred to as the “LP Entities” throughout these reasons. The term “Canwest” will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global’s other subsidiaries which are not applicants in this proceeding.

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

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

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, *The Gazette*, was established in Montreal in 1778. The others are the *Vancouver Sun*, *The Province*, the *Ottawa Citizen*, the *Edmonton Journal*, the *Calgary Herald*, *The Windsor Star*, the *Times Colonist*, *The Star Phoenix*, the *Leader-Post*, the *Nanaimo Daily News* and the *Alberni Valley Times*. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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<sup>1</sup> R.S.C. 1985, c. C. 36, as amended.

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



newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

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

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

#### Background Facts

##### (i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

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

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

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

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

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

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership’s consolidated revenues decreased by \$181.7 million or 15% to \$1.021 billion as compared to \$1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of \$66 million compared to consolidated net earnings of \$143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

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

- (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.<sup>3</sup> As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.<sup>4</sup>
- (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling \$68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
- (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to \$75

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<sup>3</sup> Subject to certain assumptions and qualifications.

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

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

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

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

(iii) LP Entities’ Response to Financial Difficulties

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

[16] The board of directors of Canwest Global struck a special committee of directors (the “Special Committee”) with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the “CRA”). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

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

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

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

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

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

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

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

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

LP secured claims in the amount of \$25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

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

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

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

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

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

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

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to \$250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the



proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*<sup>5</sup>. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

#### Proposed Monitor

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

#### Proposed Order

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

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<sup>5</sup> 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

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

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*<sup>6</sup> and *Re Lehndorff General Partners Ltd*<sup>7</sup>.

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

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<sup>6</sup> 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

<sup>7</sup> (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

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

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

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

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

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*<sup>8</sup> : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

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<sup>8</sup> 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."<sup>9</sup> Similarly, in *Re Anvil Range Mining Corp.*<sup>10</sup>, the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."<sup>11</sup>

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

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

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

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<sup>9</sup> Ibid at para. 16.

<sup>10</sup> (2002),34 C.B.R. (4<sup>th</sup>) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

<sup>11</sup> Ibid at para. 34.

(d) DIP Financing

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

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

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

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

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<sup>12</sup> *Supra*, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

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

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

(e) Critical Suppliers

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

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

11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

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

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

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

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

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and



counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.<sup>13</sup> The LP Entities also request a \$10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

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

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

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

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<sup>13</sup> This exception also applies to the other charges granted.

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

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

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

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

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

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

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

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<sup>14</sup> *Supra* note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

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

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

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

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<sup>15</sup> Supra note 7.

<sup>16</sup> [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

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

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

(i) Confidential Information

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

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*<sup>18</sup>. In that case, Iacobucci J. stated that an

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<sup>17</sup> R.S.O. 1990, c. C.43, as amended.

<sup>18</sup> [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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<sup>19</sup> *Supra*, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

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

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Pepall J.

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**COURT FILE NO.:** CV-10-8533-00CL  
**DATE:** 20100118

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN  
OF COMPROMISE OR  
ARRANGEMENT OF CANWEST GLOBAL  
COMMUNICATIONS CORP. AND THE OTHER  
APPLICANTS LISTED ON SCHEDULE "A"

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**REASONS FOR DECISION**

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Pepall J.

**Released:** January 18, 2010