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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 relief 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

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

Citation: *Edward Collins Contracting Limited (Re)*, 2022 NLSC 149
Date: October 14, 2022
Docket: 202201G1964

2022 NLSC 149 (CanLII)

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 of Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, the "Companies ")

- AND -

Docket: 202201G1853

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 Receivership of Edward Collins Contracting Limited, H & E Designs Ltd., Classic Security Ltd., FGC Holdings Ltd. and 51037 Newfoundland and Labrador Inc.

BETWEEN:

ROYAL BANK OF CANADA

APPLICANT

AND:

EDWARD COLLINS CONTRACTING LIMITED, H & E DESIGNS LTD., CLASSIC SECURITY LTD., FGC HOLDINGS LTD. and 51037 NEWFOUNDLAND AND LABRADOR INC.

RESPONDENTS

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Before: Justice Alexander MacDonald

Edited Transcript of Oral Reasons for Judgment

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

Dates of Hearing: September 16, 2022 and September 28-29, 2022

Date of Oral Judgment: October 5, 2022

Appearances:

Darren D. O'Keefe	Appearing on behalf of the Companies
Neil L. Jacobs, K.C. and Joseph J. Thorne	Appearing on behalf of Royal Bank of Canada
Maeve A. Baird	Appearing on behalf of the Minister of National Revenue

David L. Hearn	Appearing on behalf of the Government of Newfoundland and Labrador
Andrew Punzo and Mark A. Borgo	Appearing on behalf of Western Surety Company
Tim Hill, K.C. and Joshua J. Santimaw	Appearing on behalf of Daimler Truck Financial Services Canada Corporation
Andrew A. Fitzgerald, K.C.	Appearing on behalf of S.R. Stack & Company Ltd.
Phil Clarke	Appearing on behalf of Grant Thornton Limited, the Proposed Monitor
Steven McLaughlin	Appearing on behalf of Ernst & Young Inc.

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Authorities Cited:

CASES CONSIDERED: *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238; *Hester Creek Estate Winery Ltd., Re*, 2004 BCSC 345; *United Used Auto & Truck Parts Ltd., Re*, (1999), 12 C.B.R. (4th) 144, 93 A.C.W.S. (3d) 411 (B.C.S.C.); *Montréal (Ville) c. Restructuration Deloitte Inc.*, 2021 SCC 53; *Industrial Properties Regina Limited v. Copper Sands Land Corp.,* 2018 SKCA 36

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

REASONS FOR JUDGMENT

MACDONALD J.:

INTRODUCTION

[1] On July 8, 2022, the Royal Bank of Canada ("RBC") applied to appoint Ernst and Young Inc. as a court-appointed receiver over all or substantially all of the assets

of Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd ("Companies"). The Companies oppose the application.

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[2] On July 18, 2022, the Companies applied for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). They asked me to grant an initial order called for under section 11.02(1)(a) of the *CCAA* ("Initial Order"). If I deny the Initial Order, they ask that I dismiss the receivership application.

[3] On July 19 and 20, 2022, the Court heard the parties on both applications. The Court informed the parties that it could not hear these matters until September 16, 2022.

[4] On July 20, 2022, the Court granted a consent order ("Consent Order"). The Court ordered that any person having a contractual arrangement or a statutory mandate for the supply of goods or services, were restrained until further order from the Court from discontinuing, altering or terminating the supply of such goods or services ("Consent Stay") until September 16, 2022 ("Consent Stay Period").

[5] I heard both applications on September 16, 28 and 29, 2022. On September 16, 2022, I continued the Consent Order until now.

[6] The parties agree that I will deal with the *CCAA* application first. If I dismiss the *CCAA* application, I will then deal with the receivership application. I now turn to the *CCAA* application.

CCAA APPLICATION

[7] RBC, the principal secured creditor of the Companies, and Daimler Truck Financial Services Canada Corporation, a secured lender of certain equipment, oppose the *CCAA* application.

[8] The Western Surety Company ("Surety"), Edward Collins Contracting Limited's ("Collins Contracting") construction surety provider, the Canada Revenue Agency ("CRA"), and the other parties at the hearing neither supported nor opposed the *CCAA* application.

[9] I hereby grant the Companies the Initial Order which I attach as Schedule A. I will now explain why I made this decision.

[10] I have considered:

(a) Do the Companies have standing under the *CCAA*?

(b) Have the Companies satisfied the test to allow me to grant an Initial Order?

(c) If so, should the Companies' conduct during the Consent Stay cause me to refuse the Initial Order? and

(d) Did the Companies act in bad faith?

[11] I will then deal with:

(a) Should the Court exercise its discretion to grant the administration charge? and

(b) What conditions should I impose in the Initial Order?

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[12] I will first deal with whether the Companies have standing under the *CCAA*.

Do the Companies have standing under the *CCAA*?

[13] I find the Companies have standing under the *CCAA*. The *CCAA* applies to a debtor company or affiliated debtor Companies, if they are insolvent or have committed an act of bankruptcy and owe more than $5 million.

[14] The Companies owe RBC in excess of $5 million and CRA about $4.9 million. I am satisfied that the Companies are insolvent.

[15] Thus, I find that the Companies qualify as debtor companies under the *CCAA*. I now turn to whether the Companies met the test to allow me to issue an Initial Order.

Have the Companies satisfied the test to allow me to issue an Initial Order

[16] I find that the Companies have satisfied the test. I will now explain why I made that decision.

[17] Under section 11.02(1)(a) of the *CCAA*, I may pursuant to an initial order stay all proceedings against the Companies for not more than 10 days.

[18] The Supreme Court of Canada in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 ("*Callidus*"), gives me guidance on the purpose and objectives of the *CCAA* in paragraphs 39 to 42. I will now summarize that guidance.

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[19] The *CCAA* is one of three principal insolvency statutes in Canada. Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have.

[20] These objectives include:

(a) providing for timely, efficient and impartial resolution of a debtor's insolvency;

(b) preserving and maximizing the value of a debtor's assets;

(c) ensuring fair and equitable treatment of the claims against a debtor;

(d) protecting the public interest; and

(e) balancing the costs and benefits of restructuring or liquidating the company.

[21] Among these objectives, the *CCAA* generally prioritizes avoiding the social and economic losses resulting from liquidation of an insolvent company.

[22] 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.

[23] However, 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". (*Callidus* at para. 42).

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[24] *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 *CCAA* itself. Such scenarios are referred to as "liquidating *CCAA*s", and they are now commonplace in *CCAA* applications.

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[25] Liquidating *CCAA*s take diverse forms and may involve:

(a) the sale of the debtor company as a going concern;

(b) an "en bloc" sale of assets that are capable of being operationalized by a buyer;

(c) a partial liquidation or downsizing of business operations; or

(d) a piecemeal sale of assets (*Callidus* at para. 43).

[26] In this case, the Companies seek the reorganization and survival of the Companies as a going concern. That is not to say the Companies' plans may change when it formulates its final restructuring plan.

[27] Under Section 11.02(1) of the *CCAA*, I may, in an initial order, make any orders I see fit. I may:

(a) Stay proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"); and

(b) restrain proceedings in any existing action against the Companies and prohibit any new action against them.

[28] I cannot make the Initial Order effective for more than 10 days.

[29] Under subsection 11.02(2) of the *CCAA,* I can amend the Initial Order and extend the stay at a so-called comeback hearing. I must hold the hearing before the expiry of the stay in the Initial Order. I may amend these Orders. I will call these amendments the Amended Orders.

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[30] Under section 11.02(3) of the *CCAA*, I cannot grant an Amended Order unless the Companies satisfy me that:

(a) circumstances exist that make the extension appropriate; and

(b) they are acting in good faith and with due diligence.

[31] Section 11.02(3)(b) of the *CCAA* says, "in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence". Subsection 2 deals with orders after the initial order.

[32] Despite the wording of section 11.02(3)(b) indicating "good faith and due diligence" applies only to orders under subsection (2), that being orders "other than initial applications", the Supreme Court of Canada in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 69, determined good faith and due diligence applies to initial orders as well.

[33] It said at paragraph 70 that "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority".

[34] Under section 11.7(1) of the *CCAA*, when I make an Initial Order, I must appoint a person to monitor the business and financial affairs of the Companies. The monitor must be a trustee, defined in section 2 of the *BIA.* The Companies ask that I appoint Grant Thornton Limited, represented by Phil Clarke, Senior Vice-President and Bankruptcy Trustee ("Proposed Monitor").

[35] During the currency of the Initial Order and comeback Amended Orders, the Companies attempt to complete a plan of compromise and arrangement with its creditors. The Proposed Monitor assists them. The Proposed Monitor, as an officer of the Court, periodically reports to the Court on the progress of the plan.

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[36] I will now turn to the circumstances the Companies must show me to allow me to grant the Initial Order.

Legal Test – Contents of Plan

[37] Justice Orsborn in *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238, said at paragraph 15, that I should consider whether the Companies have some chance, by engaging the *CCAA* process, of furthering the purposes of the legislation.

[38] Justice Orsborn observed the Companies must overcome a low bar to trigger the *CCAA* process. However, the Companies must do more than simply ask for time.

[39] The Companies must put forth "a germ of a plan" that suggests "a reasonable possibility of restructuring" (*Norcon* at para. 16). However, they need not present a fully developed plan at the initial hearing, nor are they required to have the support of all of their creditors.

[40] To put this test in context, I will now describe the financial difficulties the Companies find themselves in and how these difficulties arose.

Companies' Financial Woes

[41] Collins Contracting is a general contractor specializing in roadworks. As described in the affidavit of David Savoie, Business Specialist with RBC, in the 2019

fiscal year, its revenue was $12.1 million and its net income was $393,000. In the 2020 FY, its revenue was $11.4 million and its profit was $310,000.[1] Significantly, Collins Contracting's obligation to CRA increased from about $60,000 to about $451,000.[2]

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[42] He says that in the 2021 FY, the Companies' revenue decreased to $8.5 million. Its 2020 FY profit became a $3.4 million loss in 2021. This loss was incurred despite Collins Contracting's $1.2 million emergency wage subsidy from Canada.[3]

[43] He further says the information in the 2021 financial statements caused Collins Contracting to be in default of the RBC loan facility because it no longer had minimum debt service coverage ratio of 1.25X called for in the loan facility.[4]

[44] Because of the Companies' financial difficulties and default, on December 31, 2021, RBC, Collins Contracting, H & E Designs Ltd., Frank Collins and Josh Collins executed the forbearance agreement.

[45] In the agreement, Collins Contracting acknowledges it is in default of its obligations to RBC. It agreed to provide interim financial statements and CRA balance reporting.

[46] It also agreed, at paragraph 1(e), to "confirm the rights and remedies available to the Bank under the Security are fully and immediately enforceable by [RBC] and hereby waive all notice periods of application thereto, including notice period of application under Section 244 of the [*BIA*]".

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[1] Affidavit of David Savoie, filed August 5, 2022, [Savoie Affidavit], at para. 15.
[2] *Ibid.* at para. 16.
[3] *Ibid.* at para. 34.
[4] *Ibid.*

[47] In the second recital of the agreement, RBC agreed not to call it loans until February 28, 2022.

[48] Collins Contracting provided RBC monthly interim year-to-date financial statements from October, 2021 to March, 2022. All showed a continued deterioration of Collins Contracting's financial position.[5]

[49] The March 2022 interim statement, provided to RBC on June 9, 2022, shows revenue of $5.3 million, compared to forecasted revenue of $15.2 million, and a net loss of $2.1 million compared to forecasted net income of $3 million. The amount owing to CRA was then about $3.2 million.[6]

[50] Thus, over the 2021 FY and up to March 2022 FY, the Companies incurred a cumulative loss of about $5.5 million. Its CRA obligation increased from $451,000 in 2020 to $3.2 million.

[51] RBC demanded its loans on July 17, 2022. RBC was owed, as of June 15, 2022, more than $5 million, together with interest, expenses and fees.[7]

[52] CRA filed an affidavit on September 12, 2022, of Mark Lohnes, Resource Officer/Complex Case Officer with CRA. He said that the Companies owe CRA about $4.9 million. He said that over $3.3 million is for deemed trust unremitted employee payroll source deductions and HST.[8] This, excluding interest and penalties, is the so-called deemed trust debt.

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[5] *Ibid.* at paras. 39-51.
[6] *Ibid.* at para. 51.
[7] Receivership Originating Application, filed July 8, 2022 at para 11.
[8] Affidavit of Mark Lohnes, filed September 12, 2022, [Lohnes Affidavit] at para. 38.

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[53] CRA says Collins Contracting owes almost $4 million of this amount. It says about $2 million (excluding penalties and interest) is for deemed trust for unremitted employee payroll source deductions ("Payroll deemed trust debt") and about $756,000 for HST deemed trust debt.[9]

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[54] In paragraph 38, CRA says the remainder of the Companies owe CRA about $939,000. About $348,000 (excluding penalties and interest) is for Payroll deemed trust debt and about $205,500 is for HST deemed trust debt.[10]

[55] CRA says that Collins Contracting last remitted amounts in March 2022, and it was the last of the Companies to do so. The Proposed Monitor said, and I accept, that he made remittances over the summer of Collins Contracting's monies owed to CRA for that period, but he did not remit any of the arrears.

[56] CRA is in the process of reviewing the Companies' accounts, and it will determine the final arrears after that review. The timing of this review is currently within the control of CRA, and its counsel could not provide me any guidance on when this review might begin or end.

[57] The Companies provided little explanation for their financial difficulties in its application or in Francis Collins' July 18, 2022 affidavit. They did not explain how it incurred the CRA debt.

[58] On July 18, 2022, Francis Collins, director of the Companies, filed an affidavit supporting the initial application. He provided me with the Companies' 2021 FY financial statements, but provided no cash flow statements or any other historical financial data.

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[9] *Ibid.* at para. 19.
[10] *Ibid.* at para. 38.

[59] Francis Collins, addressed the CRA balances by saying, "As appears from the Company's books and records, there is currently a significant amount outstanding to the Canada Revenue Agency ("CRA"). The Company is actively working with CRA to determine the full outstanding balances and to work on a payment plan to relieve this liability. The Company is hopeful that the CCAA proceedings will bring CRA to the table to discuss options, as to date CRA has not been forthcoming with information or responsive to requests from the Company to discuss the Company's CRA's position of potential discrepancies in CRA's accounting."[11]

[60] This statement shows, at best, a disturbing lack of awareness of how the Companies incurred almost $5 million in CRA obligations, including almost $3.3 million in deemed trust amounts for both income tax and HST.

[61] On September 23, 2022, Josh Collins filed an affidavit to provide me with further information. He answers the question, "How did [Edward Collins Contracting Limited] get itself into financial trouble and accumulate such a high amount of CRA Debt?"[12] He says two primary events caused both.

[62] The first event is the purchase of a defective asphalt plant. Collins Contracting underestimated the risk of purchasing a defective plant and the cost and time necessary to rectify the plant deficiencies and to bring its software up-to-date.[13]

[63] The second event is the collapse of Collins Contracting's revenue during COVID-19.[14]

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[11] Affidavit of Francis Collins, filed July 18, 2022 at para. 12.
[12] Affidavit of Josh Collins, filed September 23, 2022 [Collins' Second Affidavit], at heading A.
[13] *Ibid.* at paras. 3-12.
[14] *Ibid.* at paras. 14-25.

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[64] He says that both events contributed to a loss of almost $3 million in 2021.[15] RBC said the loss was $3.4 million and I can only assume this was because Mr. Savoie relied on interim rather than final statements.

[65] Josh Collins admits that Collins Contracting maintained its liquidity despite these losses by not paying their CRA obligations,[16] and in May 2020 by borrowing $1 million from RBC by way of a $1 million loan under the so-called "Highly Affected Sectors Credit Availability Program" ("HASCAP"). The Government of Canada guaranteed this HASCAP loan. This program is designed to support companies that suffered financially during the COVID-19 epidemic.

[66] The Proposed Monitor confirms in his first pre-filing report that the unpaid CRA funds "were used to offset the acquisition and operating losses incurred" for capital acquisitions, losses for underutilized equipment and other operational losses.[17] In paragraph 21(b), the Proposed Monitor also identifies that Collins contracting lost more than $1 million dollars on an unfavourable bridge construction contract.

[67] Thus, I find the triggering causes of the Companies' financial crisis are an improvident capital purchase, an unfavourable construction contract, and the general collapse of the Companies' revenue and its resulting operating losses. This in turn caused the Companies not to pay the deemed trust debt to CRA to fund these losses.

[68] This, together with the collapse in the Companies' retained earnings[18] and profits and the increase in CRA's deemed trust debt, caused RBC to take action to protect its security from further erosion.

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[15] *Ibid.* at para. 17.
[16] *Ibid.* at para. 18.
[17] Pre-filing Report of Grant Thornton Limited, September 15, 2022 [Proposed Monitor's First Pre-filing Report], at para. 21(c).
[18] *Supra* note 12 at para. 20 (from about $2.9 million to almost nothing in 2021).

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[69] Having discussed the cause of the Companies' financial problems, I now turn to whether the Companies put forth "a germ of a plan" that suggests "a reasonable possibility of restructuring". (*Norcon* at para. 16)

Companies' "Germ of a Plan"

[70] I find that they have. I now will explain why I made that decision.

[71] The Companies' plan is contained in the Proposed Monitor's first and second pre-filing reports and in affidavits from Josh Collins.

[72] The plan is based on two pillars. The first pillar is the prospect of Travelers Capital refinancing the Companies' debt obligations. The Companies provided me with an executed "summary of terms and conditions" dated September 22, 2022. Joshua Collins is named as a guarantor. I will call this the Term Sheet.

[73] The Term Sheet indicates that Travelers will lend the Companies 90% of the appraised forced liquidation value of the Companies' equipment value and 50% of the appraised value of certain real property. Travelers estimates this value is $6,796,490.

[74] The Companies provided me with the forced liquidation value appraisal on September 23, 2022. The Proposed Monitor tells me the valuation supports the valuation of the equipment in the Term Sheet.

[75] Travelers also requires that the Companies provide it with:

(a) completed environmental reports on specified property;

(b) real estate appraisals;

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(c) forward-looking income and cash flow statements; and

(d) Year-to-date statements and historical three-year prior financial statements.

[76] On September 22, 2022, the Companies filed copies of:

(a) an appraisal of a residence on Lakeview Dr. in Deer Lake;

(b) A real estate agent's assessment of a property at 30 Reid's Lane in Deer Lake;

(c) an appraisal of Collins Contracting's office building in Placentia;

(d) an appraisal of a real estate development;

(e) a purchase and sale agreement for property on Charter Avenue in Placentia; and

(f) an offer to purchase property at 28-30 Reid's Lane in Deer Lake.

[77] The total value of real estate described in these filings is about $2.75 million.

[78] The Term Sheet also provides that Travelers must be satisfied that the Companies have paid all CRA priority payments. As the CRA priority payments are not current, I presume they mean that the CRA priority debt must be retired from the proceeds of the loan.

[79] The Term Sheet lists all the Companies as borrowers. Thus, this condition would include deemed trust amounts due to CRA, or at least that portion that could rank ahead of Travelers' security if they remain unpaid on closing.

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[80] However, the Proposed Monitor testified at the hearing that Travelers has agreed that the HST deemed trust debt need not be paid on closing. He also said he "understands" that CRA is open to compromising the HST deemed trust debt.

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[81] Thus, it seems that Travelers will expect that the HST liability will be resolved by agreement with CRA or pursuant to a *CCAA* order before it advances funds under the Term Sheet.

[82] Travelers says in the Term Sheet that the total outstanding amounts to secured creditors and the CRA total is $7,058,337. It says this must be paid on closing.

[83] Josh Collins in his affidavit filed September 13, 2022, said there is a shortfall of about $250,000 between the amount of the Travelers' loan and the debt the Companies must repay on closing. I will call this the Loan Gap. He said the Companies can finance the Loan Gap through a variety of sources being from:

(a) $253,000 owed to the Companies by Olympic Construction Ltd. He did not provide me with any evidence of this amount or an acknowledgement from Olympic that this amount is due;

(b) a potential sale of real property in Deer Lake based on an expression of interest with an asking price of $500,000. He said, "If this offer materializes, we will net approximately $250,000".[19] On September 22, 2022, he provided me with an offer of purchase and sale for a piece of property in Deer Lake for less than that amount; and

(c) sale of equipment by the Companies for about $250,000 once they "further review our operational needs".[20] This is highly contingent. It is subject to a review of operational needs. I have no evidence of the value of this equipment. I do not know if Travelers intends to take security over this equipment.

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[19] Affidavit of Josh Collins, filed September 13, 2022 [Collins' First Affidavit], at para. 67(b).
[20] *Ibid.* at para. 67(c).

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[84] Even if the Companies can access this money, I do not accept that the Loan Gap is only $250,000.

[85] The Proposed Monitor provided an analysis of the amount Collins Contracting owes to CRA. He largely agrees with CRA's position but states that interest and penalties are not deemed trust amounts.

[86] He concludes that Collins Contracting and 51037 Newfoundland and Labrador Inc., after excluding interest and penalties, owes about $2.2 million in Payroll deemed trust debt. He acknowledges that CRA claims Collins Contracting owes it about $756,000 in HST deemed trust debt. However, he did not do an analysis in which he breaks out interest and penalties.

[87] He did not do a similar analysis for the remaining Companies. I only have CRA's evidence. It said that Classic Security Ltd. owes about $348,000 in payroll deemed trust amounts and about $151,000 in HST deemed trust debt, while H & E Designs Ltd. and FGC Holdings Ltd. owe about $28,000.[21] I do not know what portion of these is interest and penalties.

[88] In his second report filed on September 26, 2022, the Proposed Monitor disagrees with Josh Collins' Loan Gap. He said it is $473,362.[22]

[89] He said that the Companies now intend to close the Loan Gap by selling instead of financing one of the Reid Lane properties, thereby achieving a contribution of 100% of the sale price rather than 50% of its appraised value. This would net $199,000.[23]

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[21] Affidavit of Mark Lohnes, filed September 12, 2022 at paras. 27, 34 and 37.
[22] Pre-filing Report of Grant Thornton Limited, filed September 26, 2022 [Proposed Monitor's Second Pre-Filing Report] at 5.
[23] *Ibid.* at para. 17(a).

[90] Both he and Josh Collins say Collins Contracting is a beneficiary under a $500,000 insurance policy now, as the insureds died.[24] The Collinses say they discovered the existence of this policy at the end of August 2022.

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[91] The Proposed Monitor said that only half of this amount, or $250,000, is available to offset the Loan Gap. The other half will be used to bolster Collins Contracting's cash flow.[25] I will discuss Collins Contracting's cash flow statements later in this decision.

[92] The Proposed Monitor described how Collins Contracting intends to sell equipment to realize more cash than Travelers 90% forced liquidation financing would generate.[26]

[93] However, the Loan Gap is likely larger unless RBC continues to hold some of its debts, notably the HASCAP.

[94] Furthermore, the Proposed Monitor says the Companies' estimated value of real estate is about $3.3 million.[27]

[95] However, the Companies' submitted appraisals, drive-by estimates and agreements of purchase and sale totaling about $2.7 million. Furthermore, the Proposed Monitor says the real estate value is $65,000 less than Travelers' estimate.[28] Although the difference is not material to my decision, I ask the Proposed Monitor to explain the discrepancy at or before the comeback hearing.

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[24] *Ibid.* at para. 17(b).
[25] *Ibid.* at paras. 17(c) and 17(d).
[26] *Ibid.* at para. 18.
[27] *Ibid.* at para. 14(a).
[28] *Ibid.* at para.16(a).

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[96] Travelers provides in the Term Sheet that the Companies are to repay the loan principal in 24 monthly blended installments of principal and interest, with interest at the rate of 12.75%. The loan amounts are amortized up to 120 months for real estate, and 60 for equipment. The loan balance is payable at the end of the 24 months.[29]

[97] This would seem to require the Companies to repay large sums of monies over two years. Presumably, the Companies will need to satisfy Travelers that they can meet this obligation when it submits is forward-looking pro-forma income statement.

[98] Finally, the Term Sheet is subject to a condition that said, "Final approval of the subject Loan transaction and the Loan Agreement, in form and in substance, by [Travelers'] credit committee."[30] Thus, Travelers is not yet bound to the Term Sheet.

[99] I will now turn to the second pillar of the Companies' restructuring plan - positive cash flow from existing contracts.

The Cash Flow Statements

[100] The *CCAA* requires the Companies to provide weekly projected cash flow statements. The Companies should make disclosure of all material facts known to them (see *Hester Creek Estate Winery Ltd., Re*, 2004 BCSC 345 at para. 5). The standard of disclosure expected of the Companies in these cash flow statements must be realistic (see *United Used Auto & Truck Parts Ltd., Re*, (1999), 12 C.B.R. (4th) 144, 93 A.C.W.S. (3d) 411 at para. 14 (B.C.S.C.).

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[29] *Supra* note 19, Tab L, Travelers Term Sheet [Travelers Term Sheet].
[30] Travelers Loan Sheet, Conditions Precedent to Closing, clause 1.

[101] I find that these cash flow statements are adequate to support an Initial Order. In the absence of other evidence, the disclosure is realistic and there is no evidence that the Companies have not disclosed all material facts known to them.

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[102] If this is not so, the Companies risk an application to set aside the Initial Order. In such an application, the test is whether the undisclosed facts may well have affected the outcome had they been known at the time of the application.

[103] In his first pre-filing report, the Proposed Monitor submitted cash flow statements for a 19-week period from September 17, 2022 to January 27, 2023. He said he prepared cash flow statements for 19 weeks because this gives the Companies time to complete the Travelers refinancing.

[104] In the cash flow statements, found at Tab M of his first pre-filing report, the Proposed Monitor said:

(a) the project cash receipts, mostly from 18 existing construction contracts, is $2.84 million. Its costs associated with this revenue is about $1.19 million;

(b) the Companies' cash flow before operating expenses will be about $1.65 million. Operating expenses will be about $770,000. Thus, the Companies will have a net cumulative cash position of $883,000; and

(c) the cash flow statement includes a speculative "Potential New Projects" column. The Proposed Monitor said these might contribute net cash of $1.2 million. But he does not include this amount as part of his calculated cumulative cash position.

[105] I have limited information on the status of Collins Contracting's contracts. The Proposed Monitor makes a general statement that the Collins Contracting's trade accounts receivables are about $1.39 million. He said that Collins Contracting' counterparties owe them holdbacks, liquidated damages and force accounts (presumably, he means change orders under existing contracts) of about $1 million.[31]

[106] I do not know if Collins Contracting's counterparties contest these amounts. There is no evidence that the Proposed Monitor did a risk assessment on the potential recovery of these amounts. However, I will not require this information for the purposes of the Initial Order.

[107] The Proposed Monitor said that another counterparty terminated a contract that he did include in his original cash flow. He then submitted revised cash flow statements to address the $225,000 deficiency arising out of the termination. This project is for the Placentia Wellness Centre.[32]

[108] He said Collins Contracting will replace this revenue by allocating $250,000 from the life insurance proceeds.[33]

[109] In his second report, the Proposed Monitor said, "The operational assumptions required to be met to successfully achieve the refinancing include (a) [the Companies] achieve or exceed their cash flow forecast".[34]

[110] Josh Collins responded to my request I made on the first day of the hearing. He said, "Of the four projects where we currently have claims, we are in discussions on two of these projects [the same ones referred to by the Government of Newfoundland and Labrador that I refer to later in this decision] regarding [Collins

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[31] *Supra* note 17 at para. 22(a).
[32] *Supra* note 22 at para. 20(a).
[33] *Ibid.* at para. 20(b).
[34] *Ibid.* at paras. 19 and 19(a).

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Contracting] potentially returning to the projects to complete the work. As of the date of this affidavit we have been asked to present a plan to Western Surety on how we intend to complete the work, for their approval. That work is ongoing."[35]

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[111] I get some comfort from the Proposed Monitor's comments in paragraph 38 of his first pre-filing report. He says that he "has also reviewed the support provided by the Company for the Probable and Hypothetical Assumptions and the preparation and presentation of the Cash Flow Projection".[36]

[112] He goes on and says, "Based on [my] review, nothing has come to [my] attention that causes [me] to believe that, in all material respects:

(a) the Probable and Hypothetical Assumptions are not inconsistent with the purpose of the Cash Flow Projection; and

(b) … the Probable and Hypothetical Assumption, developed by management are not suitably supported and consistent with the Company's plans or do not provide a reasonable basis for the Cash Flow Projection, given the Probable and Hypothetical Assumptions".[37]

[113] However, this comfort goes only so far as he says, "The Cash Flow Forecast has been prepared by management using probable and hypothetical assumptions set out"[38] in the Cash Flow Projections. Thus, Collins Contracting prepared the Cash Flow Projections and the Probable and Hypothetical Assumptions.

[114] The Proposed Monitor did not include two contracts (Numbers 46–21PHP and 12–21PHC) with the Minister of the Department of Transportation and Infrastructure

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[35] *Supra* note 12 at p. 35.
[36] *Supra* note 17 at para. 38.
[37] *Ibid.* at para. 38.
[38] *Ibid.* at para. 37.

("Province") in his cash flow projections. On September 23, 2022, the Province took a motion with respect to these contracts.

[115] It said that on April 8, 2022, the Province declared them in default. The Province called on the Surety's performance bond. The Province has not terminated the two contracts. It said that the Surety accepted responsibility under the bonds.

[116] As the Proposed Monitor did not include these contracts in his cash flow statements, they are not relevant to this application, except to the extent they may give rise to concerns about the other contracts' status.

[117] Under section 21 of the *CCAA,* the owner of the projects can claim set-off. If the Surety responds to these defaults, it may step into the shoes of the owner and then claim set-off.

[118] However, the Supreme Court of Canada in *Montréal (Ville) c. Restructuration Deloitte Inc.*, 2021 SCC 53, at para. 63 said, "Although s. 21 of the *CCAA* indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation [set-off] between debts that arise *before an initial order is made* (in other words, 'pre-pre compensation')". [Emphasis in original.]

[119] It also said at paragraph 63, "s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*."

[120] At paragraph 62 it said "it is our view that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances."

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[121] It explained the policy reason for this decision by saying at paragraph 75, "allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival of the debtor company or the business it operates and could derail the restructuring process".

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[122] If Collins Contracting's counterparts had declared any of the contracts in default, this could undermine the prospect of Collins Contracting's cash flow from these contracts to the extent they seek so-called "pre-pre compensation".

[123] I do not know whether the Surety will continue to provide construction bonding in light of these two defaults. Lack of bonding might compromise Collins Contracting's prospects for new work.

[124] Counsel for the Surety told me that owners have declared other Collins Contracting's contracts in default, but he had no instructions on this point. He said it was unlikely the Surety will continue to offer bonding to Collins Contracting.

[125] Counsel for the Companies advised that I should not accept this evidence as it was hearsay statements from counsel for the Surety. I agree. Surety's counsel said he had no instructions on these points. The Surety did not submit any evidence.

[126] In his September 23, 2022 affidavit, Josh Collins provided me with information about Collins Contracting's bonding facility with Western Surety. Such a bonding facility is essential if Collins Contracting is to bid on any significant provincial contracts. The Surety's counsel told the Court that while a Surety facility is in place, the Surety reserves the right to issue bonds in its sole discretion.

[127] The Surety's support is a critical part of Collins Contracting continuing to work its way out of its financial problems. Josh Collins said in paragraph 26 of his affidavit that in the last 30 days, it has bid $1 million in new construction work. He did not tell me that these contracts required construction bonds.

[128] Again this is not determinative of whether I will grant the Initial Order, but it represents a significant contingency that Collins Contracting must resolve if it successfully restructures as a going-concern entity.

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[129] Thus, the Companies' plan depends on a number of contingencies. The critical ones are:

(a) satisfaction of the Term Sheet conditions precedent, including real estate appraisals supporting Travelers' loan valuation of $6,796,490;

(b) successful efforts to close the Loan Gap;

(c) the consent of RBC to remain as the HASCAP lender subordinate to Travelers and if not, assignment of this debt to another;

(d) resolution of the CRA deemed HST debt and interest and penalties in all of the debt; and

(e) the accuracy of the 17-week cash flow statements provided by the Proposed Monitor.

[130] The Companies' restructuring contingency list is daunting. However, any insolvent debtor who seeks protection under the *CCAA* likely has a similar list.

[131] The Companies seek an Initial Order. That order will expire in 10 days. The Companies have provided more than a "germ of a plan". They presented a plan that, if successful, could present a reasonable possibility of restructuring.

[132] Therefore, the Companies have established that circumstances exist which would allow me to grant the Initial Order. I now turn to whether the Companies' conduct during the Consent Stay cause me to refuse the Initial Order?

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Should the Companies' conduct during the Consent Stay cause me to refuse the Initial Order?

[133] I find that the Companies' conduct during the Consent Stay does not cause me to refuse the Initial Order. I will now explain why I made that decision.

[134] RBC says the Companies' conduct during the Consent Stay is relevant for three reasons:

(a) The first reason is the Companies' late filings show they did not act with due diligence;

(b) The second reason is the Companies' inaction to address its financial problems show they did not act with due diligence; and

(c) The third reason is that the Companies should meet a more onerous standard of whether they have "a germ of a plan" because they had advantage of the Consent Stay Period.

[135] I will first deal with the Companies' late filings.

Did the Companies' late filings show they did not act with due diligence?

[136] I find that the Companies have acted with due diligence to the extent they need to in their application for the Initial Order. I will now explain why I made this decision.

[137] The Saskatchewan Court of Appeal in *Industrial Properties Regina Limited v. Copper Sands Land Corp.,* 2018 SKCA 36 at para. 23 said, "Although it is a consideration for granting an initial order, courts generally defer the in-depth analysis of good faith and due diligence to subsequent applications." It continued

and said, "If, however, the court determines the debtor corporation is not seeking *CCAA* protection in good faith or there is c*onvincing* evidence of a lack of due diligence, the court may deny an initial order ...". [Emphasis added.]

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[138] Applicants often operate under severe financial pressure when they apply for an Initial Order. They have limited time to prepare their application and information by necessity is usually preliminary. As *CCAA* applications are usually urgent, the court may receive information shortly before the hearing. The timelines are necessarily compressed.

[139] This issue might not have arisen if the Companies had taken its application in September instead of July and made filing shortly before the hearing dates. However, the Court could not schedule the hearing until September 16, 2022, two months after the initial filing.

[140] The parties agreed on the Consent Order. The order included the Consent Stay. Both RBC and the Companies agreed to this in their interest. The Consent Stay likely benefits both the Companies and RBC as it preserves the status quo for both for more than two months. Critically, this is not a stay under the *CCAA*, or under the *BIA*.

[141] In a perfect world, the Companies would have taken advantage of the Consent Stay to improve their plan. However, this likely proved to be impossible because on August 5, 2022, the Companies replaced the Proposed Monitor with Grant Thornton.

[142] This replacement was within their rights. The Proposed Monitor is a critical part of the *CCAA* process. An applicant must have confidence in their monitor. It is not unreasonable for a new monitor to need some time to file a preliminary pre-filing report.

[143] There is no doubt the Companies filed information at the last minute. The Companies did not file their cash flow statements until the Proposed Monitor did so in his first pre-filing report, one day before the hearing. He filed a revision in his second pre-filing report, after the hearing started. Section 10(2) of the *CCAA* requires that these must accompany the application.

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[144] The receivership and *CCAA* applications were heard together. RBC's evidence was all filed in the receivership application. A summary of the key filings is set out in this table:

Documents	**Filing Date**
RBC Receivership Application (*BIA*) and supporting Affidavit	July 8, 2022
Companies' initial Application filed and supporting Affidavit	July 18, 2022
Consent Order	July 20, 2022
Companies' termination of S.R. Stack & Company Ltd. as Proposed Monitor	August 5, 2022
Affidavit of David Savoie, RBC (*BIA* proceeding)	August 5, 2022
Companies' Application to replace Proposed Monitor in the Consent Order	August 18, 2022
Affidavit of David Savoie, RBC (*BIA* proceeding)	August 24, 2022
CRA Affidavit	September 12, 2022
Affidavit of Josh Collins	September 13, 2022
Affidavit of Josh Collins	September 15, 2022
Affidavit of David Savoie, RBC (*BIA* proceeding)	September 15, 2022
Proposed Monitor's first pre-filing report	September 15, 2022
Affidavit of Josh Collins	September 23, 2022
Crown's Application	September 23, 2022
Proposed Monitor's second pre-filing report	September 26, 2022

[145] The parties all took advantage of the extra time afforded to them because of the Consent Stay Period, some more than others.

[146] CRA, a principal creditor of the Companies, filed its documents late in the process. The Province also filed its documents *after* the hearing began.

[147] The Companies filed some information I asked for after the start of the hearing. I asked for further details on the construction contracts and Collins Contracting's construction bonding. Both RBC and I asked for the equipment appraisal. RBC asked for a signed copy of the Term Sheet.

[148] Furthermore, I asked the Proposed Monitor at the end of the first day of the hearing to report to me if he became aware that there was any material change in the circumstances of the Companies' financial situation.

[149] In his second pre-filling report, he altered the cash flow statements because of a termination of a contract. He reported on the proposed use of a newly discovered $500,000 insurance policy payout benefiting Collins Contracting. He was right to do so.

[150] Furthermore, this matter was urgent. No one asked for a postponement. No one said how they might be prejudiced by the delay. Had anyone asked me for one, I would have been reluctant to grant it. Both RBC and the Companies, without a hearing on the merits, obtained the Consent Stay that affected other creditors' rights.

[151] By its nature, *CCAAs* are conducted in, as the Supreme Court of Canada in *Ted Leroy Trucking* at para. 58 states, "the hothouse of real-time litigation". Late filings in these circumstances, although are not condoned, are sometimes inevitable.

[152] The Companies, in particular though, should not assume that I am satisfied with the timing of some of their last-minute filings. The Proposed Monitor and the Companies should not expect similar latitude throughout this process.

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[153] I will now deal whether the Companies' inaction to address their financial problems show they did not act with due diligence.

Did the Companies' inaction to address their financial problems show they did not act with due diligence?

[154] I find it does not. I will now explain why I made this decision.

[155] RBC suggested that I should consider not only the Companies' inaction during the Consent Stay, but before.

[156] This position is inconsistent with the Supreme Court of Canada's guidance in *Callidus*. It suggests at paragraph 51, that the parties must act with due diligence in the *CCAA proceeding*, when it said, "A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine … the effective functioning of the *CCAA* regime .…"

[157] RBC says it asked the Companies to restructure as early as July 2021. RBC says the Companies hired two other consultants to help them with the restructure. They fired them both and hired Grant Thornton about a month and a half ago. RBC says they wasted months before they hired the Proposed Monitor.

[158] The *CCAA* focuses on the go-forward restructuring, not on the past. Someone might speculate that had the Companies taken a series of different actions, they might have avoided their financial difficulty. Perhaps they might have restructured earlier.

[159] I find that speculation about the Companies' actions which led up to its financial difficulties is irrelevant. I will not consider the Companies' failure to take action to restructure before they came to the Court seeking the Initial Order.

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[160] If I were to do so, this would have the effect of denying creditor protection to debtors who are the author of their own misfortune. The *CCAA,* at least for the Initial Order, offers a no-fault remedy, provided that the applicants act in good faith and act with due diligence in the *CCAA* application.

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[161] I will now deal with whether the Companies should meet a more onerous standard of whether they have "a germ of a plan" because they had advantage of the Consent Stay.

Should the Companies meet a more onerous standard of whether they have "a germ of a plan" because they had advantage of the Consent Stay?

[162] I find they should not. I will now explain why I made that decision. However, even if they should have done so, I find that they have.

[163] Justice Orsborn in *Norcon* said at paragraph 17, "The present case is a little different than the usual CCAA initial application. Norcon's Notice of Intention to make a BIA proposal was filed on November 25, 2019, just over two weeks ago."

[164] He continues and said, "In my view, this suggests that restructuring is not a possibility that has just appeared. Although not a lot of time has passed, the fact that the Court is being asked to continue an existing restructuring proceeding suggests that the 'germ' of any plan should exhibit a slightly higher possibility of coming to life than might otherwise be the case."

[165] This may be so, but the Initial Order was not part of any formal restructuring process. There is no court-appointed receiver or monitor to assist the Companies as an intermediary to formulate a restructuring plan.

[166] I find the Consent Stay is not a stay under the *BIA* or the *CCAA*. It is a negotiated order to accommodate the Court schedule. RBC and the Companies negotiated this stay. Presumably, they did so because it was in their mutual advantage to do so.

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[167] On the other hand, even if I consider that the *CCAA* application and the request for the Initial Order is a continuation of the restructuring process discussed between RBC and the Companies for over a year, I find it difficult to assess whether the Companies' "plan" exhibits "a slightly higher possibility of coming to life than might otherwise be the case".

[168] I have outlined the challenging contingencies the Companies' face in completing a successful plan. I have no way of knowing if the Companies are more likely to overcome these contingencies than "might otherwise be the case". However, the Companies did more than present "a germ of a plan". I discussed the reason for this earlier in this decision. I now turn to whether the Companies acted in bad faith.

Did the Companies act in bad faith?

[169] Although the Companies referred to RBC's alleged bad faith in their pleadings, affidavits and brief, these allegations relate to RBC's actions leading up to it demanding repayment of the Companies' loans.

[170] While the allegations may be relevant to the receivership application, they have little bearing on the Companies' application for an Initial Order. Furthermore, its counsel said he would not argue that RBC acted in bad faith.

[171] I now turn to RBC's allegation of the Companies' bad faith.

[172] In argument, RBC's counsel said the Companies acted in bad faith when they failed to report the escalation of the CRA deemed trust debt to RBC and when they failed to comply with the forbearance agreement.

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[173] I find that RBC did not properly bring this issue before me. However, even if it had, there is insufficient evidence to establish that the Companies acted in bad faith. I will now explain why I made this decision.

[174] David Savoie says at paragraph 34 of his affidavit, filed August 5, 2022, that RBC did not discover the "substantial" increase in the CRA debt until November 1, 2021. He says that was the first time RBC received any FY 2021 financial statements.

[175] RBC's bad faith allegation perhaps relates to whether the Companies should have told RBC about the increased CRA debt before they revealed it in their financial statements. Perhaps the allegation relates to Collin's Contracting's failure to deliver to RBC the financial statements on time, or perhaps it relates to Collins Contracting's performance of the forbearance agreement.

[176] This imprecision on exactly what good faith obligation the Companies breached is why RBC should have expressly grounded its allegation in its pleadings, affidavits or briefs, and not merely raise the issue in their argument.

[177] The British Columbia Supreme Court dealt with a similar situation in *United Used Auto*. The court said at paragraph 15, "I am also not persuaded by the submissions of the secured lenders that the Petitioners are not acting in good faith. The facts that the Petitioners failed to abide by the terms of the forbearance agreements and that they obtained restructuring advice from Deloitte & Touche Inc. in February 1998 [the court issued its decision in November 1999] does not, in my view, demonstrate a lack of good faith in bringing these proceedings."

[178] I now turn to whether I should exercise my discretion and grant the administration fee in the Initial Order.

Should the Court exercise its Discretion to grant the administration charge?

[179] I will not grant the administration charge in the Initial Order. I will now explain why I made that decision.

[180] The Companies seek, pursuant to section 11.52(1) of the *CCAA*, a charge on the Companies' property to a maximum amount of $50,000 to secure the Monitor's costs, and his and the Companies' costs for legal, financial and other experts.

[181] I must limit this administration charge to that which is reasonably necessary for the continued operation of the Companies during the initial 10-day stay.

[182] The Companies' cash flow statements show that administration costs and legal fees will be about $45,000 up to the issuance of the Initial Order, and about $20,000 for the two weeks beginning October 15, 2022.

[183] The cash flow statements show a positive cash position without the administration fee for the weeks ending September 30 to October 21, 2022.

[184] In the circumstances, I will not provide for an administration fee in the Initial Order. I will consider this request again at the comeback hearing.

[185] I now turn to what other provisions that were not in the draft order the Companies circulated, I should include in the Initial Order.

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FURTHER ORDERS

[186] Under section 11.02(1) of the *CCAA*, I can make an order on any terms that I may impose.

[187] I first note that the Companies are not asking me to authorize DIP financing in the Initial Order, so I will not do so.

[188] Given some of the information deficiencies I have identified in this decision, on or before the close of business on Thursday, October 13, 2022, the Companies will file:

(a) the FY 2022 financial statements, even if only in interim or draft form; and

(b) a breakdown of the Companies' current contracts, expected revenue, and other information to support the projections in the cash-flow statements provided to the Court in the initial filings. The Companies should disclose if any of the contracts have been declared to be in default.

[189] The Companies and the Monitor shall file an explanation if they cannot provide this information by the deadline. I now turn to the receivership application.

OTHER MATTERS – RECEIVERSHIP APPLICATION

[190] As I have granted the Initial Order, I hereby stay RBC's receivership application.

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OTHER MATTERS - OUTSTANDING MOTION AND APPLICATION

[191] A motion and application remain outstanding.

[192] The first is that the Province asks that I order the Consent Order, or by extension the Initial Order, does not affect the Province's ability to engage the bond, remedy the defaults, and complete the contracts declared in default in the manner directed by the Surety.

[193] Second is that the Companies ask that I hold one of the Companies' contract counterparties in contempt of the Consent Order.

[194] The parties should, at the comeback hearing, be prepared to discuss a process to resolve both matters if I do not set the process before then.

DISPOSITION

[195] I hereby:

(a) grant the Initial Order described in Schedule "A" annexed; and
(b) appoint Grant Thornton Limited to monitor the business and financial affairs of the Companies.

[196] I hereby set the comeback hearing for October 17, 2022, at 10:00 a.m. I make no order as to costs.

ALEXANDER MACDONALD
Justice

SCHEDULE "A"

2022 01G 1964
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

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 of Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, "**ECC**" or the "**Company**");

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INITIAL ORDER

Before the Honourable Justice Alexander MacDonald on September 16, 2022, September 28-29, 2022 and October 5, 2022:

THIS APPLICATION made by Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, "**ECC**" or the "**Applicant**") pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "***CCAA***") for an Order substantially in the form filed with the Application was heard on the 16th, 28th and 29th of September, 2022.

ON READING the affidavits of Francis Collins, Josh Collins, David Savoie, Mark Lohnes and the Exhibits attached thereto, the consent of Grant Thornton Limited ("**GTL**") to act as Court-appointed monitor of ECC (in such capacity, the "**Monitor**"), and the Pre-Filing Reports of GTL dated September 13th and September 23rd 2022;

ON HEARING the submissions of counsel for the Company, counsel for the Royal Bank of Canada, and counsel for the Canada Revenue Agency, and such other counsel that were present, no one else appearing for any party although duly served as outlined in the affidavit of service dated the 15th day of July, 2022, and on reading the consent of GTL to act as Monitor:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Materials filed, as set out in the affidavit of service is hereby deemed adequate notice so that this Application is properly returnable today and hereby dispenses with further service thereof. Further service of Court materials, including the Materials, may be facilitated by the Monitor as prescribed by paragraph 28 below.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that Edward Collins Contracting Limited, Classic Security Ltd., FGC Holdings Ltd., 51037 Newfoundland and Labrador Inc. and H & E Designs Ltd. (collectively, "**ECC**" or the "**Company**") is a Company to which the *CCAA* applies.

3. Capital terms not otherwise defined herein shall have the meaning ascribed to them in the within Application.

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Company shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the **"Property**"). Subject to further Order of this Honourable Court, the Company shall continue to carry on business in a manner consistent with the preservation of its business (the **"Business")** and Property. The Company is authorized and empowered to continue to retain and employ the employees, consultants, independent contractors, agents, experts, accountants, counsel and such other persons (collectively **"Assistants")** currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of its Business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Company, shall be entitled to continue to utilize its cash management system currently in place, or replace it with another substantially similar cash management system (the **"Cash Management System")** and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Company of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Company, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any plan of compromise or arrangement with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that the Company shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

   (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

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(b) the fees and disbursements of any Assistants retained or employed by the Company in respect of these proceedings, at their standard rates and charges; and

(c) amounts owing for goods and services supplied to the Company, if in the opinion of the Monitor, the supplier or vendor of such goods or services is necessary for the operation and preservation of the Business or Property.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein the Company shall be entitled but not required to pay all reasonable expenses incurred by the Company in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services and lease payments for mining equipment used in the operation of the Business; and

(b) payment for goods or services supplied to the Company following the date of this Order.

8. **THIS COURT ORDERS** that the Company shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, **"Sales Taxes")** required to be remitted by the Company in connection with the sale of goods and services by the Company, but only where such Sales Taxes are accrued or collected after the date of this Order; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Company.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the *CCAA* the Company shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be

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negotiated between the Company and the landlord from time to time (**"Rent"**), for the period commencing from and including the date of this Order. The Monitor, on behalf of the Company, may pay such Rent twice monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein the Company is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Company to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

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NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY

11. THIS COURT ORDERS that until and including the 17th day of October, or such later date as this Court may order (the **"Stay Period"**), no proceeding or enforcement process in any court or tribunal (each, a **"Proceeding"**) shall be commenced or continued against or in respect of the Company or the Monitor, or affecting the Business or the Property except with the written consent of the Monitor and the Company, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Company or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

12. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being **"Persons"** and each being a **"Person"**) against or in respect of the Company or the Monitor, or affecting the Business or the Property are hereby stayed and suspended except with the written consent of the Monitor and the Company, or leave of this Court, provided that nothing in this Order shall (i) empower the Company, to carry on any business which the Company is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the *CCAA*, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

13. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, except with the written consent of the Monitor and the Company, or leave of this Court.

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CONTINUATION OF SERVICES

14. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Company, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Company, and the Company shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid the Company in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and the Company or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Company. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the *CCAA*.

APPOINTMENT OF MONITOR

16. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the *CCAA* as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Company with the powers and obligations set out in the *CCAA* or set forth herein and that the Company and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Company pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

17. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:

(a) monitor the Company's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Company in its dissemination of reports and other information to the Secured Creditors (as defined herein) and their respective counsel;

(d) advise, in consultation with the Company, the preparation of the Company's cash flow statements and reporting;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Company, to the extent that is necessary to adequately assess the Company's business, cashflow, and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage with Company legal counsel or retain independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(g) perform such other duties as are required by this Order or by this Court from time to time.

18. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or be considered management of the Business, or any part thereof.

19. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, **"Possession"**) of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act* and regulations thereunder (the **"Environmental Legislation"),** provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

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20. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Company with information provided by the Company in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Company is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Company may agree.

21. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the *CCAA* or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the *CCAA* or any applicable legislation.

22. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and counsel to the Company shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Company as part of the costs of these proceedings. The Company is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, and counsel for the Company on a weekly basis and, in addition, the Company is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Company reasonable retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

23. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

24. **THIS COURT ORDERS** that the Company and all its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf shall fully co-operate with the Monitor in the exercise its powers under this Order or any other Order of the Court, including by:

    (a) advising the Monitor of the existence of any Property of which such party has knowledge of;

    (b) providing the Monitor with immediate and continued access to any Property in such party's possession or control;

    (c) advising the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the

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Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information **("Records")** of which such party has knowledge of; and

(d) providing access to and use of the Records, including any accounting, computer, software and physical facilities relating thereto, and including providing the Monitor with instructions on the use of any computer or other system as requested by the Monitor and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the Records, provided however that nothing in this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

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LIMITATION ON THE MONITOR'S LIABILITY

25. **THIS COURT ORDERS THAT** the Monitor is not and shall not, for any purposes, be deemed to be a director, officer, employee, receiver, receiver-manager, or liquidator of the Company.

26. **THIS COURT ORDERS THAT** the Monitor is not and shall not for the purposes of the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) be deemed to be a legal representative or person to whom s. 150(3) of that Act applies.

27. **THIS COURT ORDERS THAT** that the rights, protections, indemnities, charges, priorities and other provisions in favour of the Monitor set out in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, any other applicable legislation, and any other Order granted in these proceedings, all shall apply and extend to the Monitor in connection with the Monitor carrying out the provisions of this Order, amended as necessary to give effect to the terms of this Order.

SERVICE AND NOTICE

28. **THIS COURT ORDERS** that the Monitor shall (A) make this Order publicly available in the manner prescribed under the *CCAA*, (B) send, in the prescribed manner by electronic means, a notice to every known creditor who has a claim against the Company of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the *CCAA* and the regulations made thereunder.

GENERAL

29. **THIS COURT ORDERS** that the Monitor, on behalf of the Company, may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

30. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from subsequently acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Company, the Business or the Property.

31. **THIS COURT ORDERS** that each of the Company and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that a hearing for the balance of the relief sought by the Company in the Notice of Motion is hereby scheduled before this Court for the 17th day of October, 2022 at 10:00 a.m. or such other date as determined by this Court (the "**Comeback Hearing**").

33. **THIS COURT ORDERS** that on or before the close of business on Thursday, October 13, 2022, the Company shall provide the Court and each creditor referred to in paragraph 28 above, in the manner of service provided for in paragraph 28 above, with the following information: (the Company and the Monitor shall file an explanation if they cannot provide this information by the deadline):

(a) a detailed breakdown of the companies' current contracts, expected revenue, and other information to support the projections in the cash-flow statements provided to the Court on the initial filing. The Company should disclose if any of the contracts have been declared to be in default; and

(b) the FY 2022 financial statements, even if only in draft or interim form and any other information this Honourable Court may request.

ISSUED at St. John's, Newfoundland and Labrador this 5th day of October, 2022.

____

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TAB 2

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

2020 SCC 10 (CanLII)

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

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

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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.

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.

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.

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.

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

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

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.

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.

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.

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.

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

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.

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.

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.

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

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

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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

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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.

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.

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*.

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*.

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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*

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

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

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

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

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

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

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

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

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

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

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

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

The reasons for judgment of the Court were delivered by

The Chief Justice and Moldaver J.—

I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

Le juge en chef et le juge Moldaver —

I. Aperçu

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

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

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

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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.

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. 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

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

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

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

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

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

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

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

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

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

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

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

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[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

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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.

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.

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

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

[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.

[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 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).

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

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

[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

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

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

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

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

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

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

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

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

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

[2] 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.

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

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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

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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

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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.

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

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

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

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

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

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

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

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

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

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

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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).

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

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

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

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*?

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. 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.

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.

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(1) The Evolving Nature of *CCAA* Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

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

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

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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).

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

[52] 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).

[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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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)).

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] 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.

[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] 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

[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

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

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

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

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

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

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

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[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* »

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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

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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).

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

[69] 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.

[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] 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.

[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] 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

[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.

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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).

(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] 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.

[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] 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)).

[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] 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

[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.

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[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.

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

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

[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.

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

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

[4] 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.

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

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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.

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] 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).

[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] 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

[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

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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

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

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

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

[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.

[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) Interim Financing and Section 11.2 of the *CCAA*

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

[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

[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

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

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

Interim financing

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

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

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

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

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

Financement temporaire

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

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

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

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

Priority — secured creditors

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

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

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

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

Priorité — créanciers garantis

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

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

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

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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

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(*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.

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] 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.

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

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

[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*).

[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] 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

[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

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

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

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

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

[6] 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).

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

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

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

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

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

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

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

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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).

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] 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.

[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] 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:

[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 :

> 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

> [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

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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

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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*.

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] 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.

[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] 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.

[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) <u>The Supervising Judge Did Not Err in Approving the LFA</u>

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

[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.

[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

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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.

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] 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:

[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 :

- 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

- 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

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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, <u>the only potential recovery</u> 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, <u>la seule possibilité de recouvrement</u> réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));

- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

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

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

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

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

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

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

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

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

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

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

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

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

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

[112] 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]

[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] 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

[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

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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.

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] 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).

[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] 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

[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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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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.

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TAB 3

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

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

2008 NLTD 160 (CanLII)

BETWEEN:

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

AND:

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

APPLICANTS

Before: The Honourable Justice Robert M. Hall

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

Heard: October 6, 2008

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Appearances:

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

Authorities Cited:

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

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

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

HALL, J.:

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RULING ON EXTENSION OF STAY TERMINATION DATE

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

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

DECISION ON AUTHORIZATION OF ADDITIONAL DIP FINANCING AND SECURITIZATION

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

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

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

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

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

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

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

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MAXIUM FINANCIAL SERVICES INC. ("MAXIUM")

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

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

MARINE CONTRACTORS INC. AND HOME CONSTRUCTION LTD.

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

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

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

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

____
ROBERT M. HALL
Justice

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TAB 4

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

2019 NLSC 238 (CanLII)

Citation: *Norcon Marine Services Ltd., (Re)*, 2019 NLSC 238
Date: December 30, 2019
Docket: 201901G7732

IN THE MATTER OF an Application by Norcon Marine Services Ltd. for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

- AND -

Docket: 201901G7735

IN THE MATTER OF the Receivership of Norcon Marine Services Ltd.

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

APPLICANT

AND:

NORCON MARINE SERVICES LTD.

RESPONDENT

Before: Justice David B. Orsborn

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

Date(s) of Hearing: December 17, 2019

Date of Oral Judgment: December 18, 2019

Summary:

On or about November 9, 2019, Business Development Bank of Canada ("BDC"), a secured creditor of Norcon Marine Services Ltd. ("Norcon") served a Notice of Intention to enforce its security pursuant to section 244 of the *Bankruptcy and Insolvency Act* ("BIA"). In response, but more than ten days after being served with BDC's Notice of Intention, Norcon, pursuant to section 50.4 of the BIA, filed Notice of Intention to make a proposal to its creditors. On December 5, 2019, Norcon applied pursuant to section 11.02(1) of the *Companies' Creditors Arrangement Act*, ("CCAA") to transfer its proposal process to the CCAA restructuring regime. Concurrently, BDC applied pursuant to section 243 of the BIA for a court-appointed receiver. Both applications were heard together. **Held:** Both applications were dismissed. The evidence did not support a finding of "appropriate circumstances" to warrant initiating proceedings under the CCAA. Neither, in the circumstances where BDC enjoyed a contractual right to appoint a receiver, did the evidence support the conclusion that it would be just and convenient for the Court to exercise its discretion to appoint a receiver.

Appearances:

Tim Hill, Q.C. — Appearing on behalf of Norcon Marine Services Ltd.

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Darren D. O'Keefe and Allison J. Philpott	Appearing on behalf of Business Development Bank of Canada
Peter Wedlake	Appearing on behalf of Grant Thornton Limited, proposed court-appointed Receiver
Geoffrey L. Spencer	Appearing on behalf of Deloitte Restructuring Inc., proposed court-appointed Monitor
Joseph J. Thorne	Appearing on behalf of Bank of Nova Scotia

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Authorities Cited:

CASES CONSIDERED: *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522; *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60; *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36; *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35, rev'd 2015 SCC 53; *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023; *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.).

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

TEXTS CONSIDERED: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell: Toronto, Ontario 2013-2014).

REASONS FOR JUDGMENT

ORSBORN, J.:

INTRODUCTION

[1] The Court has been asked to rule on what are essentially two competing applications. One is an application by a debtor – Norcon Marine Services Ltd. ("Norcon") to transfer restructuring proceedings from the proposal track in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), to the reorganization track provided by the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The second is an application by a secured creditor – Business Development Bank of Canada ("BDC") – pursuant to section 243 of the BIA for a court-appointed receiver.

[2] The applications were heard on December 17, 2019 and a decision given on December 18 in the form of a brief summary only. Both applications were dismissed.

ISSUES

[3] Is Norcon to be permitted to continue its restructuring proceedings under the CCAA?

[4] Should a receiver be appointed by the Court?

BACKGROUND

[5] For some 20 years, Norcon has been involved in the marine transportation business, operating passenger/freight and cargo ships. Presently, it owns four vessels.

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[6] In recent times, Norcon has been hit hard by the loss of government contracts for ferry services and by problems in the aquaculture industry, an industry which provides and continues to provide a source of revenue for Norcon. Two of Norcon's vessels are presently listed for sale, and one is under arrest pursuant to proceedings in the Federal Court. The fourth vessel is working in the aquaculture business. Norcon also owns some real property.

[7] Because of the loss of the ferry contracts, the downturn in the aquaculture business and the need to write off a large debt from a related company, Norcon's financial situation is not good.

[8] BDC is owed almost $1,400,000, some $836,000 of which represents the guaranteed debt of Burry's Shipyard Inc. ("BSI"), a related company which is now bankrupt.

[9] On or about November 9, 2019, BDC served a Notice of Intention to enforce its security under section 244 of the BIA. On November 25, 2019, Norcon filed, pursuant to section 50.4 of the BIA, a Notice of Intention to make a proposal under the BIA. Such a notice may only be filed by an insolvent person.

[10] It is clear that one of the reasons, if not the primary reason, for Norcon's filing of a Notice of Intention was to impose a statutory stay on any enforcement actions by BDC. However, due to the lapse of time between November 9 and November 25, 2019, the statutory stay provision was not engaged.

[11] On December 5, 2019, Norcon filed an application seeking, in effect, to transition the BIA proceedings to CCAA proceedings. It asked for an initial order under section 11.02(1) of the CCAA, the effect of which would be to stay all proceedings – including BDC's enforcement action, for an initial ten days. Concurrently, BDC filed an application pursuant to section 243 of the BIA asking for a court-appointed receiver. These are the two applications before the Court.

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DISCUSSION

[12] I will deal first with Norcon's application for an initial CCAA order.

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[13] Provided that no proposal has been filed, proceedings commenced under Part III of the BIA may be continued under the CCAA. As Justice Brown said in *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522, the BIA proposal regime and the CCAA regime "serve the same remedial purpose" (paragraph 11), with the CCAA regime being somewhat more flexible. However, the objective remains the same – to provide a window of opportunity within which, without having to deal with creditors' claims and enforcement proceedings (because of a statutory stay), a company can explore the prospect of a reorganization or a sale which would avoid or significantly lessen the harmful economic and social effects of a liquidation and cessation of the business. See, generally, *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60. I refer particularly to paragraph 59:

> 59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> [Citation omitted.]

[14] The threshold for gaining access to the CCAA process is not high. On an initial application, section 11.02(3)(a) requires an applicant to satisfy the court that "circumstances exist that make the order appropriate". When a continuation is sought in circumstances where, as here, the BIA proposal process has already been engaged, case authorities suggest the section 11.02(3)(b) criteria of good faith and diligence also come into play. See *Clothing for Modern Times* at paragraph 14; and *Industrial Properties Regina Limited v. Copper Sands Land Corp.*, 2018 SKCA 36, at paragraphs 22-23.

[15] Although the threshold of appropriate circumstances is, in my view, low, it does require the Court to consider the initial application in the context of the objectives of the CCAA. In other words, is the Court able to conclude, even at an early stage, that there is some chance that engaging the CCAA process – which brings all enforcement proceedings to a halt – will result in furthering the purposes of the legislation?

[16] To obtain this breathing room, a debtor must do more than simply plead for time. The authorities speak of the need to have "a germ of a plan" that would suggest "a reasonable possibility of restructuring". In *Industrial Properties Regina*, the Saskatchewan Court of Appeal put it this way – at paragraphs 19-21:

> 19 The evidentiary burden the debtor corporation must satisfy to establish "appropriate circumstances" for the purposes of a 30-day stay order is not exceptionally onerous*: Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) at para 14, (2013), 8 C.B.R. (6th) 161 (Alta. Q.B.) [*Alberta Treasury*]; *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* (August 1, 2006), Doc. 0601-08395 (Alta. Q.B.) [*Matco*]; *Hush Homes Inc., Re*, 2015 ONSC 370 (Ont. S.C.J.) at paras 51-53, (2015), 22 C.B.R. (6th) 67 (Ont. S.C.J.); *Redstone Investment Corp., Re*, 2014 ONSC 2004 (Ont. S.C.J.) at paras 49-50.
>
> 20 ... The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order [now ten days], the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco*. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in *Century Services*, is to provide the conditions under which the debtor can *attempt* to reorganize.

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> 21 For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. … If, however, the debtor corporation fails to satisfy this onus and the court determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: ...

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[17] The present case is a little different than the usual CCAA initial application. Norcon's Notice of Intention to make a BIA proposal was filed on November 25, 2019, just over two weeks ago. In my view, this suggests that restructuring is not a possibility that has just appeared. Although not a lot of time has passed, the fact that the Court is being asked to continue an existing restructuring proceeding suggests that the "germ" of any plan should exhibit a slightly higher possibility of coming to life than might otherwise be the case. Further, once a debtor has engaged the BIA proposal process, there should be some reason, linked to the purpose of the restructuring/reorganization objective, to warrant continuing under the CCAA process. See, for example, the impending expiration of the maximum six-month proposal period in *Clothing for Modern Times*. The earlier in the BIA proposal process the transfer request, the more apparent should be the particular purpose precipitating the request for transition to the CCAA.

[18] What does the evidence here suggest?

[19] The evidence from Norcon consists of a pro-forma affidavit of Glenn Burry – an owner of the company – deposing as to the facts in the application. The only paragraph in the application that looks to the future is paragraph 12:

> 12. The Company is actively seeking new contracts for its vessels and services, but does not expect to enter into such new contracts until early Spring, 2020.

[20] There is no other evidence from Norcon about potential available contracts, ability to bid, chances of success, terms, efforts to date, or the like.

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[21] BDC filed an affidavit of Robert Prince, Director of Business Restructuring, setting out the lengthy history of BDC's dealings with Norcon and BSI. Norcon filed a "Pre-filing Report" of Deloitte Restructuring, the proposed CCAA monitor, and also filed its "review engagement" financial statements for the year ending January 31, 2019. The monitor updated the figures to October 31, 2019.

[22] As October 31, 2019, Norcon's current assets totaled $611,000, primarily receivables of $561,000 (rounded). Current liabilities were just over $2,660,000, not including the $836,000 liability attached to the guaranteed debt of BSI. The current liabilities include approximately $444,000 owed to the Canada Revenue Agency for unpaid source deductions and the like, income taxes of $54,000, bank indebtedness and accounts payable of over $1,290,000, and $873,000 representing the current portion of long-term debt. The long-term debt (excluding the current portion) owed to arm's-length creditors is $1,400,000. It is not contested that Norcon, as of the date of filing of the application, satisfied the $5,000,000 threshold under section 3(1) of the CCAA.

[23] The net book value of the fixed assets – primarily the vessels – is shown as $5,800,000. There is no evidence of current estimated market value.

[24] Of the efforts to date to reorganize or restructure Norcon, the Pre-filing Report says this – at paragraph 6.1:

> 6.1 [Norcon] has taken the following steps to deal with operational and financial challenges it is currently facing:
>
> (i) Reduced operating expenses, including a reduction in headcount and a redeployment of Management resources from administrative to revenue generating tasks.
>
> (ii) Actively pursuing contracts for the next operating season.
>
> (iii) Prior to the NOI Filing, the Applicant was working with CRA on an arrangement satisfactory to both parties to reduce the liability owing from the Applicant.

(iv) Engaged in discussions with Deloitte regarding a financial consulting engagement during the week beginning November 17, 2019.

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[25] The proposed monitor reviewed Norcon's projected cash flow statement for the 13 weeks ended February 28, 2020. The Pre-filing Report says:

> 7.3 The Cash Flow Forecast has been prepared by Management for the purpose described in the notes to the Cash Flow Forecast, using the probable and hypothetical assumptions set out in the notes.

[26] The assumptions referred to are the projection of the collection of accounts receivable as of November 25, 2019, and the continuation of an existing vessel crewing contract and aquaculture support contract. No evidence was given as to the particular provisions or durations of these contracts.

[27] I did not find the proposed monitor's comments on the cash flow report particularly helpful:

> 7.4 The Proposed Monitor's review of the Cash Flow Forecast consisted of inquiries, analytical procedures and discussions on the information provided by Management of the Applicant. The Proposed Monitor's involvement with respect to the hypothetical assumptions was limited to evaluating whether they were consistent with the purpose of the Cash Flow Forecast. The Proposed Monitor has also reviewed the supporting documentation provided by Management of the Applicant for the probable assumptions and the preparation and presentation of the Cash Flow Forecast.
>
> 7.5 Based on our review and the foregoing reserves and limitations, nothing has come to the attention of the Proposed Monitor that causes us to believe that, in all materials respects:
>
> (i) the hypothetical assumptions are not consistent with the purpose of the Cash Flow Forecast;
>
> (ii) as at the date of the Pre-filing Report, the probable assumptions developed by the Applicant are not suitably supported and

> consistent with the plans of the Applicant or do not provide a reasonable basis for the Cash Flow Forecast, given the hypothetical assumptions; or
>
> (iii) the Cash Flow Forecast does not reflect the probable and hypothetical assumptions.

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Counsel was not able to assist in my comprehension of these paragraphs.

[28] The projected cash flow report, on its face, shows a cash position improvement of $197,001 over the 13-week period. However, $283,476 of the cash inflow comes from the collection of existing accounts receivable. Taking these receivables out of the equation, the projected cash position will worsen by $86,475.

[29] The projected cash flow took no account of debt servicing over the 13-week period, such debt servicing estimated by BDC to be in excess of $83,000.

[30] The monitor appears to offer argument in support of Norcon's application for a CCAA process. It gives the following reasons – at paragraph 9.1:

> 9.1 As discussed herein, the Applicant wishes to convert the NOI Filing to the CCAA Proceedings on December 17, 2019 for the following reasons:
>
> (i) the CCAA will provide the Applicant with increased flexibility as it moves forward with its restructuring plan;
>
> (ii) the CCAA will provide the Applicant with additional time (if required) to prepare and present a restructuring plan, including a Plan of Arrangement, to its creditors; and
>
> (iii) if granted, the Initial Order will provide the Applicant with a stay of proceedings against all creditors, including the pending application of BDC to appoint a Receiver over the Property of the Applicant.

[31] The arguments relating to increased flexibility and additional time were not explained. The time argument is difficult to accept where, unlike the situation in *Clothing for Modern Times*, the BIA proposal process is just beginning and can potentially last for six months. I note that the situation in *Clothing for Modern Times* was where the available extensions of time to make a proposal had expired, leaving a CCAA continuation as the only means of avoiding a deemed bankruptcy.

[32] There is nothing I see in the proposed monitor's report which provides a hint of a plan for restructuring, other than, as noted, a plan to reduce operating costs in some undefined amount.

[33] The cash flow projection shows a 13-week total of compensation, occupancy and related general expenses of some $263,000, a weekly average of just over $20,000. How savings within these expenditures would realistically assist in restructuring the finances of Norcon – with a current ratio (current assets/current liabilities) of 0.23 was not explained. I think it is fair to say that, overall, the issues facing Norcon are issues of revenue and debt servicing rather than control over relatively minor expenses.

[34] The financial statements and the projected cash flow statement provide no support for Norcon's position. The report of the proposed monitor provides no support for Norcon's position. The only hope offered is one in the form of pursuing new contracts with the hope of getting one. In the circumstances of this case, that hope is not sufficient to satisfy the appropriateness threshold needed to open the door to CCAA proceedings.

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

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[36] In view of this finding, it is not necessary to consider the issues of good faith and due diligence.

[37] The application for an initial CCAA application is dismissed.

[38] That leaves BDC's request for a court-appointed receiver. BDC's request is supported by the Bank of Nova Scotia, another senior secured creditor.

[39] BDC's application was brought following its November 9, 2019, Notice of Intention to enforce its security. As noted, BDC is owed almost $1,400,000 by Norcon, including the guaranteed debt of BSI, a related company which is now bankrupt. It is fair to assume that BDC initiated the enforcement mechanism to protect its own interests as a secured creditor.

[40] The appointment of a receiver by the Court engages the exercise of the Court's discretion. A receiver may be appointed when it appears to the Court to be just or convenient to do so. Any discretion must be judicially exercised.

[41] In *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128, Justice Edwards set out, from *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, factors that may be considered by a court – at paragraph 26:

> (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
> (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> (c) the nature of the property;
> (d) the apprehended or actual waste of the debtor's assets;
> (e) the preservation and protection of the property pending judicial resolution;
> (f) the balance of convenience to the parties;
> (g) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

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(h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
(i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
(k) the effect of the order on the parties;
(l) the conduct of the parties;
(m) the length of time that a receiver may be in place;
(n) the cost to the parties;
(o) the likelihood of maximizing return to the parties; and
(p) the goal of facilitating the duties of the receiver.

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[42] In *Lemare Lake Logging Ltd. v. 3L Cattle Co.*, 2014 SKCA 35 (rev'd on constitutional grounds 2015 SCC 53), the Saskatchewan Court of Appeal suggested this analysis – at paragraph 99:

> 99 The third edition of *Bennett on Receiverships*, (Toronto: Carswell, 2011), at pp. 155-162, suggests that the following factors are typically taken into consideration in deciding whether to appoint a receiver: (a) whether irreparable harm might be caused if no order is made; (b) whether the security holder's position will be prejudiced if no receivership order is made; (c) whether it is necessary to apprehend or stop waste of the debtor's assets; (d) whether it is necessary to preserve and protect property pending a judicial resolution of matters outstanding; and (e) the balance of convenience between the parties. See also: Houlden, et al, *The 2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013) at p. 1005.

[43] These factors are not unlike those considered when injunctive relief is sought.

[44] It is accepted that the court's appointment of a receiver over the property of a person is an extraordinary order. It reflects the authority and jurisdiction of the court to act to protect and preserve property, often before the issues between the parties have been adjudicated.

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[45] The extraordinary and intrusive nature of the order must inform what is considered to be just and convenient, although as I will point out, this aspect assumes less importance when a party already has a contractual right to appoint a receiver.

[46] The party asking the Court to appoint a receiver must persuade the Court that the appointment would be just or convenient. The word 'just' suggests a requirement of fairness and balance while "convenient' suggests, in my view, not just an order which the applicant would find helpful, but one that is necessary for the protection of the assets in question. To put it simply, is it fair or necessary that the authority of the Court be used to pass control of, in this case, the debtor's assets to a receiver who will deal with those assets pursuant to court supervision?

[47] In this analysis, of what relevance is it that the applicant – here, BDC – has the ability and contractual authority to appoint a receiver and manager without enlisting the aid of the Court?

[48] In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, the Court said this at paragraph 42:

> 42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. <u>While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver</u>. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).
>
> [Emphasis added.]

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[49] Blair J. of the Ontario Superior Court expressed it slightly differently in *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274 (Ct. J.) when he said at paragraphs 11 and 13:

> 11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: … In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. … <u>The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently</u>; …
>
> …
>
> 13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver … and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. <u>Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances … including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager</u>.
>
> [Emphasis added.]

[50] I note his use of the word "necessary" when referring to a court appointment. Thus, while the fact of a party's prior consent to a private contractual appointment may lessen or eliminate the need for caution because of the intrusive nature of the appointment of a receiver, the threshold of just or convenient must still be met. Particularly when considering whether an appointment would be convenient – an element which incorporates the practical and protective nature of the appointment – my view is that a court must consider whether court supervision of the receiver is necessary to protect and preserve the assets in question and to manage any undue complexity in the functioning of the receivership. The issue is not that far removed from situations in administrative law where the availability of an adequate alternative avenue of relief may persuade

a court not to exercise its discretion to grant relief by way of an order in the nature of a prerogative writ.

[51] Is a court-supervised receivership order convenient in the sense of the added factor of court supervision being necessary to protect the interests of BDC and others affected by the fortunes of Norcon?

[52] Here, counsel for BDC acknowledged that a receivership of Norcon's secured property would be relatively straightforward. As noted, the assets are primarily fixed assets – four vessels and real property – covered by security. There is no suggestion that the assets are at risk of being removed from the jurisdiction. Any ongoing management of the business would not be complex. Counsel advised that two primary creditors, BDC and the Bank of Nova Scotia, have already signed an inter-creditor agreement addressing issues of relevance to them.

[53] BDC offers the following reasons to support a finding of just or convenient:

> 29. BDC submits that it is just and convenient for this Court to appoint a receiver in the present case for the following reasons:
>
> (a) BDC has the contractual right to appoint a private receiver.
> (b) The amount of the Indebtedness is not in dispute.
> (c) … Norcon has withheld information, has shown disregard for DBC's rights and has occasioned several Events of Default. A court-appointed receiver will be able to prevent and/or mitigate further defaults through greater transparency.
> (d) The arrest of one of Norcon's vessels in which BDC has a security interest establishes that BDC's security is in jeopardy. A court-appointed receiver is necessary to immediately protect and preserve BDC's security interest in Norcon's property.
> (e) A court-appointed receiver will be able to more effectively deal with and sell property in a manner that will maximize the value for the creditors of Norcon.
> (f) A court-appointed receiver will be able to provide all stakeholders with a more efficient forum for creditors of Norcon to resolve priority issues.

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(g) A court-appointed receiver is required as the cooperation of Norcon with a private receiver is unlikely, given Norcon's conduct to date.

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[54] The application continues:

30. The Court's refusal to grant the Receivership Application would place the interests of BDC and other creditors at significant risk.

[55] There is little, if any, evidence on these points.

[56] With respect to the conduct of Norcon, the evidence is that it did not disclose to BDC that one of its vessels had been arrested in the context of a proceeding in Federal Court. Without further evidence and argument on the point, I am not prepared to conclude, without more, that the arrest in and of itself places BDC's security in jeopardy and while this one instance of non-disclosure may be a fact, it is not sufficient to support the inference that Norcon or its management would be obstructionist so as to warrant Court supervision of a receivership. Neither, in my view, does it support the inference that Norcon's management would not cooperate with a private receiver. The evidence does support the view that the BIA-related history of the related company, BSI, and the CCAA filing by Norcon reflect efforts to delay enforcement action by creditors. But where a creditor has the ability to act expeditiously pursuant to a contractual right, the fact that a debtor may try to delay the process does not call for the intervention of the Court.

[57] The suggestion by BDC that Court supervision is necessary to more effectively deal with and sell the property and provide a more efficient forum for the resolution of priority disputes is simply that – a suggestion. I refer again to Blair J.'s comments in *Freure Village* where he suggests that an examination of all the circumstances is required to determine whether or not an appointment by the court is necessary.

[58] A fair assessment of all of the circumstances requires evidence. I note the comprehensive nature of the evidence before Edwards J. in *Crown Jewel Resort*.

[59] Looking at the evidence as a whole, I am not satisfied that there is sufficient evidence from which to draw reliable inferences relating to, and these are examples only, (i) the potential for irreparable harm in the absence of court supervision; (ii) the risk to BDC and the need for the added factor of court supervision in the protection and preservation of the assets; (iii) the need for court supervision of the relationship between Norcon and its creditors; and (iv) the relative costs and returns of a court-supervised process.

[60] In effect, and with respect, I am being asked to assume that a court-supervised process is necessary – just or convenient – for the effective and lawful realization of BDC's security interest. I am not prepared to make such an assumption.

[61] BDC has the contractual right to appoint a receiver/manager with wide powers to take over the business, manage Norcon and its assets and, if considered appropriate, sell the assets. There is no evidence to suggest that such a receiver/manager would not act efficiently and responsibly in accordance with the law, would not properly protect BDC's security, would not act in good faith to secure maximum value for the secured property, and would not have ready access to the court process should the need arise.

[62] In summary, on such evidence as I have, I am not able to reasonably draw the inference that the circumstances are such as to render just or convenient the Court's appointment of a receiver.

[63] BDC's application for a court-appointed receiver is dismissed.

[64] The parties will bear their own costs in both matters.

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DAVID B. ORSBORN
Justice

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TAB 5

Should I *CCAA* Stay or Should I *BIA* Go: A Review and Analysis of Judicial Treatment of Competing *CCAA* and *BIA* Applications

Emma Newbery, Liam Byrne and Valerie Cross[*]

I. INTRODUCTION

Canadian insolvency law primarily consists of two parallel, but distinct, statutes: the Bankruptcy and Insolvency Act and the *Companies' Creditors Arrangement Act*.[1] If a medium-to-large Canadian company becomes insolvent, it can likely seek relief under either statute. Historically, there was a clear delineation between the purposes of each piece of legislation; however, over time, these purposes have converged.

As the statutes have converged, judges, parties and stakeholders can no longer rely on legislative purpose to definitively determine whether insolvency relief should be granted under either the *BIA* or *CCAA*. The parallel nature of the legislation requires a new, systematic approach for courts to employ when weighing competing applications for relief under the *BIA* or the *CCAA*.

For this article, we surveyed more than three decades of case law to determine the factors that contribute to judicial analysis when presented with competing insolvency applications. We identified six factors commonly considered by decision-makers in these matters. Additionally, we reviewed how competing applications are affected by the stage at which those applications appear in the insolvency proceedings. Finally, we conclude by proposing recommendations for how this consistent approach should be structured.

This article is divided into four sections. In the first section, we provide background on the subject matter, including how competing applications arise in insolvency proceedings. In the second section, for illustrative purposes, we review two cases—*Affinity Credit v Vortex Drilling* and *Re Pacific Shores Resort & Spa Ltd*—where competing applications were fully considered; these provide examples of judicial reasoning on the topic.[2] The first case results in receivership proceedings under the *BIA* and the second case continues proceedings under the *CCAA*. In the third section, we survey the factors commonly considered by judges when considering competing insolvency applications. In the fourth section, we conclude with a proposed framework for analysis that can be used for competing applications, incorporating the factors highlighted in our analysis.

II. BACKGROUND

The *BIA* and the *CCAA* are the two principal insolvency statutes in Canada. Each statute provides a different set of tools to assist an insolvent company in addressing its debts and to aid a creditor in collecting amounts it is owed.

For an insolvent company, the *BIA* provides two paths: a company may either make a proposal to its creditors or declare bankruptcy.[3] While proposals are a useful tool for debtors, this article is limited to considering the interplay between *CCAA* proceedings and *BIA* receiverships, as most of the case law analysis focuses on these areas.

Under the *CCAA*, the primary tool for an insolvent company is the ability to propose a plan of arrangement to its creditors.[4] The *CCAA* plan of arrangement is similar to the *BIA* proposal. Under a *CCAA* plan of arrangement, an insolvent company proposes a plan to its creditors, which, if approved by a creditor vote, allows the company to settle its debts and ideally continue as a going concern enterprise.[5] Should the *CCAA* plan fail the creditor vote, an insolvent company can apply to extend the stay of proceedings granted under the *CCAA* and continue negotiations with its stakeholders or consider other options, including liquidation and bankruptcy.[6]

Under both a *BIA* proposal and a *CCAA* plan of arrangement, there is a stay of proceedings.[7] This stay prevents creditors from taking individual action against a debtor. For example, under the stay, a debtor is protected from being forced into bankruptcy or having its assets seized by creditors.[8] The stay allows the company "breathing room" to create a path forward for the business.[9] While there are differences in the eligibility requirements between the *BIA* proposal and the *CCAA* plan of arrangement, most medium-to-large Canadian companies would qualify for proceedings under either statute, if such companies were to become insolvent.[10]

The choice of whether to use a *BIA* proposal or a *CCAA* plan of arrangement is a strategic decision that is normally made by the debtor at the beginning of insolvency proceedings. Proceedings under either the *CCAA* or the *BIA* have advantages and disadvantages for an insolvent company, so the debtor's choice will depend on the circumstances—for example, the debtor's liquidity, its relationship with its creditors and market conditions.

In addition to the tools provided to an insolvent company, the *BIA* provides tools for a creditor to collect amounts owed by an insolvent company. Under the *BIA*, secured creditors can bring an application for the court to appoint a receiver over the insolvent company's assets and undertakings.[11]

One of the primary differences between a receivership and a *CCAA* plan of arrangement or *BIA* proposal is the level of control a creditor exercises over the proceedings. While secured creditors have a role in *BIA* proposals and *CCAA* plans—most meaningfully, the ability to vote on the proposal or plan—proposals and plans are typically a company-run process, and a creditor loses significant control over enforcement when a company seeks the protection of a stay under either the *CCAA* or *BIA*.[12] In the current insolvency era of sale and investment solicitation processes that are effected without a plan and, more recently, reverse vesting orders ("RVO"),[13] where a creditor's vote is less determinative, a secured creditor with significant liabilities at stake may prefer to have a *BIA* receiver guide the insolvency process and bring more control over the proceedings.

Thus, the creditor also faces a strategic choice when dealing with an insolvent company: Does the creditor act first and apply to appoint a receiver? Does the creditor oppose a company's initial application for a stay of proceedings under the *CCAA* or the *BIA*, or does it allow the insolvent company to proceed with an application for an initial order under the *CCAA* and consider its options at a comeback hearing or at the time of voting? The case law suggests that when a secured creditor opposes a company's application for relief under the *CCAA*, the creditor will often do so by bringing its own application for a receivership.[14]

This tension in terms of which forum to select, comes to a head in front of the court, and a judge is often asked to decide whether a company should be allowed to proceed down the path toward a *CCAA* plan or, alternatively, whether a creditor should be allowed to appoint a receiver over an insolvent company's property. The case law does not demonstrate a consistent framework that is applied to analyze such competing applications. Historically, a court could rely on the different identified purposes of the *CCAA* and the *BIA* to help with its analysis.[15] The purpose of the *CCAA* was to provide a path for companies to restructure and continue as a going concern, while the purpose of the *BIA* was for the liquidation of a company.

An early example of the court using the statutes' distinct purposes to drive its decision-making is *First Treasury Financial Inc v Cango Petroleums Inc*.[16] In *Cango*, the Court identified the purpose of the *CCAA* as enabling an insolvent company to restructure itself and continue as a going concern. Partially on this basis, the Court denied the debtor's *CCAA* application and approved the creditor's receivership application, as the debtor's proposal for restructuring involved liquidating all, or part, of the company and not continuing the business as a going concern. Now, more than 30 years later, liquidations are commonplace and acceptable under the *CCAA*.

More recently, there has been a convergence in the identified purposes of each statute.[17] The rise of liquidating *CCAA*s, and the Supreme Court of Canada's ("SCC") approval thereof, is clear evidence that *CCAA* proceedings are no longer limited to attempts to restructure the company.[18] Another sign of the convergence between the *CCAA* and *BIA* has been the confluence of the discretionary relief offered under section 11 of the *CCAA* and section 183 of the *BIA*.[19] As the statutes harmonize, this confluence results in the historical "purpose" of each statute being less definitive in determining which proceeding is appropriate in any given insolvency.

This harmonization means that judges must now decide which statute is appropriate based on the circumstances of the application. The decision of whether to allow a company to be in control of the restructuring process or to appoint a receiver can be one of the most determinative decisions on the outcome of an insolvency process. Two cases help to highlight the factors given judicial consideration when competing insolvency applications are present and the structure judges may employ in their analysis: *Affinity* and *Pacific Shores*.[20]

1. *Affinity Credit v Vortex Drilling*

Affinity provides an illustration of the factors that may sway a court to approve a receivership.[21] In *Affinity*, Justice Scherman had to decide between competing applications from the debtor, Vortex Drilling Ltd ("Vortex"), and its primary secured creditor, Affinity Credit Union 2013 ("Affinity").[22] Ultimately, Justice Scherman decided that Affinity's receivership application was the appropriate outcome given the evidentiary weakness of Vortex's materials, Vortex's negative behaviour prior to the initial application under the *CCAA*, the low chance of Vortex acquiring any new financing, the cost of *CCAA* proceedings and Affinity's loss of faith in Vortex.[23]

Vortex was a Canadian company that specialized in drilling oil wells. Starting in August 2014, global oil prices began a rapid decline. The decline in oil prices and the related decrease in drilling work resulted in Vortex being unable to make interest payments to its primary creditor, Affinity, which held security over all

of Vortex's property.[24] Affinity provided relief to Vortex by forbearing and charging interest only on Vortex's loans for a number of months.[25] When the forbearance period expired and Vortex was required to make full payments, Vortex informed Affinity that it would be unable to do so.[26]

Affinity applied for a receivership order under the *BIA* with respect to the assets, undertakings and property of Vortex. Vortex responded by seeking relief under the *CCAA*, arguing that it should have an opportunity to attempt to restructure.[27]

Justice Scherman began his analysis by reviewing the requirements for the approval of *CCAA* and *BIA* applications.[28] For a *CCAA* application, he noted, the applicant must show that it meets the requirements of "appropriateness, good faith and due diligence";[29] for a *BIA* receivership application, the applicant must show that it is "just and convenient to appoint a receiver in the circumstances."[30]

Justice Scherman first considered whether the requirements for a *CCAA* stay were met. In considering the requirements, he noted the evidentiary weakness of Vortex's application.[31] Justice Scherman was specifically concerned about the quality of the affidavits supporting the *CCAA* application. The affiant was an administrative director at Vortex, and the specific duties of the administrative director were unclear to the Court.[32] Justice Scherman was also concerned about the lack of evidence from the president and general manager of Vortex, as the operating mind of the company.[33] Further, in the affidavit of the administrative director, several statements were made regarding future improvements in cash flow that were found to be "inadmissible speculation" unsupported by any facts.[34]

Justice Scherman proceeded to consider whether Vortex had been acting in good faith in its interactions with Affinity, which, he concluded, Vortex had not.[35] Vortex had been using "accounting fictions" to mislead Affinity about its true financial position.[36] Moreover, Vortex had directly contravened a prior forbearance agreement with Affinity by paying a financial settlement to a third party that was explicitly disallowed in the forbearance agreement.[37]

After concluding that Vortex had not been acting in good faith, Justice Scherman considered the receivership and *CCAA* applications together and decided that it was appropriate to appoint a receiver. His analysis began by recognizing that Vortex, in its current state, was commercially unviable and urgently needed new capital to continue operations.[38] Furthermore, Vortex would be unable to make any debt payments to Affinity for months after the approval of a *CCAA* initial order.[39]

Justice Scherman found that it was unlikely Vortex would be able to successfully restructure through the *CCAA* process.[40] Vortex had attempted to attract new financing for two years and failed. The prospects of finding any new financing during the *CCAA* stay seemed bleak.[41] Additionally, Affinity was bearing the risk and costs of the *CCAA* proceedings, as its security would be reduced by the professional fees and debtor-in-possession interim lending incurred during the stay.[42] He found that Affinity's reasonable loss of faith in Vortex's management further weighed in favour of pursuing a receivership, rather than restructuring under the *CCAA*.[43]

Perhaps most significantly, Justice Scherman observed that Affinity had provided Vortex with more than two years of generous forbearance prior to the hearing. He stated that this forbearance had "effectively provided Vortex with much of the remedial opportunity contemplated by the *CCAA*."[44] Since Vortex had

failed to recover during this period, Justice Scherman stated that it was unclear how more time would help the situation.[45]

Justice Scherman concluded by dismissing Vortex's *CCAA* application and approving Affinity's receivership application.[46] He acknowledged the negative effects this decision would have on the stakeholders of Vortex but, on balance, concluded that it was more appropriate to approve the receivership than an initial order under the *CCAA*.[47]

This decision illustrates a number of key factors that commonly appear in competing application reasons. First, the evidentiary weakness of Vortex's application hampered its ability to demonstrate the suitability of the *CCAA* for restructuring of the company.[48] Second, Vortex's behaviour prior to the application did not align with the good faith requirement of the *CCAA*.[49] Third, the absence of any prospects for obtaining new debt financing meant that the chance of restructuring would be low.[50] Fourth, Affinity would be the one bearing the costs of *CCAA* restructuring, and the available information did not show that those costs would enhance Vortex's value.[51] Finally, evidence supported the fact that Affinity, as a major secured creditor, had, for reasonable reasons, lost faith in Vortex.[52]

2. *Re Pacific Shores Resort & Spa Ltd*

In contrast to *Affinity*, *Pacific Shores* shows how a debtor can succeed in a competing applications scenario.[53] The case involved an insolvent corporate group that had a complex corporate structure. The group included Aviawest Resorts Inc, Pacific Shores Resort & Spa Ltd and Parkside Project Inc, among others (collectively, "Pacific Shores").

Pacific Shores was engaged in the construction and management of hospitality properties.[54] In 2011, the group experienced financial difficulties stemming from cost overruns and delays related to the development of new resort properties around British Columbia.[55] Adding to Pacific Shores' woes, the 2008 financial crisis affected the capital available to the corporate group, leaving the group's operations financially vulnerable.[56]

As a result, Pacific Shores sought protection from its creditors by applying for an initial order under the *CCAA*. At the time of its application, Pacific Shores owed its secured and priority debtors more than $100 million.[57]

Pacific Shores was successful in obtaining an initial two-week *CCAA* stay, despite opposition from its two primary secured creditors, bcIMC Construction Fund Corp ("bcIMC") and Fisgard Capital Corporation ("Fisgard").[58]

At the comeback hearing, Pacific Shores applied for an extension of the stay and authorization for interim financing.[59] Again, bcIMC and Fisgard opposed Pacific Shores' application, arguing that a stay was not appropriate in the circumstances and that Pacific Shores had not met the statutory requirements of good faith and due diligence.[60] Additionally, Fisgard applied for the appointment of a receiver over a property development against which Fisgard held specific security. It was left to Justice Fitzpatrick of the British Columbia Supreme Court to determine whether either approach was appropriate in the circumstances.[61]

Justice Fitzpatrick began by reviewing the arguments raised by bcIMC and Fisgard in opposition to the *CCAA* application. The creditors' first argument was that Pacific Shores lacked any equity that would allow it to attract new capital; therefore, any restructuring efforts were destined to fail.[62]

The quality of each side's evidence was an important factor in Justice Fitzpatrick's analysis. bcIMC and Fisgard's arguments relied on appraisals commissioned on Pacific Shores' properties; the valuations indicated that no equity would remain in the properties after accounting for secured debt.[63] However, she did not find the appraisals persuasive, as they did not "provide a market value of the property, but rather an investment value to a specific investor".[64]

In contrast, Justice Fitzpatrick found Pacific Shores' appraisals reliable and accurate. Its appraisals were supported by additional evidence, including tax assessments and negotiated listing prices.[65] Pacific Shores' court-appointed monitor in the *CCAA* proceedings reported that it found Pacific Shores' appraisals to be generally accurate.[66] Pacific Shores' appraisals suggested that there were substantial assets that could be utilized for a refinancing during the *CCAA* process, which supported its *CCAA* application.[67]

The creditors' second argument was that they had a lack of faith in Pacific Shores' management, due to a lack of business success and financial irregularities.[68] Justice Fitzpatrick found this line of argument unconvincing, as she found no valid reasons for bcIMC and Fisgard to lose faith in the debtors' management. She noted that, prior to the applications, the parties had been working cooperatively together to resolve their issues.[69] Additionally, Justice Fitzpatrick found that any issue over the debtors' management abilities only emerged after Pacific Shores applied for *CCAA* protection.[70] Further, the monitor, who had been working closely with Pacific Shores' management, reported that management was acting in good faith and with due diligence.[71]

While there had had been minor issues around the treatment of funds that were required to be held in a separate trust account, Justice Fitzpatrick found that those issues had no bearing on the interests of bcIMC or Fisgard at the time of the initial order and that they had been rectified prior to the *CCAA* application.[72] Based on these considerations, she did not accept the creditors' loss-of-faith argument.[73]

The creditors' third argument asserted that Pacific Shores had no credible plan or outline of a plan to emerge from insolvency. Justice Fitzpatrick also rejected this argument. She referred to the affidavit of Pacific Shores' chief executive officer, which laid out a basic plan for restructuring.[74] Justice Fitzpatrick acknowledged that, at this early stage of the *CCAA* proceedings (two weeks following the initial order), it was reasonable for Pacific Shores not to have a definitive plan in place.[75] The outcome of the proceedings was still uncertain and it remained unclear whether it would result in a straightforward refinancing or a more extensive restructuring of Pacific Shores; however, this uncertainty did not mean that Pacific Shores did not have a plan. Furthermore, Pacific Shores had already been in communication with multiple investors who could potentially provide financing, which would help with whatever approach they pursued.[76]

bcIMC and Fisgard's final argument was that the *CCAA* process was doomed to fail because they, as the largest secured creditors, would never vote in favour of any plan of arrangement.[77] Justice Fitzpatrick dismissed this argument, stating that creditor opposition alone is not sufficient to block a debtor's *CCAA*

application.[78] Justice Fitzpatrick did not believe that two “well known and sophisticated lenders” would act against their commercial interests if Pacific Shores presented a reasonable plan of arrangement.[79]

After reviewing the creditors’ arguments opposing the *CCAA* stay, Justice Fitzpatrick turned to the creditors’ arguments that a receivership would be more appropriate. Pacific Shores’ corporate structure was complex and interlinked, making it difficult to execute separate receiverships or insolvency proceedings for each property.[80] Justice Fitzpatrick found that the different properties benefited from being linked together and that breaking those links would lead to a loss of value.[81]

In addition, a large number of stakeholders would be negatively affected if a receiver were appointed. Those stakeholders included unsecured creditors, owners of units managed by Pacific Shores and hundreds of employees.[82] Justice Fitzpatrick specifically noted that “the hundreds of parties holding unsecured debt in Aviawest [one of the development projects] are retirees who have invested their life savings into the enterprise”.[83] In the event of a receivership, all of Pacific Shores’ stakeholders, except for the first and, possibly, second, secured creditors, would suffer severe adverse consequences.[84]

Justice Fitzpatrick dismissed the receivership application and approved Pacific Shores’ application to extend the stay of proceedings, holding that:

> There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard’s somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.
>
> In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate.[85]

In *Pacific Shores*, many of the same factors that were considered in *Affinity* reappeared, including the ability of the debtor to attract new financing, the relationship between the parties and the debtor’s behaviour.[86] Once again, the Court looked at how the applications would affect stakeholders’ interests and which proceeding would best maximize the value of the debtor’s assets.[87] The similarity in factors between *Affinity* and *Pacific Shores* is not limited to these two cases: many of the same factors appear in the 30 years’ worth of competing application cases reviewed; however, no specific list or framework has emerged from the jurisprudence.

III. FACTORS USED IN ASSESSING COMPETING APPLICATIONS

In addition to *Affinity* and *Pacific Shores*, we surveyed case law where competing *BIA* and *CCAA* applications were considered from 1989 to the present day to identify which factors are commonly considered by courts when weighing competing applications. A list of the surveyed cases can be found in the Appendix.

We identified six factors that appear consistently in the case law:

1. The relationship between debtor and creditors;
2. Value maximization and cost minimization;
3. The availability of new financing;

4. The effects on stakeholders;
5. The behaviour of the parties; and
6. The need for the *CCAA*'s greater discretionary relief.

Despite similar factors appearing in the case law, we did not find a definitive approach to the analysis that insolvency judges employ when determining competing applications. Therefore, we looked at each of the factors to illustrate how they were considered in the past and how they can be used going forward.

1. Relationship between Debtor and Creditors

When considering competing applications, the courts frequently look to the relationship between the debtor and its creditors as a key factor in making a determination between competing applications. If the court finds that the relationship between the parties has deteriorated to a point where the parties can no longer work together, the court is often more likely to appoint a receiver rather than approve an order under the *CCAA.* As well, if the creditors have a reasonable lack of faith in the debtor's management, the court is more likely to appoint a receiver instead of granting *CCAA* relief.

Determining the relationship between the parties is often complicated by the hostility created by adverse applications for competing proceedings. Judges will review the evidence submitted to determine whether there is an evidentiary basis for any creditor claims of bad faith.

As previously discussed, this difficult task was undertaken in *Pacific Shores*.[88] The creditors argued that their loss of faith in Pacific Shores' management and the deterioration in their relationship justified the appointment of a receiver.[89] However, Justice Fitzpatrick determined that the loss of faith was unreasonable and the deterioration in the relationship overstated. Therefore, this factor did not provide support for the creditors' application to appoint a receiver.[90]

However, if a creditor can show that its loss of faith in the debtor is reasonable and supported by evidence, judges typically consider this to be a factor that supports appointing a receiver. In *Affinity*, Justice Scherman accepted a loss-of-faith argument. The creditors were able to show specific actions by the debtor that validated the creditor's loss of faith, such as the debtor directly violating forbearance agreements.[91] As a result, Justice Scherman found the loss of faith reasonable and weighed this as a factor in granting an order appointing a receiver.[92]

Alberta Treasury Branches v Tallgrass Energy Corp provides a further example of a case where an adverse relationship between the parties was cited as a reason supporting an order appointing a receiver instead of an order granting relief under the *CCAA*.[93] The creditors identified concrete concerns that justified their loss of faith in the debtor's management, such as inflated asset values and a flawed short-term financing strategy.[94] The creditors supported their concerns with evidence from an expert witness that management's estimates of the cost of the *CCAA* process were problematic.[95]

Justice Romaine found that the creditors were not acting "precipitously" in claiming an adverse relationship. Therefore, Justice Romaine accepted the adverse relationship as a factor supporting the appointment of a receiver.[96]

The relationship between the debtor and creditors is also considered in the judicial analysis of competing applications when creditors assert an unwillingness to approve any proposed *CCAA* plan put forward by the debtor. Creditors may assert that their unwillingness to approve any plan makes the *CCAA* inappropriate, as the process is doomed to fail from the start. A creditor's stated opposition to any plan has been mentioned in several cases in support of a receivership over *CCAA* proceedings.[97] Justice Mesbur articulated this perspective in *Callidus v Carcap:*

> Finally, in considering the question of whether to grant relief under the *CCAA*, I must also look at the position of the two major secured creditors. Neither will support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.[98]

However, as stated in *Pacific Shores*, if a judge believes that the opposition to any *CCAA* plan is overstated or unreasonable, this assertion is unpersuasive. A "recalcitrant creditor" does not have the ability to deny a debtor protection under the *CCAA.*[99]

In *Re Canadian Airlines Corp*,[100] the creditors stated that the *CCAA* process was "doomed to fail," as they would never agree to any plan and that therefore the *CCAA* stay should be lifted and a receiver should be appointed.[101]

Justice Paperny reviewed the creditors' arguments and determined that their claims were overstated.[102] She came to this conclusion as negotiations between the debtor and creditors were progressing well and the creditors had already made significant compromises in the negotiations.[103] Since the *CCAA* was not doomed to fail, Justice Paperny maintained the *CCAA* stay.[104]

The relationship between the parties plays a significant role in judicial decisions regarding competing applications. The *CCAA* process involves interaction and negotiation between the parties. If the parties cannot work together, this will likely weigh in favour of the court appointing a receiver. If the creditors state that they will reject any *CCAA* plan and are actually in a position to do so, this may also weigh in favour of a receivership.[105]

However, creditors must exercise caution in presenting claims about the state of the relationship by ensuring that their assertions are reasonable, based in fact and supported by evidence. As shown in *Pacific Shores*, a judge can review the circumstances to determine whether the parties' relationship is as negative as the creditors' claim and will not necessarily accept creditors' claims about blocking any proposed plan if commercial reality and ongoing negotiations suggest that a plan may be approved.[106]

It is crucial to maintain records of meetings and communications leading up to a debtor's application. These records can serve as evidence to demonstrate the relationship between the parties. A debtor should also prioritize transparency and honesty in its dealings with the creditor to ensure that the creditor has no reasonable basis to present an argument of bad faith or claim that its relationship with the debtor has broken down.

2. Value Maximization and Cost Minimization

The SCC has identified the maximization of creditor recovery as a central objective in insolvency proceedings.[107] Maximization of creditor recovery occurs by maximizing the value received for a debtor's business and assets and by minimizing the costs of the insolvency proceedings, all with a view to ultimately maximizing creditor recovery.

Value maximization can occur through either liquidation or restructuring, depending on the circumstances. The key question when it comes to competing applications is, who is in the best position to maximize creditor recovery—the creditors or the debtor?

In *Re Roman Catholic Episcopal Corporation of St John's*, Justice Handrigan considered value maximization when deciding between competing applications.[108] The competing applications occurred when the corporate entity that legally held all of the property of the Catholic Church in Newfoundland applied to move its insolvency proceeding from the *BIA* proposal process to the *CCAA.* This was opposed by its major creditor, a group of tort claimants that, instead, proposed a receivership or a holding proposal, both under the *BIA*.[109] Both the debtor and creditor planned to liquidate the debtor, thus leaving no dispute between restructuring and liquidation.[110]

Justice Handrigan laid the foundation of his approach by stating "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."[111]

In determining who would be best placed to work toward the best interests of the claimants, the support of the general members of the church was identified as a key factor, as their donations were a source of income for the debtor and they would likely be the people acquiring the church's assets in liquidation.[112] Since the income from donations and the proceeds from the sale of the church's property would be the funds available to the claimants, the general members' support was important in maximizing the value of the debtor.

The current management of the debtor had shown that they had the support of the general members of the church. As a result, Justice Handrigan determined that it was appropriate to approve the transfer to the *CCAA,* instead of approving the creditor's receivership application.[113]

Another instance of this factor being considered is in *Re Skydome Corp*.[114] Here, the Court also approved *CCAA* proceedings over an application to appoint a receiver, due to Justice Blair's conclusion that the *CCAA* proceedings could enhance the value of the debtor more than a receivership.[115] This conclusion was driven by two factors. First, the debtor's plan was to conduct an open auction for its assets, whereas the creditor's plan under receivership was to accept an existing offer.[116] Justice Blair reasoned that an open-auction process could result in a higher sales price than the existing offer.[117] Second, the shareholders of the debtor were also the owners of the sports team that served as the principal tenant of the debtor.[118] Losing the sports team as a tenant would be disastrous for the value of the debtor. He concluded that a *CCAA* process would keep the shareholders more engaged in the proceedings, thereby reducing the likelihood of the shareholders moving the sports team.[119]

As seen in *Re Roman Catholic* and *Skydome*, if the debtor's management can show that it is in the best position to maximize the debtor's value, this will weigh in favour of proceeding under the *CCAA*. However, the opposite is also true. If the creditors, with the help of a receiver, would be in the same or better position to maximize value, cases indicate that such circumstances support appointing a receiver.

In *Cango*, the Court characterized the issue as "who is likely to do the better job of selling off the assets? 'Better' in this context means not only who will raise the most money, but also who will best administer and distribute the proceeds."[120] In coming to a determination, Justice Austin concluded that a receiver would be "in at least as good a position" to sell off the assets as the debtor and therefore ordered the appointment of a receiver, rather than relief under the *CCAA*.[121]

Similar logic was used in *Re Shire International Real Estate Investments Ltd*. Justice Kent deemed that continuing with the *CCAA* was inappropriate because it would do nothing to increase the creditor's returns.[122]

Along with value maximization, cost minimization is crucial for enhancing creditor recovery during insolvency. Costs primarily arise from three categories: (1) professional fees associated with the insolvency process, such as the fees of the monitor, receiver and legal counsel; (2) any interim lending used to fund the debtor's operations during the insolvency process or which would be used to support its restructuring efforts; and (3) any depreciation of the debtor's assets that would be worsened by continued proceedings. These costs decrease the funds available to pay out creditors and other stakeholders. Therefore, courts scrutinize the cost impact of each application when considering competing applications.

In *Re Dondeb Inc*, the creditors were able to defeat the debtor's *CCAA* application by arguing that it would not be reasonable for the creditors to be burdened with the cost of the debtor's legal counsel during the *CCAA* proceedings.[123] They successfully argued that receivership was more appropriate, as it would mean that fewer professional fees would affect their recovery.[124]

Similarly, in *Re Octagon Properties Group Ltd*, the creditors were successful in opposing the debtor's *CCAA* application by arguing that it would be unfair to burden them with $300,000 in professional fees just to allow the debtor to "buy some time."[125] The Court agreed and cited the cost as one of the reasons to not grant an initial order under the *CCAA*.[126]

In *Affinity*, professional fees, interim lending and the cost of continuing operations were all cited by Justice Scherman as reasons weighing against granting an order providing the debtor with relief under the *CCAA*.[127] He found that the creditor would be unfairly burdened with all of the costs associated with *CCAA* proceedings.

Creditor complaints about costs are frequently raised and can be persuasive in cases of competing applications. Nevertheless, the court does not always find in favour of such arguments. If the costs can be justified by the potential of a higher return through an increase in the debtor's value, arguments regarding greater costs will be less persuasive. Moreover, judges will find cost arguments unpersuasive if they perceive little difference in costs between a receivership and the *CCAA* process.

In *Pacific Shores*, Justice Fitzpatrick discussed costs when reviewing the arguments of the secured creditors who argued against accessing interim financing.[128] The secured creditors argued that the proposed interim financing was inappropriate, as the amount requested would result in the secured creditors being "materially prejudiced."[129] Justice Fitzpatrick rejected this argument and found that interim financing would enable the debtor to continue as a going concern during the insolvency process. Continuing as a going concern allowed the debtor to continue to market units, thereby enhancing the value of the debtor generally.[130]

The cases of *Re Hush Homes* and *Re Roman Catholic* are examples where judges were unconvinced by greater cost arguments, as the costs would be similar between each of the resulting insolvency proceedings.[131] In *Hush*, the Court stated that a creditor's concern about the cost of *CCAA* proceedings was not convincing, partially because the appointment of a receiver would "come with its own set of significant costs."[132]

When addressing creditor concerns about the cost of the *CCAA*, Justice Handrigan in *Re Roman Catholic* noted that the costs of a receivership and the *CCAA* would "likely mirror each other" because they would require similar reporting requirements, and therefore he did not find the creditor's stated concerns persuasive.[133]

Maximizing the recovery of interested parties is a primary focus of insolvency law. A review of the case law indicates that applications that prioritize the best recovery for interested parties will often succeed. At the outset of insolvency proceedings, it can be difficult to determine how best to maximize value. At this stage of insolvency proceedings, case law indicates that judicial consideration will be given to whoever is best placed to maximize value, the debtor or the creditors.

3. Availability of New Financing

Generally, companies in insolvency have difficulty securing new equity financing or take-out debt financing due to the high risk involved in investing in, or lending to, a company that is already under financial stress. Interim lending is often available to debtors in insolvency proceedings; however, such lending will prime the claims of the current creditors, leading parties to be cautious in considering the amount of interim financing they will pursue or support.[134] In addition, it may soon be more difficult to acquire interim financing due to an upcoming decrease in the interest rates interim lenders can charge.[135] This change may increase the importance of non-interim lending and investment in competing-application situations.

If an insolvent debtor has received credible offers for an equity injection or take-out debt financing or can show a real possibility of acquiring new non-interim credit facilities—that is, re-financing—this would support a debtor's application for relief under the *CCAA*. When evaluating this kind of situation, the courts consider how concrete the offers of new financing are and will not treat offers that are spurious or imagined as a meaningful factor in any analysis.

In the case of *Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd*, an offer of additional investment by an outside entity played a role in the decision of Justice Masuhara to grant a *CCAA* stay and dismiss a receivership application.[136] In considering the offer, he noted that the investor

had been actively involved in creating the plan that would be executed during the *CCAA* and had already advanced some funds by way of a loan.[137] He treated the interest of the investor as an important factor in his analysis, stating that it brought "expertise and credibility" to the situation.[138]

Sometimes, a specific investor is not necessary if the debtor can show that it is in a reasonable position to attract new financing. As discussed previously, in *Pacific Shores*, the fact that the property development debtors could show that they had equity in several properties that could be used to acquire fresh financing was considered by Justice Fitzpatrick in approving the application to extend the stay of proceedings granted under the *CCAA*.[139] Similarly, in *Re Canada North Group Inc,* the company's ownership of marketable assets and indications of interests from potential investors were noted in the Court's decision to extend the stay of proceedings granted under the *CCAA,* instead of appointing a receiver.[140]

Standing in contrast to the above, in *Retail Funding Inc v Cotton Ginny Inc*, Justice Morawetz (as he then was) approved a receivership over relief under the *CCAA,* despite the fact that a lender was prepared to provide refinancing to the debtor.[141] The investor had signed a term sheet and had indicated to the Court that the infusion of fresh funds was imminent.[142] However, Justice Morawetz reasoned that the offer was still conditional and therefore could not override other factors weighing in favour of a receivership, such as the debtor's continued financial deterioration and repeated violation of forbearance agreements.[143] This case highlights that when the debtor's position is severely compromised, an offer of financing will have to be more concrete than what might typically be required.

Finally, the inability of the debtor to attract any new, non-interim financing that would allow it to restructure or continue as a going concern is often highlighted in the case law as a factor weighing against granting orders for relief under the *CCAA*.[144] In *Carcap,* the inability of the debtors to find anyone to refinance them was given as a reason supporting the creditor's receivership application over the debtors' application for relief under the *CCAA*.[145] In *Affinity*, the fact that the debtor had tried and failed to solicit new debt financing for two years, and that the debtor seemed to have little chance of acquiring any in the future, supported granting an order appointing a receiver.[146]

The above-noted cases show that new financing, be it take-out debt financing or equity financing, is a meaningful factor for several reasons. First, it reduces the financial cost of the insolvency proceedings for the creditors, thereby increasing creditor recovery. Second, it indicates that third parties see the debtor's restructuring plan as viable, lending commercial legitimacy to the plan. Third, and most importantly, it provides the means to execute the debtor's *CCAA* restructuring plan. For these three reasons, a debtor's *CCAA* application will be greatly supported if a debtor can acquire new debt or equity financing or at least show that there is a strong likelihood of acquiring such financing. Conversely, if a creditor can show that there is no possibility of the debtor receiving any new financing, this can weigh in favour of a receivership application.

4. Effects on Stakeholders

Judges regularly consider the effects each competing application will have on the interests of stakeholders. As a company's insolvency can be deleterious to everyone involved with the debtor company, the courts view applications that minimize the negative consequences for as many parties as possible more favourably.

Historically, and still often today, the *CCAA* is seen as the proceeding that best minimizes those deleterious effects. This view likely exists because the *CCAA* was a statute originally designed to lower the high social and economic costs of insolvency.[147] The *CCAA* does this by providing a more flexible approach for debtors, allowing them time and space to reorganize instead of proceeding with liquidation. As the SCC described in *Century Services*, "[r]eorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs".[148]

As discussed, with the rise of liquidating *CCAA*s*,* the *CCAA*'s purpose has expanded beyond a focus on restructurings.[149] However, the objective of reducing the cost of insolvency for stakeholders remains relevant in *CCAA* decisions, particularly in cases of competing applications. When the implementation of *CCAA* proceedings is projected to result in fewer losses to stakeholders compared with receivership, it strengthens the case for an application for relief under the *CCAA*. Apart from secured creditors, the most common stakeholders considered by judges are employees and unsecured creditors, although other parties have also been mentioned, such as customers.[150] For example, in *Canadian Airlines,* the Court recognized the flying public as a stakeholder in an airline bankruptcy.[151]

When faced with competing applications, employees are often key stakeholders that courts will consider. The potential impact on the employees of the debtor is frequently emphasized in the court's analysis.[152] As discussed by Opolsky, Babad and Noel in "Receivership Versus CCAA in Real Property Development", employment considerations predispose certain industries toward receiverships over the *CCAA*.[153] The authors identified that industries such as property development, where corporations typically have fewer employees, will be predisposed toward pursuing receiverships. On the other hand, industries such as airlines and hospitality, where there are many employees, may be predisposed toward *CCAA* proceedings.[154]

Unsecured creditors are another stakeholder group often considered by courts. In *Pacific Shores*, the large number of unsecured creditors and employees who would be negatively affected in a receivership was a factor the court considered in extending the *CCAA* stay rather than granting an order appointing a receiver.[155] In contrast, in *Octagon,* the lack of a substantial amount of unsecured debt was cited as a reason supporting the appointment of a receiver.[156] Similarly, in *Tallgrass*, the Court cited the lack of employees and of community importance in granting an order appointing a receiver rather than an order granting a *CCAA* stay.[157]

While the *CCAA* was traditionally viewed as the more stakeholder-friendly statute, the interests of stakeholders can also support a receivership if appointing a receiver would best protect those interests. In *Re Alexis Paragon Limited Partnership*, the debtor, an insolvent casino, operated on the Alexis First Nation's reserve.[158] The casino had many stakeholders, including the Alexis First Nation, which was supposed to receive a share of revenues; the more than 80 employees of the casino; and the Alberta Gaming Regulator, which, critically, provided the gaming licence.[159] In considering the competing applications, Justice Thomas noted that a receivership would allow for a very quick turnaround transaction, thereby saving the jobs of "80+- employees."[160] The Court also noted that a receivership

would preserve the relationship with the Alberta Gaming Regulator and the Alexis First Nation, which were both interested parties in the casino and vital to its operation. For those reasons, the interests of the stakeholders supported the appointment of a receiver, instead of relief under the *CCAA*.[161]

When considering stakeholder groups, it is important to note that the interests of other stakeholders cannot overtake the interests of secured creditors. As set out by Justice Kent in *Shire*:

> Having regard to the objectives of the *CCAA*, the large number of unsecured investors is, or more properly, was an appropriate consideration in granting *CCAA* protection. However, that cannot trump the interests of secured creditors when the facts show that continuing *CCAA* proceedings is putting their security at risk. That is so particularly in circumstances where there is a strong likelihood that continuing *CCAA* proceedings will do nothing to enhance the value of the properties and thereby increase the potential for return to the investors.[162]

The interests of other stakeholders will be a less persuasive factor to judges where the secured creditor's interests stand to be materially affected by the outcome of the competing insolvency applications.

Nevertheless, protecting the interests of stakeholders is a primary objective of Canadian insolvency law, making it a vital factor in any insolvency proceeding. Stakeholders can be defined broadly to include not only employees, but also unsecured creditors, customers and shareholders. However, the concerns of stakeholders do not automatically favour a *CCAA* proceeding or a receivership but will depend on the circumstances of each case.

5. Behaviour of the Parties

The behaviour of the parties prior to, and throughout, the insolvency proceedings is considered by the courts when assessing competing applications. The court's analysis of this topic is focused on determining which parties will in good faith carry out the insolvency proceedings.

Historically, the court's analysis focused significantly more on the behaviour of the debtor than the creditor. While it is true that the behaviour of a creditor is a factor to be considered in granting an order appointing a receiver, judicial mention of the behaviour of the creditor is sparse.[163] Occasionally, courts find a creditor's generous forbearance to the debtor's default to be a reason weighing in favour of a receivership.[164] Sometimes, debtors will attempt to argue that their default is the fault of the creditor's conduct, but this argument has not been persuasive to the court unless the debtor can clearly show that inequitable conduct was committed by the creditor.[165]

When the court is examining the debtor's behaviour, several factors are commonly looked at, most importantly the statutory requirements of good faith and due diligence required under the *CCAA* to receive an initial order or stay extension order.[166]

In *Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc*, the Court granted orders appointing a receiver, rather than orders granting, among other things, an initial *CCAA* stay, due to a lack of due diligence on the part of the debtors.[167] The debtors had ignored their property tax obligations for four years and made no efforts to address this issue.[168] The Court found that the debtors' refusal to modify the business plan that led them into insolvency also showed a lack of due diligence on their part.[169]

Re SLMSoft Inc provides an example of the debtor's behaviour post-*CCAA* stay, which resulted in Justice Ground ordering a receivership, rather than extending the *CCAA* stay.[170] In this case, Justice Ground cited dishonesty on the part of the debtor, failure of the debtor's management to advance promised financing and the creation of unconscionable termination clauses in the management's employment contracts as evidence of a lack of good faith.[171] The *coup de grace* was the creation of a loan agreement that violated a court order. The debtor's behaviour was described by Justice Ground as "totally inexcusable" and necessitating the move to a *BIA* receivership.[172]

Both *Conexus* and *SLMSoft* show how negative behaviour by the debtor can influence competing applications.[173] The behaviour of all the parties and stakeholders of a debtor may become a more important factor due to the 2019 codification of "good faith" in the *CCAA* and the *BIA*.[174] This amendment provides that all parties, not just the debtor, have a statutory obligation to act in good faith. If any party fails to act in good faith, the court has the broad power to construct the appropriate remedy. Therefore, the lack of good faith from all involved in insolvency proceedings now has statutory ramifications.[175]

However, the opposite is also true. A debtor's positive behaviour can provide support for its application for relief under the *CCAA*. In *Re Roman Catholic,* the debtor's positive behavior supported its application to transfer from the *BIA* to the *CCAA* despite creditor opposition.[176] The Court found that the debtor had been meeting and beating deadlines set by the Court and that it seemed fully committed to generating the maximum value for its creditors.[177] Additionally, the Court noted that the debtor had not contested that certain funds were available to be distributed to the creditors, even though there was some contention in that regard.[178] This behaviour indicated to the Court that the debtor was acting in the interests of the creditors, which weighed in favour of granting the *CCAA* order.

When judges are faced with competing applications for a receivership or relief under the *CCAA*, the outcome will affect the level of control the debtor will retain during the insolvency process. Therefore, looking at the debtor's behaviour prior to and during the insolvency process is a logical step, one that is also reflected in the recent addition of good-faith requirements in both the *BIA* and the *CCAA*.

6. Need for *CCAA*'s Greater Discretionary Relief

Occasionally, the different powers contained in the *CCAA* and the *BIA* come into play when considering competing applications. As Watson, Monczka and Schultz note in their recent article, the difference in the discretionary relief offered by each statute can be overstated, and similar discretionary relief is offered by both statutes.[179] Nevertheless, judges have previously cited the different powers contained in each statute as a factor to consider when evaluating competing applications.

Canadian Imperial Bank of Commerce v Community Pork Ventures Inc provides an example of where the different powers were considered in determining whether to progress insolvency proceedings under the *BIA* or the *CCAA*.[180] The debtor in this case was a pork-production company with 16 barns and operations spanning two provinces.[181] The business operations of each of the 16 barns were "self-accounting" and no two barns operated the same way, making the collective restructuring efforts difficult.

[182] Under the initial order, PwC was appointed as monitor of the debtors.[183] At a subsequent hearing, certain creditors applied to appoint a receiver; however, the court dismissed the receivership application and granted an extension of the stay of proceedings under the *CCAA*.[184]

As the proceedings progressed, the debtors struggled to propose a plan that could properly account for the restructuring of all 16 barns. To move the restructuring process forward, the Court appointed KPMG as a "selling officer" to run a sales process in parallel to the debtors' efforts to present a plan to its creditors and set a deadline for a viable restructuring plan to be presented to the Court.[185]

The proposed plan was subsequently presented to the Court and Justice Kyle found that the plan was doomed to fail.[186] As such, Justice Kyle determined that the best course of action was to grant an order appointing KPMG as receiver of the debtors' property and affairs, which would allow KPMG to continue with the sale process already underway.[187]

However, there was a lingering issue with a supplier contract. One of the hog suppliers sought to terminate its contract with the debtors, not because it wished to stop supplying the hogs, but due to "certain price aspects of the contract to which it [the supplier] would no longer be subject were the contract to end."[188] Under the *CCAA*, the supplier was prevented from terminating the contract with the debtors. Justice Kyle was, at the time, concerned about the Court's powers to compel the supplier to continue the contract under the *BIA*, reasoning that:

> The issue as between CCAA and BIA arises because there is uncertainty as to the validity of a proposed clause in the BIA receivership order which imposes a stay and specifically continues the Olymel contract. While the stay of creditors claims and proceedings would not be inconsistent with the BIA, the power of the court under that Act in its discretion to direct the continuance of contractual relations, as in the Olymel situation, is less clear.[189]

Therefore, the Court granted a three-month stay under the *CCAA* to allow the supplier contract to continue with certainty for the duration of the stay.[190] This resulted in a BIA receivership contained within a *CCAA* proceeding.

In *Arrangement relatif à 9186-9297 Québec inc*, Justice Bélanger also commented on the discretionary relief offered by the *CCAA*.[191] Uniquely, in this case, a creditor applied for relief under the *CCAA* in opposition to the debtor and a majority of creditors who favoured a receivership. Part of the creditor's reasons for favouring the *CCAA* was that the *CCAA* would allow for the maintenance of key permits through an RVO transaction.[192] The Court considered this factor, but since the creditor had failed to show the necessity of an RVO, the Court was not convinced that relief under the *CCAA* was required.[193]

As noted by Watson, Monczka and Schultz, the discretionary powers offered under the *BIA* and *CCAA* are aligning.[194] The result of this alignment is that there are now fewer differences in the powers available under each statute. For example, there is now case law establishing that an RVO can be issued in a *BIA* proceeding.[195] This case law undermines the creditor's argument used in *9186-9297* that the *CCAA* was more suitable than the *BIA* due to the ability to grant an RVO.[196] However, there are still instances where the tools and recourse available under each statue may be determinative. For example, the recent influx of cannabis insolvencies in Canada have proceeded primarily under the *CCAA*, likely due to the nature of the products involved and because cannabis licences have specific requirements set out in the

Cannabis Act that make them difficult to transfer. In a *CCAA* proceeding, these licences do not need to be transferred from the debtor company to a receiver to operate and sell the business, making the operation and sale of a cannabis company in insolvency more efficient.[197]

Nevertheless, due to this convergence of powers between the statutes, we expect the greater discretionary relief offered by the *CCAA* to become less relevant over time. However, as long as there remain powers that are exclusive to either statute, it will remain a relevant factor.

7. Summary

While there is no consistent judicial approach to addressing competing applications in insolvency proceedings, the case law shows a pattern of six factors that help determine whether a *CCAA* proceeding or a receivership is appropriate in the circumstances:

1. The relationship between debtor and creditors;
2. Value maximization and cost minimization;
3. The availability of new financing;
4. The effects on stakeholders;
5. The behaviour of the parties; and
6. The need for the *CCAA*'s greater discretionary relief.

Most of these factors can be boiled down to determining which party would be in a better position to achieve the objectives of insolvency law. No one factor decides the outcome, and judges consider multiple factors in deciding between competing applications.

Currently, the case law does not take a uniform approach to considering these factors. A consistent approach to deciding competing applications would provide better clarity to the parties and aid counsel in framing relevant arguments. While the factors are evident after a thorough review of the case law, a more straightforward approach would help highlight the relevant facts for debtors and creditors to include in their arguments.

IV. COMPETING APPLICATIONS AT THE DIFFERENT STAGES OF PROCEEDINGS

Judicial consideration of competing applications can vary based on the stage and type of proceeding. For example, competing applications can arise at the very beginning of proceedings or can occur when the insolvency process is well underway. When and where the competing applications arise will affect how the courts assess the six factors discussed above.

1. Initial Application

Competing applications often occur at the very beginning of insolvency proceedings. In *Affinity*, the competing applications were heard at the initial hearing, before Vortex had entered either *BIA* or *CCAA* proceedings.[198]

At the initial hearing, the requirements to show the suitability of an initial *CCAA* stay are quite low. The applicant is only required to show that "there is some chance that engaging the CCAA process – which brings all enforcement proceedings to a halt – will result in furthering the purposes of the legislation".[199] This requirement is often described as requiring "a germ of a plan".[200] The burden of proof for an initial stay may be low; however, as the stay itself is only 10 days long, the relief offered is limited as well.[201]

Based on a review of the case law, the lower threshold for the *CCAA* applicant at the initial application, coupled with the fact that most of these applications are largely *ex parte*, makes it more likely that the *CCAA* applicant will succeed over the receivership applicant. Additionally, a judge may see a receivership as "an irrevocable step" and therefore may be disinclined to order it at this early stage of proceedings unless the *CCAA* application has no merit.[202] Nevertheless, many *CCAA* applications do fail at the initial order stage because the factors do not favour *CCAA* proceedings.[203] Weakness of the evidence supporting the application can also result in the dismissal of a *CCAA* application in favour of a receivership at the initial order stage.[204]

2. After a *CCAA* Stay Has Been Ordered

Even once a debtor has secured an initial or longer-term *CCAA* stay, a creditor can apply to end the *CCAA* and appoint a receiver over the assets and property of the debtor. This change often occurs at the statutorily mandated *CCAA* comeback hearings but can occur any time a creditor wishes to apply to the court to lift the stay of proceedings.[205] In *Pacific Shores*, the competing applications occurred at the *CCAA* comeback hearing, following the order for an initial *CCAA* stay.[206]

At this point, the bar is higher for debtors to justify that a *CCAA* proceeding remains appropriate.[207] A judge may consider how the factors have developed during the *CCAA* stay by looking at whether the debtor's behaviour has been appropriate during the stay,[208] how the debtor's refinancing efforts are advancing[209] and whether the debtor's plans to maximize value are unfolding as anticipated.[210] Courts are willing to switch from the *CCAA* process to a receivership if the factors suggest that this would be more appropriate.[211]

3. After a Receivership Has Been Approved

In contrast, once a receivership has been ordered, it is uncommon for competing applications to occur or to be successful.[212]

The lack of substantial case law on competing applications that occur after a receivership has been ordered may be because, as one judge put it, "the appointment of a receiver is, for all intents and purposes, an irrevocable step, removing the control of the companies from their present management and placing it in the hands of a third party."[213]

V. CONCLUSION

The lack of a uniform approach to determining competing applications supports the need for a more consistent approach to deciding competing insolvency applications.[214]

Based on a review of the *ad hoc*, but overlapping, approaches in the case law, we propose a two-part approach when a court is faced with competing *CCAA* or *BIA* receivership applications. First, each applicant must meet the threshold requirement for the order sought. The *CCAA* applicant must make out the statutory requirements for an initial order or extension of the stay of proceedings under the *CCAA*—namely, whether the applicant has met the requirements of "appropriateness, good faith and due diligence".[215] The receivership applicant must also meet the test prescribed by the *BIA* for an appointment of a receiver—specifically, whether it is "just and convenient to appoint a receiver in the circumstances."[216]

If the court finds that either a *CCAA* proceeding or a *BIA* receiver could be supported, the analysis progresses to a second step. The court will consider which process is appropriate in these circumstances; the authors propose that this can be evaluated by analyzing six factors and asking the following questions:

1. Does the relationship between the debtor and the creditors support granting a *CCAA* order, or has the relationship broken down such that a receivership is the most appropriate way forward?
2. Would relief under the *CCAA* or a receivership proceeding maximize the value of a debtor's assets?
3. Has the debtor established that there is a possibility of refinancing and continuing as a going concern, such that liquidation under a receivership would be inappropriate?
4. Would relief under the *CCAA* or receivership proceeding be more beneficial to the stakeholders?
5. Does the behaviour of the debtor and the creditors favour either relief under the *CCAA* or a receivership proceeding?
6. Are there any specific tools available under the *CCAA* or the *BIA* that favour one statute over the other?

This frame of analysis mirrors the approach that has developed for judicial approval of the sale of a debtor's assets, undertaking and property outside of the ordinary course of business in both the *CCAA* and *BIA*. In sale-approval applications, a court considers whether the legislative requirements have been met to order the sale of a debtor's assets and, if the legislative requirements are satisfied, considers the factors originally set forth in *Royal Bank of Canada v Soundair Corp* to analyze whether the sale out of the ordinary course is appropriate.[217]

Following this approach would enhance consistency in the case law. Each applicant would be required to make out the statutory requirements for the proceeding it is proposing, thereby following the intent of the legislature. Then the court may move to consider the six factors to determine which proceeding is appropriate, with a view to the purposes of Canadian insolvency legislation.

We believe that this framework fills the current gap that exists when courts are faced with simultaneous *BIA* receivership and *CCAA* stay applications and that it provides a structured approach to competing applications. Given the increase in insolvencies and the myriad competing goals of debtors, creditors and other stakeholders, the issue of competing applications is likely to become more prevalent. The

framework and evaluation of the six factors set forth in this article can offer a standard and purposeful approach to competing applications, balancing the interests at play in these difficult and important applications.

ADDENDUM

On 29 August 2023, Justice Osborne of the Ontario Superior Court issued an order converting the insolvency proceedings of Validus Power Corp and its related entities from a *BIA* receivership to *CCAA* proceedings.[218] The application to convert had been brought by the receiver and was unopposed by any other party.[219] The application was brought to allow the debtor to conduct a sale and investment solicitation process and allow for the possibility of an RVO in the future.[220]

In granting the order, Justice Osborne stated that granting the conversion would provide the "maximum chance" of preserving the debtor as a going concern, which would hopefully maximize the number of employees retained.[221] As well, an RVO effected through the *CCAA* would be the most commercially viable way to sell the debtor due to the highly regulated nature of the debtor's business, power generation.[222]

This case highlights the increasing fluidity of insolvency proceedings where one proceeding can switch between the *BIA* and the *CCAA* at different stages. This is a desirable development, as it will provide increased flexibility to creditors and debtors, allowing for more efficient resolutions of insolvencies because they will be able to use the most suitable statute at different stages of proceedings.

It also highlights how even in uncontested applications the factors highlighted in this article are considered by judges. Here, Justice Osborne cited the interests of stakeholders and employees, and the maximization of the debtor's value through the reverse vesting process as reasons to allow the conversion from the *BIA* to the *CCAA*. Finally, it shows that conversions from receiverships to the *CCAA* are possible if found to be appropriate in the circumstances.

APPENDIX: CONTESTED APPLICATION CASES REVIEWED[223]

Style of Cause	Citation	Year	Province	Industry	Outcome	Stage of Insolvency Proceedings
Alberta Treasury Branches v Hat Development Ltd	(1988) 1988 CanLII 3571 (AB KB), 64 Alta LR (2d) 17, 71 CBR (NS) 264 (QB)	1988	Alberta	Unclear	*BIA* receivership maintained	After appointment of a *BIA* receiver

Style of Cause	Citation	Year	Province	Industry	Outcome	Stage of Insolvency Proceedings
Re Ursel Investments Ltd	1990 CanLII 7504, 2 CBR (3d) 260 (Sask QB)	1990	Saskatchewan	Construction	*BIA* receivership	After approval of *CCAA* application to order meeting of creditors pursuant to the *CCAA*
First Treasury Financial Inc v Cango Petroleums Inc	(1991) 1991 CanLII 8338 (ON SC), 78 DLR (4th) 585, 3 CBR (3d) 232 (Ont Ct J (Gen Div))	1991	Ontario	Energy	*BIA* receivership	Initial application
Re Skydome Corp	(1998) CarswellOnt 5914, 16 CBR (4th) 125 (Ct J (Gen Div))	1998	Ontario	Recreation	*CCAA* extension granted	Application for extension of *CCAA* stay
General Electric Capital Canada Inc v Euro United Corp	1999 CanLII 14848, 25 CBR (4th) 250 (Ont Sup Ct J [Comm List])	1999	Ontario	Industrial	Receiver appointed within the *CCAA*	Comeback hearing after initial *CCAA* stay
Re Canadian Airlines Corp	2000 CanLII 28202 (AB KB), [2000] CarswellAlta 622, 19 CBR (4th) 1 (QB)	2000	Alberta	Airline	*CCAA* order maintained	After approval of *CCAA*
Canada (Attorney General) v VDS Management Inc	2002 BCSC 284	2002	British Columbia	Financial	Application for equitable receiver dismissed	After approval of *CCAA*
IF Propco Holdings (Ontario) 36 Ltd v 1228851 Ontario Ltd	2002 CarswellOnt 6613, [2002] OJ No 1667 (Sup Ct J)	2002	Ontario	Real estate	*BIA* receivership	Initial application
Re SLMSoft Inc	2003 CarswellOnt 4402, [2003] OJ No 4685 (Sup Ct J)	2003	Ontario	Technology	*BIA* receivership	After approval of *CCAA*

Style of Cause	Citation	Year	Province	Industry	Outcome	Stage of Insolvency Proceedings
Community Pork Ventures Inc v Canadian Imperial Bank of Commerce	2005 SKQB 294	2005	Saskatchewan	Food	Receiver appointed within the *CCAA*	After approval of *CCAA*
Matco Capital Ltd v Interex Oilfield Services Ltd	(1 August 2006), Calgary, Alta QB 060108395 (Oral Reasons for Judgment, Romaine J) cited in Justice Lloyd W Houlden, Justice Geoffrey B Morawetz & Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Carswell, 2009) (looseleaf updated 10 October 2023) at § 22:9	2006	Alberta	Energy	*BIA* receivership	Initial application
Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp	2008 BCCA 327	2008	British Columbia	Real estate	*BIA* receivership	Appeal from extension of *CCAA* stay
Retail Funding Inc v Cotton Ginny Inc	2008 CarswellOnt 4808, 45 CBR (5th) 250 (Sup Ct J [Comm List])	2008	Ontario	Retail	*BIA* receivership	Initial application
Re Octagon Properties Group Ltd	2009 ABQB 500	2009	Alberta	Real estate	*BIA* receivership	Initial application
Re Shire International Real Estate Investments Ltd	2010 ABQB 84	2010	Alberta	Real estate	*BIA* receivership	Comeback hearing after initial *CCAA* stay
Re Pacific Shores Resort & Spa Ltd	2011 BCSC 1775	2011	British Columbia	Recreation	*CCAA* extension granted	Comeback hearing after initial *CCAA* stay
Callidus Capital Corp v Carcap Inc	2012 ONSC 163	2012	Ontario	Financial	*BIA* receivership	Initial application
Re Dondeb Inc	2012 ONSC 6087	2012	Ontario	Real estate	*BIA* receivership	Initial application

Style of Cause	Citation	Year	Province	Industry	Outcome	Stage of Insolvency Proceedings
Re NFC Acquisition GP Inc	2012 ONSC 1244	2012	Ontario	Food	*BIA* receivership	After approval of *CCAA*
Alberta Treasury Branches v Tallgrass Energy Corp	2013 ABQB 432	2013	Alberta	Energy	*BIA* receivership	Initial application
Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd	2013 BCSC 2358	2013	British Columbia	Energy	*CCAA* stay granted	Initial application
Re Alexis Paragon Limited Partnership	2014 ABQB 65	2014	Alberta	Gambling	*BIA* receivership	Initial application
Romspen Investment Corporation v 6711162 Canada Inc	2014 ONSC 2781	2014	Ontario	Real estate	*BIA* receivership	Initial application
Re Hush Homes Inc	2015 ONSC 370	2015	Ontario	Real estate	*CCAA* stay granted	Initial application
Re Canada North Group Inc	2017 ABQB 508	2017	Alberta	Industrial	*CCAA* extension granted	Comeback hearing after initial *CCAA* stay
Affinity Credit Union 2013 v Vortex Drilling Ltd	2017 SKQB 228	2017	Saskatchewan	Energy	*BIA* receivership	Initial application
Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) et al	2018 ONSC 7382, Toronto CV-18-607303-00CL (Ont Sup Ct J [Comm List])	2018	Ontario	Real estate	*BIA* receivership	Initial application
Re Norcon Marine Services Ltd	2019 NLSC 238	2019	Newfoundland	Transport	Both *CCAA* and *BIA* receivership denied	Post filing of *BIA* notice of intention

Style of Cause	**Citation**	**Year**	**Province**	**Industry**	**Outcome**	**Stage of Insolvency Proceedings**
BCIMC Construction Fund Corp v The Clover on Yonge Inc	2020 ONSC 1953	2020	Ontario	Real estate	*BIA* receivership	Initial application
Re 2607380 Ontario Inc	(18 March 2021), Toronto, Ont Sup Ct J [Comm List] CV-20-00636875-00CL (Endorsement of Dietrich J), online (pdf): *Richter* <www.richter.ca/wp-content/uploads/2020/02/37-2607380-ontairo-inc--endorsement-of-justice-dietrich-march-18-2021.pdf>	2021	Ontario	Real estate	*BIA* receivership	After approval of *CCAA*
Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc	2021 SKQB 273	2021	Saskatchewan	Senior care	*BIA* receivership	Initial application
Re Edward Collins Contracting Limited	2022 NLSC 149	2022	Newfoundland	Construction	*CCAA* stay granted	Initial application
Re Roman Catholic Episcopal Corporation of St. John's	2022 NLSC 81	2022	Newfoundland	Religious	*CCAA* stay granted	Post filing of *BIA* notice of intention
Arrangement relatif à 9186-9297 Québec inc	2022 QCCS 1707	2022	Québec	Real estate	*BIA* receivership approved	Initial application
Re Port Capital Development (EV) Inc	2022 BCSC 1464	2022	British Columbia	Real estate	*CCAA* sale approved	After approval of *CCAA*
Royal Bank of Canada v Canwest Aerospace Inc	2023 BCSC 514	2023	British Columbia	Industrial	*CCAA* stay granted	Initial application

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]; *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

[2] *Affinity Credit Union 2013 v Vortex Drilling Ltd*, 2017 SKQB 228 [*Affinity*]; *Re Pacific Shores Resort & Spa Ltd*, 2011 BCSC 1775 [*Pacific Shores*].

[3] *BIA*, *supra* note 1, ss 42(1), 50.

[4] *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at paras 39–46, 100–4 [*Callidus SCC*].

[5] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 14 [*Century Services*].

[6] Alfonso Nocilla, "Is 'Corporate Rescue' working in Canada" (2013) 53:3 Can Bus LJ 382 at 399.

[7] *BIA*, *supra* note 1, s 69(1); *CCAA*, *supra* note 1, ss 11.02(1), 11.02(2).

[8] *Century Services*, *supra* note 5 at para 14. In *Century Services*, the Court is discussing a *CCAA, supra* note 1, stay, but a stay under the *BIA, supra* note 1, proposal regime has a similar purpose.

[9] *Canada v Canada North Group Inc*, 2021 SCC 30 at paras 19–21 [*Canada North SCC*].

[10] *BIA*, *supra* note 1, s 50(1); *CCAA*, *supra* note 1, s 3(1). The main eligibility difference is that the *CCAA* requires that the debtor owe over $5 million.

[11] *BIA*, *supra* note 1, s 243.

[12] *Re Skydome Corp,*1998 CarswellOnt 5914, 16 CBR (4th) 125 at paras 1–4 (Ont Sup Ct J (Gen Div) [Comm List]) [*Skydome*].

[13] Janis Sarra, "Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions", *Houlden & Morawetz Insolvency Newsletter* (7 February 2022) Insolv L Nws 2022-6 at 1–2.

[14] Refer to Appendix 1 for a list of cases surveyed. Receivers can be appointed by application to the Court by a secured creditor under the *BIA*, *supra* note 1, s 243. In addition to receivers appointed under the *BIA,* secured creditors may have contractual rights to appoint a private receiver outside of a court process; however, if a stay has been granted under the *CCAA*, *supra* note 1, such a creditor will have to apply to the Court to lift the stay before proceeding to appoint a private receiver. In addition, there are a number of provincial statutes that allow for the appointment of a receiver, such as the British Columbia *Law and Equity Act*, RSBC 1996, c 253; however, these statutes will not be discussed in this article.

[15] For a discussion of the purposes of the *BIA, supra* note 1*,* and the *CCAA, supra* note 1, see *Canada North SCC, supra* note 9 at paras 73, 118–34.

[16] *First Treasury Financial Inc v Cango Petroleums Inc,* (1991) 1991 CanLII 8338 (ON SC), 78 DLR (4th) 585, 3 CBR (3d) 232 at paras 22, 41 (Ont Sup Ct J (Gen Div)) [*Cango*].

[17] *Callidus SCC*, *supra* note 4 at paras 39–46.

[18] *Ibid*.

[19]

[19] For a discussion of this evolution see: Eamonn Watson, Gray Monczka & Jordan Schultz, "Anything You Can Do, I Can Do Better: Does the CCAA Provide Broader Discretionary Relief than the BIA?" in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law*, 20th ed, 2022 CanLIIDocs 4309 [Watson, Monczka & Schultz].

[20] *Affinity*, *supra* note 2; *Pacific Shores, supra* note 2.

[21] *Affinity*, *supra* note 2.

[22] *Ibid* at paras 1–2.

[23] *Ibid* at paras 30, 37, 40.

[24] *Ibid* at paras 8–10.

[25] *Ibid* at para 10.

[26] *Ibid* at para 11.

[27] *Ibid* at paras 1–3.

[28] *Ibid* at paras 17–20.

[29] *Ibid* at paras 18, 20. See *CCAA, supra* note 1, s 11.02.

[30] *Ibid* at para 20. See *BIA*, *supra* note 1, s 243.

[31] *Ibid* at paras 27–32.

[32] *Ibid* at para 28.

[33] *Ibid* at para 30.

[34] *Ibid* at para 29.

[35] *Ibid* at paras 33–35.

[36] *Ibid* at para 34.

[37] *Ibid* at para 35.

[38] *Ibid* at paras 36–37.

[39] *Ibid* at para 36.

[40] *Ibid* at para 37.

[41] *Ibid.*

[42] *Ibid*. For an explanation on interim financing, see footnote 134.

[43] *Ibid* at para 37.

[44] *Ibid* at para 38.

[45] *Ibid*.

[46] *Ibid* at paras 38–40.

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[47] *Ibid* at para 37.

[48] *Ibid* at paras 28–30.

[49] *Ibid* at paras 33–35. See *CCAA, supra* note 1*,* s 11.02.

[50] *Ibid* at paras 36–37.

[51] *Ibid.*

[52] *Ibid* at para 37.

[53] *Pacific Shores*, *supra* note 2.

[54] *Ibid* at paras 6–13.

[55] *Ibid* at para 10.

[56] *Ibid.*

[57] *Ibid* at paras 11–13.

[58] *Ibid* at para 1.

[59] *Ibid* at paras 1–4.

[60] *Ibid* at para 4.

[61] *Ibid* at paras 15, 55.

[62] *Ibid* at para 15.

[63] *Ibid* at paras 16–24.

[64] *Ibid* at paras 18–24.

[65] *Ibid* at paras 20–21.

[66] *Ibid*.

[67] *Ibid* at para 24.

[68] *Ibid* at para 25.

[69] *Ibid* at para 33.

[70] *Ibid* at paras 27–29.

[71] *Ibid* at para 32.

[72] *Ibid* at para 30.

[73] *Ibid* at para 33.

[74] *Ibid* at para 35.

[75] *Ibid* at para 39.

[76] *Ibid* at para 36.

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[77] *Ibid* at para 40.

[78] *Ibid* at para 41.

[79] *Ibid* at para 44.

[80] *Ibid* at para 55.

[81] *Ibid* at paras 54–56.

[82] *Ibid* at para 57.

[83] *Ibid.*

[84] *Ibid* at para 58.

[85] *Ibid* at paras 58–59.

[86] *Ibid* at paras 15–29, 32, 36.

[87] *Ibid* at paras 54–58.

[88] *Pacific Shores, supra* note 2.

[89] *Ibid* at paras 25–33.

[90] *Ibid* at para 28.

[91] *Affinity*, *supra* note 2 at paras 33–37.

[92] *Ibid*.

[93] *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 at paras 18–21 [*Tallgrass*].

[94] *Ibid*.

[95] *Ibid*.

[96] *Ibid*.

[97] *Callidus v Carcap,* 2012 ONSC 163 at para 61 [*Carcap*]; *Cango*, *supra* note 16 at para 41; *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953 at paras 101–03.

[98] *Carcap*, *supra* note 97 at para 61.

[99] *Pacific Shores*, *supra* note 2 at para 41.

[100] *Re Canadian Airlines Corp,* 2000 CanLII 28202 (AB KB), [2000] CarswellAlta 622, 19 CBR (4th) 1 (QB) [*Canadian Airlines*].

[101] *Ibid* at paras 8–11.

[102] *Ibid* at para 24.

[103] *Ibid* at paras 23–25.

[104] *Ibid* at para 32.

[105] *Re Octagon Properties Group Ltd*, 2009 ABQB 500 at para 17 [*Octagon*].

[106]

[106] *Pacific Shores*, *supra* note 2 at paras 25–33.

[107] *Callidus SCC*, *supra* note 4 at para 42.

[108] *Re Roman Catholic Episcopal Corporation of St. John's*, 2022 NLSC 81 (CanLII) [*Re Roman Catholic*].

[109] *Ibid* at para 46. A holding proposal is a dated *BIA, supra* note 1*,* concept that allows a debtor more time to make a proposal to its creditors. Here, Justice Handrigan dismissed the creditors' request because a holding proposal's relevance to modern *BIA* proceedings is questionable and because the words of the *BIA* could not support a further extension of the proposal process.

[110] *Ibid* at paras 49, 52, 74.

[111] *Ibid* at para 57.

[112] *Ibid* at para 59.

[113] *Ibid* at paras 61, 67.

[114] *Skydome*, *supra* note 12.

[115] *Ibid* at paras 21–22.

[116] *Ibid* at paras 3–4.

[117] *Ibid* at paras 14–15.

[118] *Ibid* at para 18.

[119] *Ibid*.

[120] *Cango*, *supra* note 16 at para 37.

[121] *Ibid* at para 41(b).

[122] *Re Shire International Real Estate Investments Ltd*, 2010 ABQB 84 at para 9 [*Shire*].

[123] *Re Dondeb Inc*, 2012 ONSC 6087 at paras 27–29 [*Dondeb*].

[124] *Ibid* at para 29.

[125] *Octagon*, *supra* note 105 at paras 7, 17.

[126] *Ibid* at para 17.

[127] *Affinity*, *supra* note 2 at para 37.

[128] *Pacific Shores*, *supra* note 2 at para 49.

[129] *Ibid* at paras 48, 49.

[130] *Ibid.*

[131] *Re Hush Homes Inc*, 2015 ONSC 370 at para 47 [*Hush*]; *Re Roman Catholic*, *supra* note 108 at para 60.

[132] *Hush*, *supra* note 131 at para 47.

[133] *Re Roman Catholic*, *supra* note 108 at para 60.

[134]

[134] Debtor-in-possession lending, or interim financing, is financing that is provided to debtor companies undertaking the insolvency process. Such loans differ from other types of loans because the interim lender is typically granted a super-priority charge that places the interim lender ahead of certain other creditors. For more information on interim financing lending, see Practical Law Canada Finance, "DIP Financing: Overview" (7 August 2023), online (practice note): *Thomson Reuters Practical Law Canada* <ca.practicallaw.thomsonreuters.com/w-013-2291>.

[135] Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023*, 1st Sess, 44th Parl, 2023, cl 610-616 (assented to 22 June 2023). The federal government has recently passed legislation that will reduce the criminal rate of interest from 60% to 35%. This change will come into effect upon Cabinet approval. The bill also changes the calculation from being based on the effective annual rate to being based on the annual percentage rate, which will effectively result in a further reduction on how much a lender can charge as interest.

[136] *Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd*, 2013 BCSC 2358 at paras 2, 39.

[137] *Ibid* at para 13.

[138] *Ibid* at para 32.

[139] *Pacific Shores*, *supra* note 2 at para 24.

[140] *Re Canada North Group Inc*, 2017 ABQB 508 at para 47 [*Canada North ABQB*].

[141] *Retail Funding Inc v Cotton Ginny Inc*, 2008 CarswellOnt 4808, 45 CBR (5th) 250 (Sup Ct J [Comm List]) at paras 93–96.

[142] *Ibid* at para 49.

[143] *Ibid* at paras 66, 85.

[144] *Affinity, supra* note 2 at para 37; *Tallgrass*, *supra* note 93 at para 21.

[145] *Carcap*, *supra* note 97 at para 59.

[146] *Affinity, supra* note 2 at para 37.

[147] *Century Services*, *supra* note 5 at paras 15–18. See also *Canada North SCC, supra* note 9 at paras 118–34.

[148] *Century Services*, *supra* note 5 at para 18.

[149] See for example Bill Kaplan, "Liquidating CCAAs: Discretion Gone Awry?" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009). See also *Canada North SCC, supra* note 9 at para 73.

[150] *Pacific Shores*, *supra* note 2 at para 57.

[151] *Canadian Airlines, supra* note 100 at para 26.

[152] *Pacific Shores*, *supra* note 2 at para 57; *Canadian Airlines, supra* note 100 at para 26.

[153] Jeremy Opolsky, Jacob Babad & Mike Noel, "Receivership Versus CCAA in Real Property Development: Constructing a Framework for Analysis" in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law 2020* (Toronto: Thomson Reuters, 2021) at 6–7 [Opolsky, Babad & Noel].

[154] *Canadian Airlines*, *supra* note 100; *Pacific Shores*, *supra* note 2. Both cases are illustrative in how certain industries will have a greater chance of having the *CCAA* approved due to having a large number of employees.

[155] *Pacific Shores*, *supra* note 2 at paras 57–59.

[156]

[156] *Octagon*, *supra* note 105 at para 17.

[157] *Tallgrass*, *supra* note 93 at para 15.

[158] *Re Alexis Paragon Limited Partnership*, 2014 ABQB 65.

[159] *Ibid* at paras 1–11, 51.

[160] *Ibid* at para 51(e).

[161] *Ibid* at paras 51–52.

[162] *Shire*, *supra* note 122 at para 9.

[163] See *Royal Bank of Canada v Chongsim Investments Ltd*, 1997 CarswellOnt 988, 28 OTC 102 (Ont Ct (Gen Div)), as an example of where the court considered the negative behaviour of a creditor in an application for a receiver.

[164] *Affinity, supra* note 2 at para 38; *Tallgrass*, *supra* note 93 at para 21.

[165] *Romspen Investment Corporation v 6711162 Canada Inc*, 2014 ONSC 2781 at paras 65–70 [*Romspen*].

[166] *CCAA*, *supra* note 1, s 11.02(3b).

[167] *Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc*, 2021 SKQB 273 at para 59 [*Conexus*].

[168] *Ibid*.

[169] *Ibid*.

[170] *Re SLMSoft Inc*, 2003 CarswellOnt 4402, [2003] OJ No 4685 (Sup Ct J) at paras 2–4 [*SLMSoft*].

[171] *Ibid*.

[172] *Ibid* at paras 4–6.

[173] *Affinity, supra* note 2; *SLMSoft*, *supra* note 170.

[174] *BIA*, *supra* note 1, s 4.2; *CCAA*, *supra* note 1, s 18.6.

[175] Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019).

[176] *Re Roman Catholic*, *supra* note 108.

[177] *Ibid* at para 57.

[178] *Ibid* at para 58.

[179] Watson, Monczka & Schultz, *supra* note 19.

[180] *Canadian Imperial Bank of Commerce v Community Pork Ventures Inc*, 2005 SKQB 294 [*Community Pork*].

[181] *Ibid* at para 6.

[182] *Ibid*.

[183] *Ibid* at para 5.

[184]

[184] *Ibid* at para 12.

[185] *Ibid*.

[186] *Ibid* at para 8.

[187] *Ibid* at para 9.

[188] *Ibid* at para 3.

[189] *Ibid* at para 13.

[190] *Ibid* at para 15.

[191] *Arrangement relatif à 9186-9297 Québec inc*, 2022 QCCS 1707 (CanLII) [*9186-9297*].

[192] *Ibid* at para 39.

[193] *Ibid*.

[194] Watson, Monczka & Schultz, *supra* note 19 at 17.

[195] *Ibid at* 13.

[196] *9186-9297*, *supra* note 191.

[197] Chris Nyberg, James Reid & Morgan Crilly, "Burnt Out: Lessons from the Cannabis Crash" in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law*, 18th ed, 2020 CanLIIDocs 3609.

[198] *Affinity, supra* note 2 at paras 1–2.

[199] *Re Norcon Marine Services Ltd*, 2019 NLSC 238 (CanLII) at para 15.

[200] *Re Edward Collins Contracting Limited*, 2022 NLSC 149 (CanLII) at para 39.

[201] *CCAA*, *supra* note 1, s 11.02(1).

[202] *Royal Bank of Canada v Canwest Aerospace Inc*, 2023 BCSC 514 at para 23 [*Canwest*].

[203] For examples of where a *CCAA* stay initial application failed, see *Tallgrass*, *supra* note 93; *Affinity, supra* note 2; *Romspen*, *supra* note 165; and *Dondeb*, *supra* note 123.

[204] *Affinity*, *supra* note 2 at paras 27–32; *Conexus*, *supra* note 167 at paras 57–58.

[205] *Shire*, *supra* note 122 at paras 1–7. In this case, the competing applications occurred at the *CCAA, supra* note 1*,* comeback hearing. See *Canada North ABQB*, *supra* note 140 at paras 1–2, 70–72, for another example where the competing applications occurred at the comeback hearing.

[206] *Pacific Shores*, *supra* note 2 at paras 1–2.

[207] See *SLMSoft, supra* note 170; *Shire*, *supra* note 122, as examples of *CCAA, supra* note 1*,* proceedings that changed to receiverships.

[208] *SLMSoft, supra* note 170 at paras 1–6.

[209] *Canada North ABQB*, *supra* note 140 at para 47.

[210] *Community Pork, supra* note 180 at paras 1–8.

[211]

[211] *Ibid*; *SLMSoft, supra* note 170*; Shire*, *supra* note 122.

[212] *Alberta Treasury Branches v Hat Development Ltd*, (1988) 1988 CanLII 3571 (AB KB), 64 Alta LR (2d) 17, 71 CBR (NS) 264 (QB), and the case discussed in the Addendum, are the only cases we found where it was attempted.

[213] *Canwest*, *supra* note 202 at para 23.

[214] The recent Coromandel Properties Ltd ("Coromandel") insolvency in British Columbia provides an example of a need for a more uniform approach to considering competing applications. Coromandel was a Vancouver-based real estate development that was extremely leveraged. On 6 February 2023, Coromandel and 82 related entities sought protection from creditors under the *CCAA, supra* note 1. Many secured creditors opposed the initial stay application. Instead of determining if a *CCAA* stay was appropriate, the judge adjourned the matter to the next hearing and ordered a court-ordered stay of proceedings, rather than a stay under the *CCAA*. This adjournment and court-ordered stay were extended at a hearing on 16 February 2023. The court-ordered stay was ultimately resolved on 10 March 2023, when Coromandel chose to discontinue the *CCAA* proceedings. Interestingly, the judge never had to determine whether relief under the *CCAA* or proceeding under a receivership or other insolvency proceeding was the appropriate forum for this insolvency. See *In the Matter of a Plan of Compromise and Arrangement of Coromandel Properties Ltd* (6 February 2023), Vancouver S-230854 (BCSC); *In the Matter of a Plan of Compromise and Arrangement of Coromandel Properties Ltd* (16 February 2023), Vancouver, BCSC S-230854 (Order Made After Application); and *In the Matter of a Plan of Compromise and Arrangement of Coromandel Properties Ltd* (10 March 2023), Vancouver, BCSC S-230854 (Notice of Discontinuance).

[215] *Affinity*, *supra* note 2 at paras 18, 20; *CCAA*, *supra* note 1, s 11.02. Along with the other statutory requirements, ie*,* $5 million in debt, etc., *CCAA*, *supra* note 1, s 3(1).

[216] *Affinity*, *supra* note 2 at paras 17–20; *BIA*, *supra* note 1, s 243.

[217] *Royal Bank of Canada v Soundair Corp*, (1991) 1991 CanLII 2727 (ON CA), 4 OR (3d) 1, 83 DLR (4th) 76 (CA); see also eg, *Nordstrom Canada Retail, Inc*, 2023 ONSC 4199 at paras 16–18.

[218] *Macquarie Equipment Finance Limited v Validus Power Corp et al* (29 August 2023), Toronto, Ont Sup Ct J [Comm List] CV-23-00703754-00CL (Endorsement of Justice Osborne).

[219] *Ibid* at para 6.

[220] *Ibid* at paras 11, 21–22.

[221] *Ibid* at para 13.

[222] *Ibid* at paras 22–23.

[223] Opolsky, Babad & Noel, *supra* note 153. This table is a continuation of the list provided in this article.