

COURT FILE NUMBER **2101-00814**

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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

AND IN THE MATTER OF CALGARY OIL &  
GAS SYNDICATE GROUP LTD., CALGARY  
OIL AND GAS INTERCONTINENTAL GROUP  
LTD. (IN ITS OWN CAPACITY AND IN ITS  
CAPACITY AS GENERAL PARTNER OF T5 SC  
OIL AND GAS LIMITED PARTNERSHIP),  
CALGARY OIL AND SYNDICATE PARTNERS  
LTD. and PETROWORLD ENERGY LTD.

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**BENCH BRIEF OF THE APPLICANTS,**

**CALGARY OIL & GAS SYNDICATE GROUP LTD., CALGARY OIL AND GAS  
INTERCONTINENTAL GROUP LTD. (IN ITS OWN CAPACITY AND IN ITS  
CAPACITY AS GENERAL PARTNER OF T5 SC OIL AND GAS LIMITED  
PARTNERSHIP), CALGARY OIL AND SYNDICATE PARTNERS LTD. and  
PETROWORLD ENERGY LTD,**

**IN SUPPORT OF AN APPLICATION RETURNABLE SEPTEMBER 24, 2021 AT 11:00  
A.M. BEFORE THE HONOURABLE MADAM JUSTICE B.E. ROMAINE**

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## I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicants, Calgary Oil & Gas Syndicate Group Ltd. (“**Syndicate Group**”), Calgary Oil and Gas Intercontinental Group Ltd. (“**COGL**”) (in its own capacity and in its capacity as general partner of T5 SC Oil and Gas Limited Partnership (the “**Limited Partnership**”), Calgary Oil and Syndicate Partners Ltd. (“**Syndicate Partners**”) and Petroworld Energy Ltd. (“**Petroworld**” and, collectively, the “**Applicants**”, and together with the Limited Partnership, the “**Companies**”), in support of the Applicants’ application for a Sale Approval and Vesting Order approving the sale of all issued and outstanding shares in COGL (the “**GP Shares**”), to Spartan Delta Corp, (the “**Purchaser**” and the “**GP Transaction**”), and for a Stay Extension and Termination of CCAA Proceedings Order which would extend the Stay Period until the earlier of (i) service of a certificate by the Monitor substantially in the form attached as Appendix “A” to Schedule “B” of this Application (the “**CCAA Termination Time**”) or (ii) October 31<sup>st</sup>, 2021. The Purchaser is also the buyer of all outstanding units of the Limited Partnership in a transaction which re-capitalized the Limited Partnership and provided funds for distribution to creditors (the “**LP Transaction**”).
2. All capitalized terms not otherwise defined in this Brief have the meanings ascribed thereto in the Affidavit sworn on September 13, 2021 by Ryan Martin, the Applicants’ corporate representative (the “**Martin Affidavit**”).<sup>1</sup>

## I. FACTS

3. The facts supporting the relief sought in the within Application are more particularly set out in the Martin Affidavit, the affidavit sworn by Ryan Martin in relation to these proceedings on July 19, 2021 (the “**Plan Sanction Affidavit**”) and the affidavit sworn by Ryan Martin in relation to these proceedings on May 17, 2021 (the “**Creditors’ Meeting Affidavit**”). A brief summary of the procedural history of this matter is as follows.
4. On February 11, 2021, the Honourable Mr. Justice D. B. Nixon granted the Companies’ application for an Initial Order (the “**Initial Order**”). The Initial Order provided for,

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<sup>1</sup> Affidavit of Ryan Martin, sworn on September 13, 2021 at para 1 [**Martin Affidavit**].

among other things, a stay of proceedings in respect of the Companies, until and including February 21, 2021 (the “**Stay Period**”). The Stay Period was subsequently extended by this Honourable Court pursuant to an amended and restated initial order granted by the Honourable Mr. Justice R. A. Neufeld on February 19, 2021, and by a second amended and restated initial order granted by the Honourable Mr. Justice Nixon on March 4, 2021, which extended the Stay Period until and including April 15, 2021.

5. Pursuant to two Orders granted by the Honourable Mr. Justice J.J. Gill on April 13, 2021 (the Stay Period was further extended to May 25, 2021, and the Court authorized and directed the Applicants, with the assistance of the Monitor, to conduct a reverse proof of claims procedure for all creditors (the “**Creditors**”) who have a Claim (as such term is defined in the CCAA) against the Companies, some or any of them, or their directors and officers.
6. On April 21, 2021, Spartan Delta Corp. (“**Spartan**”) entered into an equity transaction with COGL, the Limited Partnership and COSP (the “**LP Transaction**”), pursuant to which Spartan will provide a cash injection of CAD \$37,500,000 in exchange for limited partnership units in the Limited Partnership as agreed to in the Definitive Agreement effective April 21, 2021 (the “**LP Purchase Agreement**”). The LP Transaction was set to close on September 3, 2021 under the Second Revised Plan.
7. Pursuant to three Orders granted by the Honourable Mr. Justice P.R. Jeffrey on May 25, 2021 the effective dates of disclaimer for certain contracts disclaimed by COGL under section 32 of the CCAA were modified, one contract with a third party was terminated, and certain commercially sensitive documents were sealed. In addition, the Stay Period was further extended to July 31, 2021, and the Court authorized and directed the Applicants, with the assistance of the Monitor, to conduct a Late Claims Procedure to permit parties to agreements disclaimed by the Applicants to file Late Filed Claims.
8. Additionally, pursuant to a fourth Order granted by the Honourable Mr. Justice P.R. Jeffrey on May 25, 2021, a Creditor’s Meeting was ordered to be convened on July 19, 2021 to consider the Plan.

9. The Creditors' Meeting was duly convened on July 19, 2021, and the Plan of Arrangement and Compromise was approved by the requisite double majority of creditors. Pursuant to a fifth order granted on July 26, 2021 by the Honourable Mr. Justice C.M. Jones of this Court (the "**Plan Sanction Order**"), the Court sanctioned and approved the Revised Plan of Compromise and Arrangement and extended the Stay of Proceedings to September 30, 2021.
10. On August 31, 2021, the Applicants, at the request of Spartan and with the consent and assistance of the Monitor, filed a Second Revised Plan of Arrangement and Compromise (the "**Second Revised Plan**"), changing the Plan Implementation Date and Plan Termination Date contained in the Revised Plan from August 31, 2021 to September 3, 2021, in order to provide additional time to close the LP Transaction.
11. On September 3, 2021 the LP Transaction closed and Spartan initiated the transfer of \$37,500,000 (the "**Equity Injection Funds**") to the Monitor in accordance with the Second Revised Plan.
12. On September 3, 2021, the Companies and Spartan entered into a second transaction in the form of a Share Purchase Agreement (the "**GP Purchase Agreement**") between Spartan and Syndicate Group for the purchase of all outstanding shares of COGL (the "**GP Shares**" and the "**GP Transaction**").

## **II. ISSUES**

13. The Applicants respectfully request that this Honourable Court determine the following issues:
  - (a) Should the Court issue the Sale Approval and Vesting Order approving the GP Transaction?
  - (b) Should the Court extend the Stay until the earlier of (i) the filing of the Monitor's Certificate or (ii) October 31<sup>st</sup>, 2021?

### III. LAW & ARGUMENT

#### A. The Sale and Vesting Order is fair, reasonable, and protects the interests of all parties.

14. In considering whether or not to authorize the disposition of assets of a debtor company outside the ordinary course of business, a court must consider the factors first set out by the Court of Appeal in *Royal Bank of Canada v Soundair Corp.*<sup>2</sup> The principles articulated by the Court in *Soundair* are as follows:
- (a) whether there has been a sufficient effort made to get the best price, and the receiver has not acted improvidently;
  - (b) the interests of all parties;
  - (c) the efficacy and integrity of the process; and
  - (d) whether there has been unfairness in the working out of the process.<sup>3</sup>
15. Furthermore, as Romaine J. of this Court held in *Sanjel Corporation (Re)*, due consideration should be given to two further factors:
- (a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and
  - (b) the weight to be given to the recommendation of the monitor.<sup>4</sup>
16. These factors largely overlap with and are set out in subsection 36(3) of the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36 (the “CCAA”), and are analyzed here under the framework set out by subsection 36(3).<sup>5</sup> The section 36(3) factors are:

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<sup>2</sup> *Royal Bank of Canada v Soundair Corp*, 4 OR (3d) 1, 1991 CarswellOnt 7706 at para 46 (*Soundair*) [TAB 1].

<sup>3</sup> *Soundair* at para 46 [TAB 1].

<sup>4</sup> *Re Sanjel Corp*, 2016 ABQB 257 at para 59 [*Re Sanjel*] [TAB 5].

<sup>5</sup> *Grafton-Fraser v Cadillac*, 2017 ONSC 2496 at para 19 [TAB 2]; *Canwest Global Communications Corp.*, 2010 ONSC 2870 at para 13 [TAB 3].

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or distribution;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.<sup>6</sup>

i. *The process leading to the GP Transaction was reasonable in the circumstances.*

17. The process by which a debtor company's assets are sold is only required to be reasonable, not perfect.<sup>7</sup> A court considering whether or not to approve the disposition of assets will give effect to the "business judgment rule", and should not interfere lightly with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the process was fair, reasonable, transparent and efficient.<sup>8</sup>
18. The GP Transaction is necessarily incidental to the successful completion of the LP Transaction and distribution of funds to creditors.<sup>9</sup> The control of the GP by the Purchaser enables the Limited Partnership to also be controlled by the Purchaser, who intended to have such rights through the LP Transaction. At this point in the proceeding, there is no

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<sup>6</sup> *Companies Creditors Arrangement Act*, RSC 1985, c. C-36 s 36(3) [CCAA] [TAB 4].

<sup>7</sup> *Re Sanjel* at para 80 [TAB 5].

<sup>8</sup> *Re Sanjel* at para 57 [TAB 5].

<sup>9</sup> *Martin Affidavit* at paras 17-18.

viable alternative to carrying out the LP Transaction, as no other offers to recapitalize the Companies were made or are available.<sup>10</sup>

19. The GP Transaction will:

- (a) transfer all outstanding shares in COGL to the Purchaser;<sup>11</sup>
- (b) permit the Purchaser to operate the Companies' business without interruption and comply with regulatory requirements necessary to license wells, capitalize assets and generally carry on operations for the Limited Partnership, which is now almost entirely owned by the Purchaser;<sup>12</sup>
- (c) avoid additional interest charges of approximately \$100,000;<sup>13</sup>
- (d) not affect the quantum of ongoing distributions to creditors under the Second Revised Plan of Arrangement.<sup>14</sup>

ii. *The Monitor approves of the GP Transaction*

20. Courts will general approve a sale where the Monitor is of the view that the sale price and terms are commercially reasonable and satisfactory.<sup>15</sup>

21. The Monitor supports the timing and nature of the GP Transaction as necessary in the circumstances, and accepts that any marketing efforts of the GP Shares would have been contradictory to the spirit and intent of the LP Transaction, likely unsuccessful and wasteful of the realization from the Business.<sup>16</sup> The value is in the Limited Partnership rather than its operating partner, the GP. The transfer of ownership of the GP to the Purchaser consolidates the ownership for the Limited Partnership, as intended in the LP Transaction.

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<sup>10</sup> Martin Affidavit at para 19.

<sup>11</sup> Martin Affidavit at para 16.

<sup>12</sup> Martin Affidavit at para 17(a).

<sup>13</sup> Martin Affidavit at para 20.

<sup>14</sup> Martin Affidavit at para 21.

<sup>15</sup> *North American Tungsten Corporation Ltd. (Re)*, 2016 BCSC 12 at para 30(a) [**TAB 6**].

<sup>16</sup> Martin Affidavit at paras 21-22.



iii. *Consultation of creditors prior to the GP Transaction was not needed, and would have been disproportionate to the importance of the GP Transaction*

22. The Revised Plan was approved by the requisite majorities of shareholders by number and by value at the Creditors' Meeting.<sup>17</sup> The GP Transaction does not affect the percentage recovery for creditors, or remove any commercially valuable assets from the Companies.<sup>18</sup> Given the lack of effects on Creditors, notice to Creditors prior to the GP Transaction, or any type of sale process, would have been disproportionate.

23. In fact, the only possible result of consultation of creditors prior to the GP transaction would have been increased delay and resulting uncertainty, as the Purchasers would have been left for a period of time with an essentially unusable asset in the form of the Limited Partnership units without the benefit of control of the GP through the GP shares.<sup>19</sup>

24. Furthermore, any creditor consultation would have come at a cost of \$10,000 in interest charges per day.<sup>20</sup> Given the need to close the LP Transaction to minimize further interest costs and the lack of any negative effect on creditors, the decision to forego creditor consultation was in the best interests of creditors and had no real negative effects.

25. Even if the GP Transaction did have any negative effect on creditors, those creditors would have been appropriately notified via the service of materials in support of this application, and are at liberty to make their concerns known to the Court in connection with this application.

iv. *The GP Transaction has a positive effect on Creditors, and consideration for the GP Shares is reasonable and fair.*

26. Due to the nominal value of the GP Shares, the GP Transaction has no impact on cash flow or on recovery by creditors.<sup>21</sup>

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<sup>17</sup> Fifth Report of the Monitor, filed July 20, 2021 at para 41.

<sup>18</sup> Martin Affidavit at paras 13, 21.

<sup>19</sup> Martin Affidavit at para 17, 19.

<sup>20</sup> Martin Affidavit at para 20.

<sup>21</sup> Martin Affidavit at para 21.

27. The GP Transaction was necessary to close the LP Transaction, and any further delay with respect to the GP Transaction carried with it the risk of endangering the LP Transaction.<sup>22</sup>
28. Any delay in the LP Transaction would have delayed the ability of the Monitor to begin distributing the Equity Injection Funds. Accordingly, if the GP Transaction was of any effect at all to other interested parties, it was a positive effect, as it avoided incurring ongoing interest charges which would have been due to Crown Capital.<sup>23</sup>
29. The GP Shares are of no value to any party other than the Purchaser, and are only valuable to the purchaser as a result of the legal requirement that a limited partnership have a general partner.<sup>24</sup> COGL has no assets beyond a single limited partnership unit, maintained as a function of its statutorily mandated role as a general partner under the limited partnership agreement. This limited partnership unit was of nominal value prior to the LP Transaction, and is worth even less following Spartan's purchase of an additional 37,500,000 limited partnership units.<sup>25</sup>
30. Accordingly, the GP Transaction's purchase price of \$100.00 represents the fair market value of the GP Shares.<sup>26</sup>

**B. The Extended Stay of Proceedings is Necessary and Appropriate in the Circumstances**

16. Section 11.02(2) of the *CCAA* empowers a court to extend the stay of proceedings granted to a debtor company. In considering whether to grant a stay extension, the Court should consider whether it is appropriate in the circumstances and whether the applicant has been acting in good faith and with due diligence.<sup>27</sup> These considerations underpin any exercise of the Court's discretionary authority under the *CCAA*.<sup>28</sup>

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<sup>22</sup> Martin Affidavit at para 17(c).

<sup>23</sup> Martin Affidavit at paras 17, 21.

<sup>24</sup> Martin Affidavit at para 13.

<sup>25</sup> Martin Affidavit at paras 9, 10(a).

<sup>26</sup> Martin Affidavit at para 13.

<sup>27</sup> *CCAA*, s 11.02(3) [TAB 4].

<sup>28</sup> 9354-9186 *Québec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 49 [*Callidus*] [TAB 7].

17. Appropriateness is assessed by examining whether the order sought advances the remedial policy objectives underlying the CCAA designed to mitigate the potentially catastrophic impacts of insolvency. These objectives include: (a) the timely, efficient and impartial resolution of a debtor's insolvency; (b) preserving and maximizing value of the debtor's assets for the benefit of its stakeholders; (c) ensuring the fair and equitable treatment of claims against the debtor; and (d) the preservation of jobs and communities affected by the company's financial distress.<sup>29</sup>
18. The possibility that one or more creditors may be prejudiced as a result of a stay should not affect the Court's exercise of its authority to grant one. The prejudice to one or more stakeholders must be balanced against, and offset by, the benefit to all stakeholders impacted by the company facilitating a reorganization. Thus, the Court's primary concerns under the CCAA are not for one stakeholder, but for the debtor and all of its stakeholders.<sup>30</sup>
19. Since the granting of the Plan Sanction Order, the Companies, with the oversight and assistance of the Monitor, have worked diligently to:
  - (a) maintain the stability of their operations, manage their liquidity position and monitor cash flows, including by preparing the updated Cash Flow Forecast;
  - (b) continue to operate their business for the benefit of all stakeholders;
  - (b) amend the Revised Plan to accommodate the closing date of September 3, 2021;
  - (c) close the LP Transaction;
  - (d) update the Cash Flow Forecast;
  - (e) finalize outstanding claims; and
  - (e) address Spartan's operational concerns by developing the GP Purchase Agreement and closing the GP Transaction.<sup>31</sup>

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<sup>29</sup> *Callidus* at paras 40, 42 and 50 [TAB 7].

<sup>30</sup> *Re Lehndorff General Partner Ltd*, 17 CBR (3d) 24, 1993 CarswellOnt 183 at paras 5-6 [TAB 8].

<sup>31</sup> Martin Affidavit at paras 6, 7.

20. The Applicants currently seek a stay of proceedings up to and including the earlier of (i) the CCAA Termination Time or (ii) October 31<sup>st</sup>, 2021, which would extend to the Limited Partnership, and their directors and officers. The requested stay extension will allow the Applicants and the Monitor time to finalize the outstanding Indian Oil and Gas Canada (IOGC) and Canada Revenue Agency (CRA) Claims and conclude the distribution of the Equity Injection Funds.<sup>32</sup> The Monitor is in support of the requested stay extension.
21. Since the granting of the Initial Order, the Companies have at all times operated and managed the business and operations of the Limited Partnership's Ferrier Assets in the ordinary course of business.<sup>33</sup> The Companies have been acting in good faith and with due diligence throughout these CCAA proceedings and submit that the requested stay extension is appropriate in the circumstances.<sup>34</sup>

#### **IV. CONCLUSION**

31. Accordingly, for the reasons set out above, the Applicants submit that it is necessary and appropriate in the circumstances to grant the requested relief to approve Sale Approval and Vesting Order and grant the stay extension.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13<sup>TH</sup> DAY OF SEPTEMBER 2021**

**BORDEN LADNER GERVAIS LLP**



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Matti Lemmens  
Solicitors for the Applicants, Calgary Oil & Gas  
Syndicate Group Ltd., Calgary Oil and Gas  
Intercontinental Group Ltd. ((in its own  
capacity and in its capacity as general partner of  
T5 SC Oil and Gas Limited Partnership),  
Calgary Oil and Syndicate Partners Ltd., and  
Petroworld Energy Ltd.

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<sup>32</sup> Martin Affidavit at para 24.

<sup>33</sup> Martin Affidavit at para 6(a).

<sup>34</sup> Martin Affidavit at para 28.

**V. LIST OF AUTHORITIES AND OTHER ATTACHMENTS**

<b>TAB NO.</b>	<b>DOCUMENT DESCRIPTION</b>
1	<i>Royal Bank of Canada v Soundair Corp</i> , 4 OR (3d) 1, 1991 CarswellOnt 7706
2	<i>Grafton-Fraser v Cadillac</i> , 2017 ONSC 2496
3	<i>Canwest Global Communications Corp.</i> , 2010 ONSC 2870
4	<i>Companies Creditors Arrangement Act</i> , RSC 1985, c. C-36
5	<i>Re Sanjel Corp</i> , 2016 ABQB 257
6	<i>North American Tungsten Corporation Ltd. (Re)</i> , 2016 BCSC 12
7	<i>9354-9186 Québec Inc v Callidus Capital Corp</i> , 2020 SCC 10
8	<i>Re Lehndorff General Partner Ltd</i> , 17 CBR (3d) 24, 1993 CarswellOnt 183

**TAB 1**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** [PCAS Patient Care Automation Services Inc., Re](#) | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205  
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,  
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

**ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION  
(respondent), CANADIAN PENSION CAPITAL LIMITED (appellant)  
and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)**

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991

Judgment: July 3, 1991

Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

*J. T. Morin, Q.C.* , for Air Canada.

*L.A.J. Barnes* and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.

*S.F. Dunphy* and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.

*W.G. Horton* , for Ontario Express Limited.

*N.J. Spies* , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Debtors and creditors

**VII Receivers**

**VII.6** Conduct and liability of receiver

**VII.6.a** General conduct of receiver

**Headnote**

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

**Held:**

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

#### Table of Authorities

##### Cases considered:

*Beauty Counsellors of Canada Ltd., Re* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — referred to

*British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — referred to

*Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — referred to

*Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — applied

*Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) (C.A.) — referred to

*Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — referred to

*Selkirk, Re* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — referred to

##### Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

#### Galligan J.A. :

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air



10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

### **1. Did the Receiver Act Properly in Agreeing to Sell to OEL?**

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

### **1. Did the Receiver make a sufficient effort to get the best price and did it act providently?**

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

**TAB 2**

2017 ONSC 2496

Ontario Superior Court of Justice [Commercial List]

Grafton-Fraser Inc. v. Cadillac Fairview Corp.

2017 CarswellOnt 6473, 2017 ONSC 2496, 279 A.C.W.S. (3d) 18

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRAFTON-FRASER INC.

GRAFTON-FRASER INC. (Applicant) and CADILLAC  
FAIRVIEW CORPORATION LIMITED, ET AL. (Respondents)

L.A. Pattillo J.

Heard: April 20, 2017

Judgment: May 2, 2017

Docket: CV-17-11677-00CL

Counsel: Stuart Brotman, Dylan Chochla, for Applicant  
Lily Coodin, for Cadillac Fairview Corporation Limited  
J. Dietrich, M. Sassi, for Monitor  
Gordon Meiklejohn, for Trade & Global Inc.  
N. Renner, for Purchaser and DIP Lender  
Linda Galessiere, for Various Landlords  
Evan Cobb, for CIBC

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

**Headnote**

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

Debtor company obtained order for protection pursuant to [Companies' Creditors Arrangement Act \(CCAA\)](#) — Order appointed monitor which was then authorized to carry out solicitation and sale process for debtor company's business and assets — 174 potential interested parties were invited to participate in bid process — Successful bidder agreed to purchase debtor company's business and assets on going concern "as is, where is" basis and to offer employment on similar terms to no fewer than 1,100 of debtor company's employees with short time-frame to closing date — Proposed transaction was supported by monitor and by debtor company's two primary secured creditors, as well as all stakeholders with notice with exception of one unsecured creditor who objected to transaction as it affected unsecured creditors — Debtor company brought application for order approving sale of assets — Application granted — Transaction was beneficial to stakeholders as it provided for continuation of substantial portion of debtor company's business, thereby assuring customer for go-forward suppliers, tenant for landlords of 139 retail stores, and employment for majority of employees — While transaction would result in some of unsecured creditors not being paid, likely alternative was liquidation which would result in no recovery for unsecured creditors generally — In context of sale of company's business under [CCAA](#) there was no requirement that creditors be treated equally — Proposed sale was best opportunity for maximizing recovery for creditors and providing greatest benefit to all stakeholders including landlords, employees, suppliers

etc — Market was fully canvassed and all likely bidders were given opportunity to bid on assets — Transaction represented highest and best offer for assets and short time-frame to closing eliminated ongoing costs of CCAA proceeding.

#### Table of Authorities

##### Cases considered by L.A. Patillo J.:

*Nelson Education Ltd., Re* (2015), 2015 ONSC 5557, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) — followed

*Nortel Networks Corp., Re* (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) — considered

*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

##### Statutes considered:

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

Generally — referred to

s. 36 — considered

s. 36(3) — considered

APPLICATION by debtor company for order approving sale of its assets pursuant to Companies' Creditors Arrangement Act.

#### L.A. Patillo J.:

##### Introduction

1 This is an application by Grafton-Fraser Inc. ("Grafton") for, among other things, an order approving the sale of its assets as set out in an asset purchase agreement dated January 24, 2017 with 1104307 B.C. Ltd. (now GSO GF Acquisition B.C. Ltd.) (the "Purchaser") pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") (the "Transaction").

2 The application is supported by the Third Report of Richter Advisory Group Inc. in its capacity as monitor for Grafton (the "Monitor").

3 The application is either agreed to or unopposed by all of the stakeholders with notice save and except for Tradex Global Inc. ("Tradex") who is an unsecured creditor and who objects to the Transaction as it affects the unsecured creditors.

4 For the reasons that follow, I approve the Transaction and grant the relief requested by Grafton. Notwithstanding that the Transaction does not treat all of Grafton's unsecured creditors equally, in my view, it meets the principles set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137, 7 C.B.R. (3d) 1 (Ont. C.A.) and s. 36 of the CCAA.

##### Background

5 On January 25, 2017, Grafton obtained an order from this court granting it protection pursuant to the CCAA (the "Order"). Among other things, the Order appointed the Monitor and granted Grafton the authority to enter into amended and restated forbearance agreements with its two primary and secured lenders, Canadian Imperial Bank of Commerce ("CIBC") and GSO Capital Partners LP ("GSO") as agent for the GSO Lenders.

6 Grafton is a leading retailer of men's clothing which, prior to the Order operated 158 stores in Canada under various names including "Tip Top Tailors" and "George Richards Big and Tall".

7 On January 30, 2017, the court issued a further order approving, among other things, the proposed sale and investment solicitation process for Grafton's business and assets to be carried out with the Monitor's assistance (the "SISP") and authorizing Grafton to enter into the Agreement which was to serve as the minimum bid under the SISP (the "Stalking Horse APA"). The Purchaser is a party related to GSO.

## Position of the Parties

17 Tradex submits that the Transaction, as structured, should not be approved. Rather, in order to ensure that all unsecured creditors are treated equally, the Purchaser must be required to make the \$5.2 million and any other amounts it has committed to pay to Grafton's unsecured creditors, not just to a select group of unsecured creditors, but *pari passu* to all unsecured creditors.

18 Grafton has agreed, for the purposes of this motion only, and without admitting any liability, to accept that Tradex has an unsecured claim against it. It submits that the Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of its business and should be approved. Further, there is no requirement under the CCAA that creditors be treated equally.

## Analysis

19 Section 36 of the CCAA provides that the court may authorize the disposition of assets of a debtor company outside the ordinary course of business. The factors to be considered by the court in approving such a disposition were first set out by our Court of Appeal in *Soundair* and are now largely set out in s. 36(3) of the CCAA which provides:

s.36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- b) whether the monitor approved the process leading to the proposed sale or distribution;
- c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- d) the extent to which the creditors were consulted;
- e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

20 Considering the above factors in respect of the Transaction and the events leading up to it, I find the evidence establishes:

- a) the SISP was reasonable in the circumstances and was approved by the court;
- b) the Monitor approved the SISP and assisted Grafton in carrying out its terms;
- c) the Monitor has confirmed in its Third Report that the Transaction would be substantially more beneficial to Grafton's creditors, as compared to the alternatives, which may result in the liquidation of Grafton's assets;
- d) the Monitor and Grafton's two primary secured creditors, CIBC and GSO, are each supportive of the Transaction;
- e) the Monitor is of the view that the Transaction represents the best opportunity to maximize recoveries for creditors of Grafton and provides the greatest benefit to all stakeholders (including landlords, employees, customers, go-forward suppliers, etc.), as it results in the continuation of Grafton's business;
- f) that further marketing of Grafton's assets would not likely result in greater realizations as the market has been fully canvassed and all likely bidders have already been provided the opportunity to bid on the assets;
- g) the Transaction represents the highest and best offer for the Purchased Assets and the short time-frame to closing will eliminate ongoing costs of the CCAA proceeding; and

**TAB 3**

2010 ONSC 2870

Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 3509, 2010 ONSC 2870, 189 A.C.W.S. (3d) 598, 68 C.B.R. (5th) 233

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

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

Pepall J.

Judgment: May 21, 2010

Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Betsy Putnam for Applicant, LP Entities  
Mario Forte for Special Committee of the Board of Directors  
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.  
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders Syndicate  
M.P. Gottlieb, J.A. Swartz for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders  
Robert Chadwick, Logan Willis for 7535538 Canada Inc.  
Deborah McPhail for Superintendent of Financial Services (FSCO)  
Thomas McRae for Certain Canwest Employees

Subject: Insolvency; Estates and Trusts

**Related Abridgment Classifications**

Bankruptcy and insolvency

XIV Administration of estate

XIV.6 Sale of assets

XIV.6.b Sale by tender

XIV.6.b.ii Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.i "Fair and reasonable"

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous  
[Companies' Creditors Arrangement Act](#) — Sale and investor solicitation process — In earlier order, court approved support agreement between LP entities and senior lenders (support transaction) and commencement of sale and investor solicitation process (SISP) — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — AHC transaction would be implemented pursuant to plan of compromise or arrangement — LP entities brought application for order authorizing them to enter into asset purchase agreement based on AHC bid and conditionally sanctioning support transaction, among other relief — Application

granted — AHC transaction was approved — Proposed disposition of assets met criteria in s. 36 of *Companies' Creditors Arrangement Act* and common law — Process was reasonable — Sufficient efforts were made to attract best possible bid — AHC bid was better than support transaction — Effect of proposed sale on interested parties was positive.

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

Procedure — Court approved commencement of sale and investor solicitation process (SISP) in earlier order — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — LP entities brought application for order approving amended claims procedure, authorizing them to call meeting of unsecured creditors to vote on AHC plan, and amending SISP procedures so LP entities could advance AHC transaction, among other relief — Application granted — Requested claims procedure order was approved — Because AHC plan was approved, scope of process had to be expanded to ensure as many creditors as possible could participate in meeting to consider AHC plan — Meeting order to convene meeting of unsecured creditors to vote on AHC plan was granted — On consent, SISP was amended to extend date for closing of AHC transaction and to permit proposed dual track procedure — Amendments were warranted as practical matter and to procure best available going concern outcome for stakeholders and LP entities.

Bankruptcy and insolvency --- *Companies' Creditors Arrangement Act* — Arrangements — Approval by court — "Fair and reasonable"

In earlier order, court approved support agreement between LP entities and senior lenders (support transaction) and commencement of sale and investor solicitation process (SISP) — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — AHC transaction would be implemented pursuant to plan of compromise or arrangement — LP entities brought application for order authorizing them to enter into asset purchase agreement based on AHC bid and conditionally sanctioning support transaction, among other relief — Application granted — It was prudent for LP entities to simultaneously advance AHC transaction and support transaction — Support transaction was conditionally sanctioned — Excess of required majorities of senior lenders voted in favour of support transaction — Absent closing of AHC transaction, support transaction was fair and reasonable as between LP entities and creditors — There were no available commercial going concern alternatives to support transaction — There had been strict compliance with statutory requirements.

#### Table of Authorities

##### Cases considered by *Pepall J.*:

*Canadian Airlines Corp., Re* (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — followed

*Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

*Canadian Airlines Corp., Re* (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

*Canadian Airlines Corp., Re* (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

##### Statutes considered:

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

Generally — referred to

s. 6 — referred to

s. 6(3) — referred to

s. 6(5) — referred to

s. 6(6) — referred to

s. 11 — referred to



8 Certain liabilities are excluded including pre-filing liabilities and restructuring period claims, certain employee related liabilities and intercompany liabilities between and among the LP Entities and the CMI Entities. Effective as of the closing date, Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to 10% of the non-unionized part-time or temporary employees employed by the LP Entities.

9 The AHC Bid contemplates that the transaction will be implemented pursuant to a plan of compromise or arrangement between the LP Entities and certain unsecured creditors (the "AHC Plan"). In brief, the AHC Plan would provide that Opco LP would acquire substantially all of the assets of the LP Entities. The Senior Lenders would be unaffected creditors and would be paid in full. Unsecured creditors with proven claims of \$1,000 or less would receive cash. The balance of the consideration would be satisfied by an unsecured demand note of \$150 million less the amounts paid to the \$1,000 unsecured creditors. Ultimately, affected unsecured creditors with proven claims would receive shares in Holdco and Holdco would apply for the listing of its common shares on the Toronto Stock Exchange.

10 The Monitor recommended that the AHC Asset Purchase Agreement based on the AHC Bid be authorized. Certain factors were particularly relevant to the Monitor in making its recommendation:

- the Senior Lenders will received 100 cents on the dollar;
- the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;
- the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;
- the AHC Bid contemplates that the transaction will be implemented through a Plan under which \$150 million in cash or shares will be available for distribution to unsecured creditors;
- unlike the Support Transaction, there is no option *not* to assume certain pension or employee benefits obligations.

11 The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the Bid was credible, reasonably certain and financially viable. The LP Entities agreed with that assessment. All appearing either supported the AHC Transaction or were unopposed.

12 Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested.

13 The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.*<sup>1</sup> decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions

of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

### ***Claims Procedure Order and Meeting Order***

14 Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

### ***SISP Amendment***

15 It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The SISP procedures must be amended. The AHC Transaction which is to be effected through the Ad Hoc Committee Plan cannot be completed within the sixty days contemplated by the SISP. On consent of the Monitor, the LP Administrative Agent, the Ad Hoc Committee and the LP Entities, the SISP is amended to extend the date for closing of the AHC Transaction and to permit the proposed dual track procedure. The proposed amendments to the SISP are clearly warranted as a practical matter and so as to procure the best available going concern outcome for the LP Entities and their stakeholders. Paragraph 102 of the Initial Order contains a comeback clause which provides that interested parties may move to amend the Initial Order on notice. This would include a motion to amend the SISP which is effectively incorporated into the Initial Order by reference. The Applicants submit that I have broad general jurisdiction under [section 11 of the CCAA](#) to make such amendments. In my view, it is unnecessary to decide that issue as the affected parties are consenting to the proposed amendments.

### ***Dual Track and Sanction of Senior Lenders' CCAA Plan***

16 In my view, it is prudent for the LP Entities to simultaneously advance the AHC Transaction and the Support Transaction. To that end, the LP Entities seek approval of a conditional sanction order. They ask for conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.

17 The Senior Lenders' meeting was held January 27, 2010 and 97.5% in number and 88.7% in value of the Senior Lenders holding Proven Principal Claims who were present and voting voted in favour of the Senior Lenders' Plan. This was well in excess of the required majorities.

18 The LP Entities are seeking the sanction of the Senior Lenders' [CCAA](#) Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' [CCAA](#) Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' [CCAA](#) Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' [CCAA](#) Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the [CCAA](#). As such, the three part test set forth in the *Canadian Airlines Corp., Re*<sup>2</sup> has been met. Additionally, there has been compliance with [section 6 of the CCAA](#). The Crown, employee and pension claims described in section 6 (3),(5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

### ***Conclusion***

**TAB 4**

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

**Most Recently Cited in:** *Wiebe v. Weinrich Contracting Ltd.*, 2021 ABCA 242, 2021 CarswellAlta 1576, 90 C.B.R. (6th) 1, [2021] A.W.L.D. 2812, 333 A.C.W.S. (3d) 475 | (Alta. C.A., Jul 2, 2021)

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

S 11.02

Currency

**11.02**

**11.02(1) Stays, etc. — initial application**

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

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

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**11.02(3) Burden of proof on application**

The court shall not make the order unless

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

**11.02(4) Restriction**

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

**Amendment History**

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

**Currency**

Federal English Statutes reflect amendments current to June 21, 2021

Federal English Regulations Current to Gazette Vol. Extra 155:6 (August 16, 2021)

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End of Document

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Canada Federal Statutes

Companies' Creditors Arrangement Act

Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]

Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

**Most Recently Cited in:** *Canada v. Canada North Group Inc.*, 2021 SCC 30, 2021 CSC 30, 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, EYB 2021-397318, 333 A.C.W.S. (3d) 23, 2021 D.T.C. 5080, 2021 D.T.C. 5081 | (S.C.C., Jul 28, 2021)

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

s 36.

Currency

**36.**

**36(1) Restriction on disposition of business assets**

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

**36(2) Notice to creditors**

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

**36(3) Factors to be considered**

In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**36(4) Additional factors — related persons**

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**36(5) Related persons**

For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

**36(6) Assets may be disposed of free and clear**

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**36(7) Restriction — employers**

The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

**36(8) Restriction — intellectual property**

If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

**Amendment History**

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269

**Currency**

Federal English Statutes reflect amendments current to June 21, 2021

Federal English Regulations Current to Gazette Vol. Extra 155:6 (August 16, 2021)

**TAB 5**



2016 ABQB 257  
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

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

In the Matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Heard: April 28, 2016

Judgment: May 16, 2016

Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

**Headnote**

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

Sale of assets — Debtor companies were severely impacted by economic downturn, and breached covenants under credit agreement with secured creditors — Debtors agreed with secured creditors to implement Sales and Investment Solicitation Process (SISP), which resulted in proposed asset sales that would provide no recovery for unsecured creditors — Debtors were granted Initial Order under [Companies' Creditors Arrangement Act](#) — Debtors brought application for order approving sales transactions generated through SISP — Trustee of bonds brought application for order dismissing debtors' application, and allowing bondholders to propose plan of arrangement, among other relief — Debtors' application granted; trustee's application dismissed — As result of enactment of s. 36 of Act, there was no jurisdictional impediment to sale of assets where such sales met requisite tests, even in absence of plan of arrangement — Fact that SISP occurred before seeking protection under Act did not amount to abuse of Act — Despite speed and economic environment, SISP was reasonable, competitive and robust, and generated range of bids significantly above liquidation value — Allegations of bad faith were not supported by evidence — Bondholders were aware of SISP and intention to obtain protection under Act, and were not improperly denied access to information — Factors in s. 36(3) of Act favoured approval of proposed sales — Further allegations raised after hearing were duly investigated by monitor and shown to be groundless [Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36](#).

**Table of Authorities**

**Cases considered by B.E. Romaine J.:**

*AbitibiBowater inc., Re* (2010), 2010 QCCS 1742, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220 (C.S. Que.) — considered  
*Algoma Steel Inc., Re* (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to  
*Bloom Lake, g.p.l., Re* (2015), 2015 QCCS 1920, 2015 CarswellQue 4072, 27 C.B.R. (6th) 1 (C.S. Que.) — considered

### III. Applicable Law

54 Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

- (a) whether the process leading to the proposed sale was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale;
- (c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale on creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

55 In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISF was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

56 Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

- a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?
- b) Were the interests of all parties considered?
- c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?
- d) Was there unfairness in the working out of the process?

*Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (Ont. C.A.) at para 20.

57 Gascon, J. (as he then was) suggested in *AbitibiBowater inc.*, Re, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

- a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and
- b) the weight to be given to the recommendation of the monitor.

58 As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

### IV. Analysis

59 The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

78 I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

79 Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

81 These are serious allegations, but they are not supported by the evidence.

82 As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

83 These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

85 The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

86 The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate. It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

**TAB 6**

2016 BCSC 12  
British Columbia Supreme Court

North American Tungsten Corp., Re

2016 CarswellBC 20, 2016 BCSC 12, [2016] B.C.W.L.D. 625, 262 A.C.W.S. (3d) 292, 33 C.B.R. (6th) 45

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd., Petitioner

Butler J.

Heard: November 16-17, 2015

Judgment: January 7, 2016

Docket: Vancouver S154746

Counsel: John R. Sandrelli, Tevia R.M. Jeffries, for Petitioner

Kibben M. Jackson, Fergus McDonnell, for Monitor, Alvarez & Marsal Canada Inc.

William E.J. Skelly, Lisa C. Hiebert, for Callidus Capital Corporation

Mary Buttery, H. Lance Williams, for Government of Northwest Territories

Jonathan McLean, Angela L. Crimeni, for Wolfram Bergbau and Hütten AG

Kieran E. Siddall, Scott Boucher, for Global Tungsten & Powders Corp.

Gordon G. Plottel, for Finning International

Matthew Nied, for Amalgamated Mining Inc.

Jason W. Levine, Melissa A. Nicolls, for Her Majesty the Queen, Department of Indian Affairs & Northern Development Canada

Jose A. Delgado, for Driving Force Inc.

Kenneth Landa, for Her Majesty the Queen in Right of Canada

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.3 Arrangements](#)

[XIX.3.b Approval by court](#)

[XIX.3.b.i "Fair and reasonable"](#)

**Headnote**

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Government of Northwest Territories (NWT) held security for reclamation obligations of debtor, including first registered charge over mining property — NWT sought to sell mining claim property belonging to debtor by way of asset purchase agreement (APA) — Application was opposed by certain creditors who held charge on mining property second to that of NWT who claimed that acceptance of NWT bid would turn contingent liability of debtor into hard asset — NWT brought application for order approving sale of mining claim property belonging to debtor company to it by way of APA pursuant to \$4.5 million credit bid — Application granted — Debtor's reclamation obligations were due and owing — Whether bid was cash or NWT's credit bid, purchase price must first satisfy outstanding [Companies' Creditors Arrangement Act \(CCAA\)](#) charges and then be applied against NWT security — Under current market conditions, there was no possibility for other creditors to recover on

their security — Highest offer received by monitor for mining property was \$500,000 less than NWT credit bid — Effort made to obtain best price for mining property was more than sufficient — Consideration received was fair and reasonable, taking into account market value of mining property — Allocation of CCAA charges were to be made by monitor.

**Table of Authorities**

**Cases considered by *Butler J.*:**

*Comstock Canada Ltd., Re* (2013), 2013 CarswellOnt 18611, 2014 ONSC 493 (Ont. S.C.J. [Commercial List]) — considered

*Hunjan International Inc., Re* (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — referred to

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 4838, 56 C.B.R. (5th) 224 (Ont. S.C.J. [Commercial List]) — considered

*TBS Acquireco Inc., Re* (2013), 2013 ONSC 4663, 2013 CarswellOnt 9481, 3 C.B.R. (6th) 261 (Ont. S.C.J. [Commercial List]) — referred to

*White Birch Paper Holding Co., Re* (2010), 2010 QCCS 4915, 2010 CarswellQue 10954, 72 C.B.R. (5th) 49 (C.S. Que.) — followed

**Statutes considered:**

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

Generally — referred to

s. 36 — considered

s. 36(3) — considered

*Waters Act*, S.N.W.T. 2014, c. 18

Generally — referred to

**Regulations considered:**

*Waters Act*, S.N.W.T. 2014, c. 18

*Waters Regulations*, N.W.T. Reg. R-019-2014

s. 11 — considered

APPLICATION by Government of Northwest Territories by way of asset purchase agreement.

***Butler J.*:**

1 On November 16 and 17, 2015, I heard a number of applications in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding. Global Tungsten & Powders Corp. and Wolfram Bergbau and Hütten AG (collectively the "Tungsten Purchasers") applied to cancel supply agreements with North American Tungsten Corporation (the "Company"). The Company applied for the following orders:

- a) Extension of the Stay of Proceedings to March 31, 2016;
- b) Enhancement of the powers of the Monitor during the extension;
- c) A second administration charge to secure fees and disbursements for the Monitor and counsel during the extension; and
- d) Lifting the stay of proceedings to permit redundant equipment to be released to security holders.

2 These applications were not contentious. The Monitor noted that the Company and its management continued to act in good faith and with due diligence in relation to the restructuring proceedings and recommended that the Court grant these orders. Following submissions of counsel and some minor changes to the proposed terms, I granted those orders.

3 At the same hearing, the Government of the Northwest Territories ("GNWT") brought an application for an order approving the sale of the Mactung mining claim property ("Mactung"), belonging to the Company, to it by way of an asset purchase agreement (the "APA") pursuant to a \$4.5 million credit bid. The application was opposed by the Tungsten Purchasers. Callidus

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

...

29 As set out in s. 36(3), the list of factors is not exhaustive; the court must consider all of the circumstances to determine whether the proposed asset sale is fair and reasonable. The issue of fairness focuses on the process utilized to attempt to obtain the best price for the asset for the benefit of creditors. The question of reasonableness focuses on the consideration to be received. The duties of a court when considering a proposed asset sale were succinctly summarized by Morawetz J. in *Nortel* at para. 35:

[35] The duties of the court in reviewing a proposed sale of assets are as follows:

- 1) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;
- 2) It should consider the interests of all parties;
- 3) It should consider the efficacy and integrity of the process by which offers have been obtained; and
- 4) It should consider whether there has been unfairness in the working out of the process

30 When I consider all of the factors set out in s. 36(3) and the duty of the court as described in *Nortel*, I am satisfied that I should exercise my discretion to approve the sale of the Mactung property to the GNWT. My reasons for doing so include the following:

a) Courts will generally approve a sale where the Monitor is of the view that the sale price and terms are commercially reasonable and satisfactory: see, for example, *Comstock Canada Ltd., Re* (2013), 2014 ONSC 493 (Ont. S.C.J. [Commercial List]). Here, the Monitor stated in its Eleventh Report:

10.8 The purchase price offered by GNWT of \$4.5 million is greater than any purchase price offered pursuant to any of qualified bids received in the Amended SISP. The purchase price is also vastly less than the estimated gross amount due to GNWT and secured against the Mactung assets, estimates of which range from approximately \$15 to \$28 million before taking into account cash security held by the GNWT.

10.9 After considering the matters set out above, and after discussions with the Company, GNWT and Callidus, the Monitor is satisfied that (i) the purchase price under the Mactung APA is superior to any purchase price contained in the three qualified bids, and (ii) subject to one comment below regarding GNWT's entitlement to subrogation, the terms of the Mactung APA are commercially reasonable. Accordingly, the Monitor supports GNWT's application for the Mactung Credit Bid Order.

b) The SISP was a thorough sales process as a result of which a large number of potential purchasers were identified and contacted. Detailed confidential information regarding the Cantung Mine and the Mactung property was provided to 18 interested parties. Site visits were arranged and management presentations were offered to interested parties. The depth

**TAB 7**



**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Port Capital Development \(EV\) Inc. v. 1296371 B.C. Ltd.](#) | 2021 BCCA 319, 2021 CarswellBC 2650 | (B.C. C.A., Aug 20, 2021)

2020 SCC 10, 2020 CSC 10

Supreme Court of Canada

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

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

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

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

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

Heard: January 23, 2020

Judgment: May 8, 2020

Docket: 38594

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

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

Neil A. Peden, for 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, Clifton P. Prophet, for Respondent, Callidus Capital Corporation

Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.

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

Subject: Civil Practice and Procedure; Insolvency

## Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.e Miscellaneous

### Headnote

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

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

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

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

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

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

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

**Held:** The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): [Section 11 of the CCAA](#) empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising [CCAA](#) proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the [CCAA](#) proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the [CCAA](#) that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from [s. 11 of the CCAA](#), which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the [CCAA](#). Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's [CCAA](#) proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the [CCAA](#) protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in [s. 11.2\(4\) of the CCAA](#) individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the [CCAA](#), and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

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

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

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

**Arrêt:** Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple,

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

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

#### Table of Authorities

##### Cases considered by *Wagner C.J.C., Moldaver J.:*

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — referred to

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

*Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

*BA Energy Inc., Re* (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

*Blackburn Developments Ltd., Re* (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

*Boutiques San Francisco inc., Re* (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

*Bridging Finance Inc. v. Béton Brunet 2001 inc.* (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

*Canada Trustco Mortgage Co. v. R.* (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada*) 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada*) 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.*) 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

*Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

*Caterpillar Financial Services Ltd. v. 360networks Corp.* (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

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

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

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

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

#### IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

#### V. Analysis

##### A. Preliminary Considerations

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

##### (1) The Evolving Nature of *CCAA* Proceedings

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

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving

and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

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

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

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

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

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating *CCAAs*. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.<sup>3</sup> Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed,

in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

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

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

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

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

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

### Good faith

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

### Good faith — powers of court

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

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



**TAB 8**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** *Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp.* | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183

Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

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

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

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison and Melissa J. Kennedy*, for applicants.

*L. Crozier*, for Royal Bank of Canada.

*R.C. Heintzman*, for Bank of Montreal.

*J. Hodgson, Susan Lundy and James Hilton*, for Canada Trustco Mortgage Corporation.

*Jay Schwartz*, for Citibank Canada.

*Stephen Golick*, for Peat Marwick Thorne \* Inc., proposed monitor.

*John Teolis*, for Fuji Bank Canada.

*Robert Thorton*, for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.2 Initial application](#)

[XIX.2.b Grant of stay](#)

[XIX.2.b.i General principles](#)

**Headnote**

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — [Companies' Creditors Arrangement Act](#) — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the [Companies' Creditors Arrangement Act](#) ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the [CCAA](#).

**Held:**

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the [CCAA](#) and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement [s. 11 of the CCAA](#) when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the [CCAA](#). However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement [s. 11](#) and grant the stay.

While the provisions of the [CCAA](#) allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

**Table of Authorities**

**Cases considered:**

*Amirault Fish Co., Re*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to

*Associated Investors of Canada Ltd., Re*, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — referred to

*Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — referred to

*Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 [H.C.] — referred to

*Feifer v. Frame Manufacturing Corp., Re*, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — referred to

*Fine's Flowers Ltd. v. Fine's Flowers (Creditors of)* (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — referred to

*Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — referred to

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — referred to

*Inducon Development Corp. Re* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — referred to

*International Donut Corp. v. 050863 N.B. Ltd.* (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — considered

*Keppoch Development Ltd., Re* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — referred to

lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.); *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

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

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

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)*, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments*

*Inc. v. Toronto Dominion Bank*, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act*, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.). It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.*, supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.*, supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 320 where Gibbs J.A. for the court stated: