Clerk's Stamp

OURT FILE NUMBER:	2101-
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	CROWN CAPITAL PARTNER FUNDING, LP, by its general partner CROWN CAPITAL LP PARTNER FUNDING INC.
DEFENDANTS	T5 SC OIL AND GAS LIMITED PARTNERSHIP, by its general partner, CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD. (formerly TRIPLE FIVE INTERCONTINENTAL GROUP LTD.), CALGARY OIL AND GAS INTERCONTINENTAL GROUP LTD., CALGARY OIL AND SYNDICATE PARTNERS LTD. (formerly T5 ENERGY PARTNERS LTD.), and NADER GHERMEZIAN
DOCUMENT:	**BENCH BRIEF OF THE APPLICANT FOR AN INTERIM RECEIVERSHIP ORDER AND RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100, 222 - 3rd Ave SW Calgary, AB T2P 0B4 Telephone: 403.693.5420/4347 Fax: 403.508.4349 Attention: Ryan Zahara/Catrina Webster File: 0024563.00166

TABLE OF CONTENTS

PART I – INTRODUCTION 3
PART II – STATEMENT OF FACTS 5
PART III - ISSUE 10
PART IV – LAW AND ARGUMENT 10
A. CCAA Relief is Inappropriate in the Circumstances 10
i. Loss of Faith in Management 17
ii. The Borrower only has one Asset 18
iii. Applicants Lack Sufficient Funds or Interim Financing 19
iv. Certain of the Applicants do not satisfy the requirements for CCAA protection 21
v. The Proposed Charges are Inappropriate 22
B. Appointment of a Receiver is Necessary 22
i. Interim Receiver is Appropriate 22
ii. COVID-19 Pandemic 24
PART V – RELIEF SOUGHT 26
LIST OF AUTHORITIES 27

PART I – INTRODUCTION

1. This brief is submitted on behalf of Crown Capital Partner Funding, LP, by its General Partner Crown Capital LP Partner Funding Inc. ("**Crown Capital**" or the "**Lender**") in support of Crown Capital's Application (the "**Receivership Application**") for an Interim Receivership Order and a Receivership Order over the property of: (i) T5 SC Oil and Gas Limited Partnership, by its general partner, Calgary Oil and Gas Intercontinental Group Ltd. ("**T5 LP**" or the "**Borrower**"); (ii) Calgary Oil and Gas Intercontinental Group Ltd. ("**Intercontinental**" or the "**General Partner**"); and (iii) the collateral of Calgary Oil and Syndicate Partners Ltd. ("**Syndicate Partners**") (as defined below).

2. This brief is also submitted in opposition to the Originating Application (the "**CCAA Application**") filed by Calgary Oil & Gas Syndicate Group Ltd. ("**Syndicate Group**"), Intercontinental (in its own capacity and in its capacity as general partner of T5 LP), Syndicate Partners and Petroworld Energy Ltd. ("**Petroworld**"; together with Syndicate Group, Intercontinental and Syndicate Partners, the "**Applicants**") for relief under the *Companies' Creditors Arrangement Act* ("the "**CCAA**").[1]

3. The Borrower's financial hardship was not triggered by the recent downturn in commodity prices due to the COVID-19 pandemic, but rather, due to poor management and significantly lower than forecasted production from its assets as a result of, among other things, poor planning and execution by management of unsuccessful capital and drilling programs. The Lender has lost faith in management of the Borrower and does not believe that management has the expertise or experience necessary to continue to manage the Borrower and its ongoing operations or to restructure its affairs through an overly complicated and convoluted CCAA proceeding.

---

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"), at **TAB 1**.

4. The Lender's concern is that the Borrower will incur significant restructuring costs during a critical time where the value of its primary asset is steadily declining and has lower than estimated production. Any delay to the commencement of the sales process may jeopardize the ability of the Lender to recover all of the amounts advanced to the Borrower and is likely to negate any recovery for other stakeholders of the Borrower.

5. The Applicants, in their evidence filed before this Court, have failed to provide any basis on which this Court could conclude that it is appropriate to grant protection under the CCAA. The Applicants primarily seek relief from the terms of a Forbearance Agreement that T5 LP and Intercontinental entered into in October of 2020 with Crown Capital, including delaying a sales process they have already commenced, and advise that they hope commodity pricing will improve while they consider "strategic alternatives".

6. The evidence presented to this Court does not demonstrate that the Applicants have even the "germ" of a plan or will be able to formulate any viable exit strategy that would allow them to successfully restructure their affairs. The Applicants are simply attempting to forestall a sales process of their only valuable asset, that they have already commenced because they believes their assets might have more value at some indeterminate point in time in the future. This evidence is insufficient to obtain protection under the CCAA.

7. Three of the applicants, Syndicate Group, Syndicate Partners and Petroworld (the "**Other Applicants**") under the CCAA Application do not have any ongoing business operations or any employees, they have not provided any evidence that those entities satisfy the test for relief under the CCAA or that they are insolvent, and they seek CCAA protection on the basis that they are: either (i) holders of limited partnership units or other equity associated with the Borrower or the General Partner; or (ii) provide some management and office services to the Borrower.

8. Crown Capital submits that the Other Applicants are separate legal entities that have proposed to obtain a priority charge for services provided to them through any CCAA proceedings commenced that can only be satisfied from the value of the assets of the Borrower. There is no basis upon which additional restructuring fees and costs associated with the Other Applicants should be borne by the assets of the Borrower. The Lender, who is the stakeholder with the primary economic interest in the assets, should not be required to fund a restructuring of the Other Applicants.

9. It is more appropriate and in the best interest of all stakeholders to appoint FTI Consulting Canada Inc. ("**FTI**") as an Interim Receiver under section 47 of the *Bankruptcy and Insolvency Act* (the "**BIA**"),[2] and then as Receiver under section 243 of the BIA, over the property of the Borrower and the General Partner to continue with the existing sales process in order to monetize the assets in an effective and efficient manner.

PART II – STATEMENT OF FACTS

10. Crown Capital relies on the facts set out in the Affidavit of Adam Jenkins, sworn on behalf of Crown Capital on February 9, 2021 (the "**Jenkins Affidavit**") and the Supplemental Affidavit of Adam Jenkins sworn on February 9, 2021.[3] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Jenkins Affidavit.

11. Crown Capital most recently advanced funds to the Borrower pursuant to an amended and restated loan agreement dated October 31, 2019 between Crown Capital and the Borrower (the "**Loan Agreement**").[4]

12. Crown Capital has no contractual relationship with Syndicate Group or Petroworld. However, Syndicate Group is a holding company holding 100% of the voting shares in

[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, at s. 47 (the "**BIA**"), at **TAB 2**.
[3] The Affidavit of Adam Jenkins, sworn February 9, 2021 (the "**Affidavit of A. Jenkins**") and Supplemental Affidavit of Adam Jenkins sworn on February 9, 2021.
[4] Affidavit of A. Jenkins, at para. 10.

Syndicate Partners and Petroworld provides office space, office supplies, and office management support to Intercontinental.[5]

13. As of February 8, 2021, the total indebtedness of the Borrower to Crown Capital pursuant to the Loan Agreement and a Production Payment Agreement is $30,168,624.60 (collectively, the "**Outstanding Indebtedness**") with interest accruing thereafter at the default rates set out in the Loan Agreement and the Production Payment Agreement, plus all legal and other costs and expenses incurred by Crown Capital in respect of the Loan Agreement on a solicitor and own client (full-indemnity) basis.[6]

The Security and the Guarantees

14. The evidence relating to the Security and Guarantees is set out in paragraphs 18-26 of the Jenkins Affidavit.

History of the Relationship between the Borrower and the Lender

15. In support of the original loan agreement and the amount of funds provided thereunder, the Borrower provided a budget and forecast on July 13, 2018 (the "**July 2018 Forecast**") to the Lender.[7]

16. The Borrower utilized all of the funds advanced from the original loan agreement to repay its existing secured indebtedness of $7,200,000 with the remainder being used to complete a two-well drilling program. The Borrower subsequently advised the Lender towards the end of 2018 that it required additional funds in order to pay for the costs incurred in respect of the drilling program and a compression project. The Borrower had a significant deviation from its July 2018 Forecast, resulting in a working capital deficit of approximately $13,000,000. The majority of this shortfall was related to trade payables over 90 days incurred by the Borrower to complete the 2018 drilling program.[8]

[5] Affidavit of R. Martin sworn on February 5, 2021 (the "**Martin Affidavit**"), at paras. 9 and 14.
[6] Affidavit of A. Jenkins, at para. 15.
[7] Affidavit of A. Jenkins, at para. 27.
[8] Affidavit of A. Jenkins, at para. 28.

17. The Borrower, on February 19, 2019, in support of this request for additional funds, provided a budget and forecast to the Lender (the "**February 2019 Forecast**") estimating the increased production and cash flow from the recently drilled wells.[9]

18. The request by the Borrower for additional funds at the end of 2018 resulted in the loan agreement being amended and restated on March 13, 2019 and the amount of funds advanced by Crown Capital to the Borrower was increased by $5,000,000 (the "**$5M AF**") to bring the total principal amount of $20,000,000 outstanding to the Lender. As part of this advance, the equity sponsor for the Borrower provided $2,000,000 (collectively, the "**2019 Equity**"), with an expectation that an equity sponsor would provide a further $3,000,000 of equity to be raised by August 22, 2019. The $5M AF and 2019 Equity was then used to reduce the outstanding accounts payable and trade debt of the Borrower and complete its capital program.[10]

19. In the summer of 2019, the Borrower threatened to sue the Lender if it did not advance further additional funds to the Borrower, notwithstanding that the Lender had no legal obligation to provide any additional funding to the Borrower under the Loan Agreement. Despite the parties discussing a potential increase to the amount outstanding under the Loan Agreement to $30,000,000 in December 2018, due diligence completed by Crown Capital indicated that the business was underperforming its initial budget, and would not support that level of investment.[11]

20. The Lender understood at this time that the Borrower was seeking refinancing of the Loan Agreement from various other entities. The Loan Agreement, at that time, had an amount outstanding of $20,000,000 and there were prepayment fees set out in the Loan Agreement for any early prepayment of the amount outstanding to the Lender.[12]

---

[9] Affidavit of A. Jenkins, at para. 29 and Exhibit "M".
[10] Affidavit of A. Jenkins, at para. 30.
[11] Affidavit of A. Jenkins, at para. 32 and Exhibit "N".
[12] Affidavit of A. Jenkins, at para. 33.

21. The Lender understands that the Borrower was not able to refinance the amounts outstanding under the Loan Agreement at this time and notwithstanding that: (i) production rates were higher than current levels; (ii) there was no additional uncertainty associated with the COVID-19 pandemic; and (iii) the amounts outstanding to the Lender under the Loan Agreement was significantly lower than it currently is.[13]

22. The Borrower and the Lender entered into further discussions in August of 2019 about providing further additional funds to the Borrower. Those discussions ultimately culminated in the execution of the current version of the Loan Agreement, in its second amendment and restatement on October 31, 2019, which increased the amount outstanding under the Loan Agreement to the principal amount of $27,000,000.[14]

23. During these discussions, and to support the request for further additional funds, the Borrower again provided an estimated budget and forecast (the "**August 2019 Forecast**") regarding the expected production and cash flow benefits to be gained from the expenditure of the further additional funding of $7,000,000. The Lender used the August 2019 Forecast to consider and ultimately approve providing the further additional funding of $7,000,0000 (the "**$7M AF**") to the Borrower.[15]

24. The $7M AF was to be deployed by the Borrower as follows:

a. Approximately $4,000,000 was to be allocated to pay outstanding trade creditors that still had not been paid from the drilling program (Q4 2018) and capital program (Q1 2019) completed previously by the Borrower; and

b. Approximately $3,000,000 was to be allocated towards a drilling program to drill two new wells (the "**2019 Wells**").[16]

---

[13] Affidavit of A. Jenkins, at para. 34.
[14] Affidavit of A. Jenkins, at para. 36.
[15] Affidavit of A. Jenkins, at para. 37.
[16] Affidavit of A. Jenkins, at para. 38.

25. The August 2019 Forecast estimated that cash flow from operations would be used to repay the remaining $8,500,000 of the $11,500,000 of the total capital estimate in the 6 months following the completion of the drilling program (collectively, the "**2019 Program**") conducted for the 2019 Wells.[17]

26. The Borrower at the time of the request for the $7M AF and the Loan Agreement was executed in October of 2019 made representations to the Lender that with the addition of the 2019 Wells, the Borrower would then be self-funded through its operations going forward.[18]

27. At the time the $7M AF was advanced by the Lender in 2019, the Borrower had significant trade creditors that were not being paid. The Borrower at all times advised the Lender that these would be repaid through the increased production, improvements realized from the 2019 Program, and the additional cash flow generated from the 2019 Wells.

28. The large amount of outstanding trade creditors was an ongoing problem for the Borrower over multiple years, including prior to any impact on the business associated with the COVID-19 pandemic.[19]

29. The result of the 2019 Program was that the Borrower overspent on the capital expenditures by 12% (or $1,400,000) and missed the initial estimated production date for the 2019 Wells by 6 months. The 2019 Wells did not come online until April 2020. Additionally, the overall production of the 2019 Wells has been significantly below what was estimated by the Borrower in the August 2019 Forecast. Excluding the volumes associated with the 2019 Wells from the aggregate production in 2020, I have calculated that 2020 production from the Borrower's existing wells (the wells in operation as of August 2019) was 27% below the August 2019 Forecast. This further highlights managements inability to accurately forecast the production of the Assets.[20]

[17] Affidavit of A. Jenkins, at para. 39.
[18] Affidavit of A. Jenkins, at para. 40.
[19] Affidavit of A. Jenkins, at para. 41.
[20] Affidavit of A. Jenkins, at para. 42.

30. The 2019 Wells have also substantially underperformed the Borrower's forecast of production for those wells. Crown Capital calculated that the 2019 Wells have produced at an average of 63% below the Borrowers expected production as forecast in the August 2019 Forecast.[21]

31. The Borrower has underperformed its production and cash flow expectations in each forecast it has provided to the Lender, with the largest deviation from the various forecasts attributed to significantly lower than forecasted production, not commodity pricing.[22]

32. On February 8, 2021, the Lender issued notice of termination of the Forbearance Agreement (the "**Notice of Termination**"), and a demand for payment with a notice of intention to enforce security (collectively, the "**Demand Letter**") to the Borrower by and through its General Partner. On February 8, 2021, the Lender also issued demands for payment and notices of intention to enforce security on the Guarantors.[23]

PART III - ISSUE

33. The primary issues for this Honourable Court to determine on the within Application is whether the CCAA Application ought to be granted, and if not, whether the Receivership Application ought to be granted.

PART IV – LAW AND ARGUMENT

A. CCAA Relief is Inappropriate in the Circumstances

34. Pursuant to the CCAA, this Honourable Court may grant an initial CCAA Order provided that it is appropriate to do so, and the statutory requirements are met.

35. In *Alberta Treasury Branches v. Tallgrass Energy Corp.* ("***Tallgrass Energy***"), Madam Justice B.E.C. Romaine held:

> "a section 11 order under the CCAA is not granted merely upon the fact of its application. [The Applicant] must satisfy the court that circumstances exist that

[21] Affidavit of A. Jenkins, at para. 44.
[22] Affidavit of A. Jenkins, at para.44.
[23] Affidavit of A. Jenkins, at para. 55 and Exhibits "W" and "X".

> make the order appropriate, and that it has acted and is acting in good faith and with due diligence."[24]

36. In *Tallgrass Energy*, Justice Romaine held it was key for the debtor to show there was "any reasonable possibility that it will be able to restructure its affairs."[25] While the burden is low, and some courts have accepted "a germ of plan" as sufficient, Justice Romaine added that "there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring."[26] As confirmed in *Tallgrass Energy*, the purpose of the CCAA is "remedial, not preventative", and is not intended to be the "last gasp of a dying company."[27]

37. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, the Court noted that while the CCAA confers broad authority, such discretion is not boundless: "This authority must be exercised in furtherance of the remedial objectives of the CCAA".[28] In considering whether appropriate circumstances exist for a court to grant an Initial CCAA Order, courts have referred to the purpose of the CCAA, being a statute designed to "facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking".[29]

38. With these requirements in mind, the Borrower bears the onus of satisfying the court that granting of an Initial CCAA Order is appropriate.[30] The Borrower cannot satisfy this onus based upon the evidence before the Court.

39. The Borrower's rationale for commencing CCAA proceedings is that it does not presently want to commence a sales process because it believes its Assets may have more value in the

---

[24] *Alberta Treasury Branches v. Tallgrass Energy Corp*., 2013 ABQB 432 ("***Tallgrass Energy***"), at para. 13, at **TAB 3**.
[25] *Tallgrass Energy*, at para. 14, at **TAB 3**.
[26] *Tallgrass Energy*, at para. 14, at **TAB 3**.
[27] *Tallgrass Energy*, at para. 14, at **TAB 3**.
[28] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 49, at **TAB 4**.
[29] *Marine Drive Properties Ltd. Re*, 2009 BCSC 145 ("***Marine Drive***"), at para. 31, at **TAB 5**; *Octagon Properties Group Ltd., Re*, 2009 ABQB 500 ("***Octagon***"), at para. 9, at **TAB 6**; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 ("***Maple Bay***"), at paras. 26-27, at **TAB 7**.
[30] *Canada North Group Inc. (Companies' Creditors Arrangement Act*), 2017 ABQB 550, at para. 77, at **TAB 8**; *Target Canada Co. (Re)*, 2015 ONSC 303, at para. 82, at **TAB 9**.

future.[31] The Assets in this case are approximately 10 wells located in the Spirit River formation of the Ferrier area of Alberta. No evidence has been provided to this Court that increased commodity pricing will provide sufficient benefit to the Borrower to allow it to restructure its affairs. Simple hope that the value of an asset might improve in the future cannot, without some evidence, be sufficient to support the granting of an initial order under the CCAA.

40. Conversely, substantial evidence has been provided by Crown Capital that the Assets are currently experiencing declining production, any delay to a sale of the Assets could have a significant negative impact on the recoveries of Crown Capital and other creditors, and the Borrower (through its current management) is not capable of successfully planning or executing any capital or drilling programs that will improve the Assets.[32]

41. The Martin Affidavit attempts to place the blame for the current financial circumstances of the Borrower on the effects of the COVID-19 pandemic and the volatility in commodity prices associated with same.[33] There is no evidence provided by the Borrower that the COVID-19 pandemic substantially impacted the revenue of the Borrower or its underlying business, except for some general statements that there has been commodity price fluctuation during this period.[34] In fact the evidence provided by the Borrower is that prices for natural gas increased significantly in the third quarter of 2020 during the COVID-19 pandemic.[35] Further, the Borrower submitted evidence that the commodity prices it obtained in the third quarter of 2020 increased substantially when compared to prices received at the same time in 2019.[36] It also appears that the Borrower realized a 36% increase in the gross aggregate production revenues for the third

[31] Affidavit of R. Martin at para. 78.
[32] Affidavit of A. Jenkins at paras. 43-46.
[33] Affidavit of R. Martin at para. 29.
[34] Affidavit of R. Martin at paras. 31-38.
[35] Affidavit of R. Martin at para. 31.
[36] Affidavit of R. Martin at para. 33.

quarter of 2020 in the midst of the COVID-19 pandemic when compared to the same period in 2019.[37]

42. The Lender has provided clear evidence that the reason for the financial difficulties of the Borrower and lack of available cash follow has been the underperformance of the production from the Assets and an over estimation of that performance by the Borrower's management, as opposed to any negligible variance in commodity prices.

43. For example, average commodity prices in 2020, excluding hedging, were only 13% below management's own forecast of commodity prices in the August 2019 Forecast[38]. By contrast production from the wells operated by the Borrower in August 2019 have been 27% below estimates of management for 2020 and the 2019 Wells have also underperformed by an average of 63% during this period[39]. Had the Borrower achieved its target production date and production volumes in 2020 it would have had approximately $8,900,000 in additional cash flow.

44. The Lender's position is that the Borrower and its management should not have the opportunity through a CCAA proceeding to continue to expend significant funds with minimal results and further deplete the Assets subject to the Security. Permitting a mismanaged and underperforming debtor to carry on business is not a desirable policy goal, especially when the continuation of that business significantly prejudices the primary stakeholder with the most substantial economic interest in the outcome of the CCAA proceedings.

45. The Borrower had ample time from the date of its default under the Loan Agreement in March of 2020 to consider other "strategic options" and chose not to pursue any such alternatives. There has been no explanation by the Borrower in its evidence provided to this Court for why during the period from March 2020 to February 5, 2021 it took no active steps to consider any strategic options, no steps to seek a refinancing of the amounts outstanding to Crown Capital or implemented any other measures to deal with its large amount of trade

[37] Affidavit of R. Martin at para. 35.
[38] Affidavit of A. Jenkins at Exhibit "S".
[39] Affidavit of A. Jenkins at paras. 43 and 44.

payables. There has been almost no details of what potential restructuring alternatives the Borrower might explore if it is granted CCAA protection.[40]

46. The Court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. ("***Maple Bay***") overturned an order extending a CCAA stay due to the lack of evidence of a compromise or arrangement that would be more advantageous to its creditors than existing remedies.[41] The Court acknowledged there would be "little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full".[42]

47. The debtors in the present case do not seek CCAA relief to make a compromise or arrangement, but rather, seek CCAA protection to avoid complying with the terms of the Forbearance Agreement, prevent Crown Capital from enforcing its rights as a secured creditor and to hope for improved commodity prices at some indeterminate point in time in the future. The Borrower appears to suggest that it should be allowed to just pay interest payments and production payments to the Lender until the Loan Agreement expires in March of 2022[43]. This precludes payments of all of the other amounts that would be due and owing to Crown Capital during this period including significant principal repayments that the Borrower agreed to as part of the Loan Agreement. The estimate by the Borrower that it will have sufficient funds to make even these limited payments is also highly questionable based upon the Borrower's acknowledgement of the volatility of commodity prices, the declining production from the Assets and the Borrower's well documented inability to properly forecast its own cash flow and production.

48. The Borrower has proposed to this Court that under CCAA protection, it will provide payments to unsecured trade creditors and professionals ahead of Crown Capital. The

[40] Affidavit of R. Martin at paras. 42 and 78.
[41] *Maple Bay*, at **TAB 7**.
[42] *Maple Bay*, at para. 36, at **TAB 7**.
[43] Affidavit of R. Martin at para 79.

Applicants have further requested a number of priority charges rank ahead of Crown Capital, including an Administration Charge, Critical Suppliers' Charge, and Directors' Charge.

49. The Court in *Marine Drive Properties Ltd., Re* set aside a CCAA Initial Order, finding that the debtors "sought CCAA protection to buy time to continue their attempts to raise new funding" and "sought DIP financing so that they can do this at the expense of their creditors."[44] The Court held that due to the applicants' business and financing arrangements, it was extremely unlikely that a compromise or arrangement would be reached and that this matter was "not an appropriate use of the extraordinary remedy offered by the CCAA".[45]

50. It is evident from the lack of consultation with Crown Capital prior to filing for protection under the CCAA that management does not have any viable plan or solution to resolve the significant debts owing by the Borrower to both its secured and unsecured creditors. The Borrower, not less than 4 months ago, agreed to a Forbearance Agreement that required it to undertake a sales process for the sale of its Assets. The Borrower took all necessary steps to select and engage a sales advisor and commence that sales process and is now attempting to forestall that very process it agreed to by filing for an initial order under the CCAA.

51. The Lender has provided evidence of its serious concerns that if there is a delay to the Sales Process that there is a substantial risk that any later sale of the Assets will not result in sufficient proceeds to repay the amounts outstanding under the Loan Agreement as interest under the Loan Agreement continues to accrue and production from the Assets continues to decline[46].

52. The Lender had significant concerns in October of 2020 that the Borrower would not be able to satisfy its obligations to the Lender other than through a sale of its Assets and this was the reason that a requirement to conduct a sales process was included as part of the Forbearance Agreement. The Borrower has not presented this Honourable Court with any

---

[44] *Marine Drive*, at para. 38, at **TAB 5**.
[45] *Marine Drive,* at para. 38, at **TAB 5**.
[46] Affidavit of A. Jenkins at paras. 69, 77 and 78.

realistic or even potential solutions, other than a sale of its Assets, by which it could satisfy the amounts outstanding to the Lender or its other creditors. The Lender is not prepared to "restructure" its debt and the Borrower has no ability through the CCAA proceedings to force the Lender to accept any such restructuring of the amounts outstanding to it.

53. Additionally, the Borrower claims that one of the underlying issues that support its need for protection under the CCAA is that it cannot operate under the parameters established by the BAA. Any issues with the implementation of the BAA were a result of the failure of management of the Borrower to properly prepare and provide the list of proposed payables for approval by the Lender. The Borrower was unable to manage this process due its own disorganization and inability to manage its payables on an ongoing basis. The Lender at all times promptly responded to and complied with the requirements under the BAA and the Forbearance Agreement for approving the list of proposed payables presented to it by the Borrower[47].

54. The BAA has in no way interfered with the ability of the Borrower to operate its business. It has been the failure of management of the Borrower to effectively execute on its capital program and drilling programs and to manage its payables associated with those programs (which was why the Lender required the BAA as part of the Forbearance Agreement) in a competent manner that has impacted the Borrower's ability to operate its business.

55. The Borrower's complaint that it does not want to comply with the terms of the BAA and that the process is too cumbersome is not supported by any evidence that the BAA has affected its operations. The issues facing the Borrower do not arise from its inability to control the funds available through the BAA, but rather that the Borrower does not generate sufficient funds from its production to pay all of its outstanding creditors on a monthly basis.

56. If the Borrower does not want to comply with the terms of the BAA this cannot make it appropriate to grant protection under the CCAA. The overdue trade payables and insufficient cash flow of the Borrower have been ongoing for an extended period of time, are the result of

[47] Affidavit of A. Jenkins at para. 51 and 52.

the Borrower's own inability to properly estimate and execute on its drilling and capital programs and is not due to the implementation of the BAA in October of 2020 (which was agreed to at that time by the Borrower).

57. The CCAA Application should be dismissed, and Crown Capital should be permitted to exercise its rights over the Security as it sees fit, including the appointment of an Interim Receiver to preserve the assets of the Borrower.

i. Loss of Faith in Management

58. The Borrower has a long track record and history of underperformance that is evidenced by significant increases in budget expenditures for drilling projects, failure to meet production estimates and execute on its drilling programs, and failure to generate sufficient cash flow to meet its obligations generally to the Lender and trade creditors. Further, efforts to refinance and restructure the affairs of the Borrower have previously been unsuccessful. As Crown Capital holds all of the secured debt, it is unlikely the Borrower will advance a plan that would be accepted by the Lender.

59. An example of this history of underperformance is the recent production optimization projects (the "**PO Projects**") undertaken by the Borrower in November of 2020 after execution of the Forbearance Agreement. The Borrower estimated that completion of the PO Projects would add an additional 1318 boe/d to the overall production of the Borrower. The PO Projects cost approximately $1,300,000 out of the cash flow of the Borrower. Management now estimates that after completion of the PO Projects that production increased by only about 143 boe/d[48].

60. The Lender in order to allow the PO Projects to proceed agreed to forgo its November 2020 interest payment, principal payments and royalty payments it was entitled to under the Loan Agreement[49]. This is another considerable "miss" and further demonstrates management

[48] Affidavit of A. Jenkins at para. 60.
[49] Affidavit of A. Jenkins at para. 60.

of the Borrower's inability to properly forecast, plan and execute on capital programs or realize any substantive benefit from the significant expenditure of funds for such capital programs.

61. The inability of the Borrower to be proactive and negotiate a further restructuring plan with Crown Capital, and instead to pursue the CCAA Application with almost no notice, illustrates that the Applicants' current management is incapable of completing a successful restructuring of the business. The Borrower has also recently changed its legal name with no rational explanation to the Lender or this Court why that step was undertaken prior to filing for CCAA protection.

ii. The Borrower only has one Asset

62. The Monitor has acknowledged that the only assets and operations of the debtors business relates to the "production of natural gas and natural gas liquids from 10 wells" located in the Spirit River formation in the Ferrier area[50].

63. The evidence that the Assets have a reserve value of $179.2 million (as outlined by the Borrower in the Martin Affidavit) provides no assistance to the Court in determining whether or not it is appropriate to grant the Initial Order. The valuation contained in the reserve report requires that additional capital of approximately $73 million be spent by the Borrower over the next 4 years to achieve that valuation and unlock any significant value in the Assets[51].

64. There is no evidence before this Court that the Borrower has the available capital or the capability and management expertise to realize on this reserve value. To the contrary, the evidence before this Court is the Borrower has been largely unsuccessful in its capital and drilling programs to improve production and cash flow from the Assets and the production from the Assets continues to decline. As a result, Crown Capital submits that no weight should be given to this evidence regarding the reserve value of the Assets as the Borrower is currently unable to generate sufficient cash flow to pay the Lender or its trade creditors.

[50] Pre-filing Monitor's Report at para 11.
[51] Affidavit of A. Jenkins at para. 67

65. The Applicants do not have any employees, and have only engaged the services of four consultants.[52] Intercontinental is the only operating entity within the group of Applicants. In these circumstances, the economic impacts of liquidating the Assets are minimal. The Borrower acknowledges that Syndicate Group and Syndicate Partners, are holding companies and have no ongoing business operations. The Applicants further acknowledge that none of Syndicate Group, Syndicate Partners, nor Petroworld have any employees.[53] Accordingly, there is no risk of material job loss.

66. The Court in *Tallgrass Energy* relied on the limited number of employees, lack of ongoing business, the opposition of the secured lenders, and the lack of a realistic or commercially reasonable plan to deny an application for an Initial Order.[54] The Court further considered the fact that the proceeding would likely be a liquidating CCAA and the secured creditors had lost faith in the debtor's management.[55] Each of those same factors are present in the within proceeding.

67. In the case of *Dondeb Inc., Re*, the Court held that the "use of the CCAA for the purpose of liquidation must be used with caution" especially when "an overall less costly receivership" can accomplish the same overall goal.[56]

68. As a result, the CCAA Application ought to be dismissed, and an Interim Receivership Order and Receivership Order ought to be granted over the assets of the Borrower and the General Partner.

iii. Applicants Lack Sufficient Funds or Interim Financing

69. The Applicants requested a stay of proceedings to continue operations and restructure their business. However, they have no interim financing and lack sufficient funds to pay for any unplanned for costs of the Applicants' business, even in the short term.

---

[52]Affidavit of R. Martin, at para. 21.
[53] Affidavit of R. Martin, at para. 21.
[54] *Tallgrass Energy*, at para 15, at **TAB 3**.
[55] *Tallgrass Energy*, at para. 18, at **TAB 3**.
[56] *Dondeb Inc., Re,* 2012 ONSC 6087, at para. 34, at **TAB 10**.

70. The evidence of the Borrower is that there are insufficient funds available to continue operations or pay critical suppliers and they acknowledge the following:

a. Syndicate Group, Syndicate Partners, and Petroworld conduct minimal business and lack of any revenue generation based on the trial balances provided by the Applicants;[57]

b. the Borrower will only be able to meet their post-filing obligations if the blocked accounts pursuant to the BAA are no longer imposed based during the 13-week cash flow forecast;[58]

c. there is no, or limited, cash available in the deposit accounts;[59]

d. trade creditors are owed significant sums, estimated to be in excess of $12,000,000;[60] and

e. the Borrower acknowledges that there are currently five liens registered upon surface titles to the lands on which the Assets are located, which is the Borrower's only asset of value.[61]

71. The Monitor has acknowledged that there is an issue respecting the lack of immediately available funds for the Borrower to deal with any unplanned for or emergency costs and expenses associated with the assets. The Monitor highlighted that there is a risk the Borrower will further default on payments to suppliers in emergency situations or where pre-payment for goods or services is required, and noted that the current liquidity is only sufficient if arrangements are made to address short term cash requirements.[62]

[57] Affidavit of R. Martin, at para. 44 and exhibits 11, 12, and 13.
[58] Affidavit of R. Martin, at para. 98 and exhibit 24.
[59] Affidavit of R. Martin, at para. 45.
[60] Affidavit of R. Martin, at para. 54.
[61] Affidavit of R. Martin, at para. 56.
[62] Monitor's Report, at para 26(c) and (d).

72. The Lender has significant concerns that the Borrower, should any emergency or other issue arise in respect of the operation of the Assets, will not have sufficient funds to pay for services to protect the value of the Assets during this period.

iv. Certain of the Applicants do not satisfy the requirements for CCAA protection

73. The debtors are seeking an Initial CCAA Order over each of the entities with debts owing to Crown Capital: T5 LP and Intercontinental, and in addition, have included the Other Applicants.

74. The debtors have provided no evidentiary basis for the inclusion of Syndicate Partners, Syndicate Group and Petroworld in the CCAA proceedings and have failed to illustrate how including the Other Applicants will assist in formulating a restructuring or plan of arrangement for the Borrower and the General Partner who have the only Assets of value. The Other Applicants are not necessary for the ongoing operations of the Borrower and the Other Applicants have no assets to fund the CCAA proceedings.

75. In these circumstances, only Intercontinental meets the requirement of having claims in excess of $5,000,000 pursuant to s. 3 of the CCAA; however, no rationale has been provided respecting the inclusion of Other Applicants, other than on the basis of the affiliation. The Borrower acknowledged that Syndicate Partners and Syndicate Group are holding companies and Petroworld is a business whose sole purpose is to provide office space and supplies and office management through contractors to Intercontinental.

76. There is insufficient evidence presented to have these entities included in the CCAA proceedings and any restructuring involving these entities will only add complexity and costs to the proceedings, with no benefit to the Borrower's stakeholders.

77. The CCAA process proposed by the Borrower is overly complicated for what is necessary to maximize the benefits to all stakeholders from the Assets. Based on the circumstances, the Assets of the Borrower should be liquidated for the benefit of its stakeholders. Given that this case will likely result in a liquidation, there are no efficiencies to be

gained from the unnecessarily complex and expensive CCAA process as proposed by the Borrower. Crown Capital submits that its Security should not be primed to restructure entities that have no connection to the Borrower and where the restructuring of such entities will not enhance the value of the Assets.

v. The Proposed Charges are Inappropriate

78. Crown Capital is not willing to consent to the charges priming the interests of Crown Capital as proposed by the Borrower.

79. The Applicants have proposed a critical supplier charge for four of their trade creditors. Crown Capital has concerns that the Borrower currently lacks sufficient funds to properly respond to an emergency or be able to provide payment for any required expenses in the short term.[63] This critical supplier charge will not protect the Borrower's business in the event an unforeseen expense arises.

B. Appointment of a Receiver is Necessary

i. Interim Receiver is Appropriate

80. Pursuant to section 47 of the BIA, a Court may appoint an interim receiver if it is shown to the court to be necessary for the protection of: (i) a debtor's estate; or (ii) the interests of a creditor who sent the notice under section 244(1).

81. In *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd*., the Court upheld an Order for the appointment of an interim receiver where the commercial duty justice relied on the fact that there was an outstanding debt, the debtor was in default, and the business of a debtor is in jeopardy.[64] The Court was satisfied that there were sufficient concerns regarding the creditors security and that an interim receiver was necessary to protect its interest.

82. In *Third Eye Capital Corporation v. Dianor Resources Inc.*, the Court confirmed that section 47 permits a Court to grant an order appointing an interim receiver where “a secured

---

[63] Affidavit of A. Jenkins, at para. 76.
[64] *CWB Maxium Financial Inc. v. 2026998 Alberta Ltd*., 2020 ABCA 118, at paras. 6 and 18, at **TAB 11**.

creditor had or was about to send a notice of intention to enforce security pursuant to s. 244" of the BIA.[65] On February 8, 2021, Crown Capital issued demands to the debtors, and is thus entitled under the BIA to seek the appointment of an interim receiver.

83. In *Romspen Investment v. 6711162 ("**Romspen**")*, the Court considered whether an Initial Order pursuant to the CCAA was appropriate or whether a Receivership Order ought to be granted and held:

> "In broad terms, the purpose of the CCAA is to permit a debtor to continue to carry on business, and where possible, avoid the social and economic costs of liquidating assets.
>
> In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:
>
> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. ... the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager."[66] [emphasis added]

84. The Borrower has been in default under the Loan Agreement for almost a full year, providing sufficient time for the Applicants to consider any strategic options. Further, the social and economic costs of liquidating the Assets are minimal based on the lack of ongoing business and lack of employees. The Assets of the Borrower should be sold as soon as possible to maintain the value of the Assets before further production declines occur. Any purchaser of the Assets will continue to employ people to operate the Assets, mitigating any social and economic costs of the appointment of an interim receiver and receiver.

---

[65] *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, at para. 49, at **TAB 12**.
[66] *Romspen Investment v. 6711162*, 2014 ONSC 2781, at paras. 59 and 60, at **TAB 13**.

85. A receivership order would permit an orderly and cost effective liquidation of the Borrower's assets, permitting Crown Capital the best opportunity to realize on its collateral and potentially be repaid the amounts outstanding under the Loan Agreement.

86. The Court in *Romspen* in granting an Order for Receivership relied on: (i) the case law that suggests courts ought to give effect to the rights of secured creditors by granting a receivership order where the security coverage of secured creditors is in question; (ii) the applicants were in essence asking the court to extend their loan agreement beyond its 2-year term"; and (iii) the secured lender had "absolutely no confidence" in the management of the applicants.[67]

87. While *Romspen* was related to a real estate development company, the principals are the same in the present case and the Borrower's request to consider "strategic alternatives" without providing any kind of restructuring plan constitutes significant risk for Crown Capital and the other creditors. As a result, an Order for the appointment of an interim receiver and receiver is appropriate in the circumstances.

88. The Lender has provided evidence that there is a significant concern if a sales process is not commenced shortly for the sale of the Assets as any delay may result in the Lender being unable to recover the entire amount outstanding to it under the Loan Agreement.[68]

ii. COVID-19 Pandemic

89. The Applicants submit that the within CCAA proceedings will provide time to advance potential restructuring alternatives for the benefit of all stakeholders,[69] however, no evidence has been put forward to suggest that the passage of time will result in any kind of restructuring plan.[70]

---

[67] *Romspen*, at paras. 61, 62, 72, and 73.
[68] Affidavit of A. Jenkins at para. 79.
[69] Affidavit of R. Martin, at para. 42.
[70] Affidavit of A. Jenkins, at para. 75.

90. The Applicants suggest that with the end of the COVID-19 pandemic and the roll-out of vaccines will remove or limit the current financial strain on the Applicants and time should be provided to wait until the negative impacts of COVID-19 have passed.[71] However, the evidence before this Honourable Court suggests that the financial strain experienced by the Applicants was inevitable based on the current management's inability to execute on its capital and drilling programs, the failure to properly forecast the results of its capital and drilling programs and less the result of current global commodity prices, among other factors unrelated to the pandemic.[72]

91. It is notable that the COVID-19 pandemic actually had the effect of increasing gas prices for much of 2020 and that the Borrower produces approximately 83% gas. The Lender does not believe any variation of commodity prices due to the COVID-19 pandemic contributed substantially to the cash flow issues of the Borrower experienced during this period.

92. This Honourable Court considered the impacts of COVID-19 in a CCAA proceeding in *Bellatrix Exploration Ltd., Re*, and found that that CIVID-19 will continue to negatively impact market forces for an unknown period of time:

> "I accept that the COVID pandemic, which was narrowly preceded by a severe and historic drop in the commodity prices for oil, made it very difficult to secure the missing financial and operational commitments. However, it is equally obvious that these factors may continue to affect market conditions negatively for some unknown period of time. Indeed, the uncertainty around the likely duration of these negative market forces is the reason given by the Bellatrix Board of Directors for approving the Spartan Bid."[73]

93. Further, in *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, the Ontario Superior Court of Justice also considered the impact of the COVID-19 pandemic when approving a stalking-horse bid and associated sales procedures. The Court held:

> "As noted above, this insolvency was not generated by the COVID-19 crisis. Penady was in financial difficulty for several months preceding the pandemic and had been unsuccessfully attempting to sell the Barrie Property for some time. I do not accept the argument that we should adopt a "wait and see" approach to determine if and when the economic crisis abates. The Applicant continues to

[71] Affidavit of R. Martin, at para. 41.
[72] Affidavit of A. Jenkins, at para. 62.
[73] *Bellatrix Exploration Ltd., Re*, 2020 ABQB 332, at para. 26, at **TAB 14**.

> see interest accrue, as noted, at approximately $550,000 per month. There is no certainty that the economic situation will improve in any given period of time and it may continue to ebb and flow before it gets better."[74]

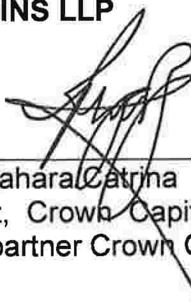
94. As a result, due to the uncertain timeline and unpredictable impact of the COVID-19 pandemic on future commodity prices, it should not be a factor that this Court should consider or be the basis for granting the CCAA Application and related stay of proceedings requested by the Borrower.

PART V – RELIEF SOUGHT

95. For the reasons set out above, Crown Capital respectfully requests that this Honourable Court dismiss the CCAA Application and grant the Receivership Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February 2021.

MLT AIKINS LLP



Ryan Zahara/Catrina Webster, Counsel for the Applicant, Crown Capital Partner Funding LP by its general partner Crown Capital LP Partner Funding Inc.

---

[74] *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, 2020 ONSC 3517, at para. 35 at **TAB 15**.

LIST OF AUTHORITIES

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

Bankruptcy and Insolvency Act, RSC 1985, c B-3...**TAB 2**

Alberta Treasury Branches v. Tallgrass Energy Corp., 2013 ABQB 432 ....**TAB 3**

9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10.....................................**TAB 4**

Marine Drive Properties Ltd. Re, 2009 BCSC 145...**TAB 5**

Octagon Properties Group Ltd., Re, 2009 ABQB 500..**TAB 6**

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 ....**TAB 7**

Canada North Group Inc. (Companies' Creditors Arrangement Act), 2017 ABQB 550.....**TAB 8**

Target Canada Co. (Re), 2015 ONSC 303...**TAB 9**

Dondeb Inc., Re, 2012 ONSC 6087 ....**TAB 10**

CWB Maxium Financial Inc. v. 2026998 Alberta Ltd., 2020 ABCA 118 ....**TAB 11**

Third Eye Capital Corporation v. Dianor Resources Inc., 2019 ONCA 508.......................**TAB 12**

Romspen Investment v. 6711162, 2014 ONSC 2781 ....**TAB 13**

Bellatrix Exploration Ltd., Re, 2020 ABQB 332,...**TAB 14**

Choice Properties Limited Partnership v. Penady (Barrie) Ltd., 2020 ONSC 3517 ....**TAB 15**

TAB 1

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to January 28, 2021

Last amended on November 1, 2019

À jour au 28 janvier 2021

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Meaning of *related* and *dealing at arm's length*

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

Application

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

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Affiliated companies

(2) For the purposes of this Act,

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

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

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Company controlled

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

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

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

Application

(3) Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

a) qui détiennent — ou en sont bénéficiaires —, autrement qu'à titre de garantie seulement, des valeurs mobilières conférant plus de cinquante pour cent du maximum possible des voix à l'élection des administrateurs de la compagnie;

b) dont lesdites valeurs mobilières confèrent un droit de vote dont l'exercice permet d'élire la majorité des administrateurs de la compagnie.

Subsidiary

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

(a) it is controlled by

(i) that other company,

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

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

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

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

Application

(4) Pour l'application de la présente loi, une compagnie est la filiale d'une autre compagnie dans chacun des cas suivants :

a) elle est contrôlée :

(i) soit par l'autre compagnie,

(ii) soit par l'autre compagnie et une ou plusieurs compagnies elles-mêmes contrôlées par cette autre compagnie,

(iii) soit par des compagnies elles-mêmes contrôlées par l'autre compagnie;

b) elle est la filiale d'une filiale de l'autre compagnie.

L.R. (1985), ch. C-36, art. 3; 1997, ch. 12, art. 121; 2005, ch. 47, art. 125.

PART I

Compromises and Arrangements

Compromise with unsecured creditors

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

R.S., c. C-25, s. 4.

PARTIE I

Transactions et arrangements

Transaction avec les créanciers chirographaires

4 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 4.

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

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

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

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

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

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

2019, c. 29, s. 136.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) 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*;

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

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

L.R.C. (1985), ch. B-3

Current to January 28, 2021

Last amended on November 1, 2019

À jour au 28 janvier 2021

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

partie des biens du débiteur et lui enjoindre d'en prendre possession dès que le requérant aura donné l'engagement que peut imposer le tribunal relativement à une ingérence dans les droits du débiteur et au préjudice qui peut découler du rejet de la requête.

Powers of interim receiver

(2) The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

Pouvoirs du séquestre intérimaire

(2) Le séquestre intérimaire peut, sur l'ordre du tribunal, prendre des mesures conservatoires et disposer sommairement des biens périssables ou susceptibles de perdre rapidement de leur valeur, et il peut exercer sur les affaires du débiteur le contrôle que le tribunal jugera recommandable, mais le séquestre intérimaire ne peut contrecarrer indûment le débiteur dans la conduite de ses affaires, sauf dans la mesure nécessaire à ces fins conservatoires ou pour se conformer à l'ordre du tribunal.

Place of filing

(3) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

R.S., 1985, c. B-3, s. 46; 1997, c. 12, s. 27(F); 2004, c. 25, s. 29; 2007, c. 36, s. 13.

Lieu du dépôt

(3) La demande visant l'obtention de l'ordonnance prévue au paragraphe (1) est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

L.R. (1985), ch. B-3, art. 46; 1997, ch. 12, art. 27(F); 2004, ch. 25, art. 29; 2007, ch. 36, art. 13.

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Nomination d'un séquestre intérimaire

47 (1) S'il est convaincu qu'un préavis a été envoyé ou est sur le point de l'être aux termes du paragraphe 244(1), le tribunal peut, sous réserve du paragraphe (3), nommer un syndic à titre de séquestre intérimaire de tout ou partie des biens du débiteur faisant l'objet de la garantie sur laquelle porte le préavis. Ce séquestre intérimaire demeure en fonctions jusqu'à celui des événements ci-après qui se produit le premier :

a) la prise de possession par un séquestre, au sens du paragraphe 243(2), des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

b) la prise de possession par un syndic des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

c) l'expiration de la période de trente jours suivant la date de la nomination du séquestre intérimaire ou de la période précisée par le tribunal.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

Instructions au séquestre intérimaire

(2) Le tribunal peut enjoindre au séquestre intérimaire :

a) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable;

(c) take conservatory measures; and

(d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

b) d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré de contrôle que le tribunal estime indiqué;

c) de prendre des mesures conservatoires;

d) de disposer sommairement des biens périssables ou susceptibles de perdre rapidement de leur valeur.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

Cas de nomination possible

(3) La nomination d'un séquestre intérimaire aux termes du paragraphe (1) ne peut se faire que s'il est démontré au tribunal que cela est nécessaire pour protéger soit l'actif du débiteur, soit les intérêts du créancier qui a donné le préavis visé au paragraphe 244(1).

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

R.S., 1985, c. B-3, s. 47; 1992, c. 27, s. 16; 2005, c. 47, s. 30; 2007, c. 36, s. 14.

Lieu du dépôt

(4) La demande visant l'obtention de l'ordonnance prévue au paragraphe (1) est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

L.R. (1985), ch. B-3, art. 47; 1992, ch. 27, art. 16; 2005, ch. 47, art. 30; 2007, ch. 36, art. 14.

Appointment of interim receiver

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;

(b) another trustee; or

(c) the trustee under the notice of intention or proposal and another trustee jointly.

Nomination d'un séquestre intérimaire

47.1 (1) Après le dépôt d'un avis d'intention aux termes de l'article 50.4 ou d'une proposition aux termes du paragraphe 62(1) et sous réserve du paragraphe (3), le tribunal peut nommer à titre de séquestre intérimaire de tout ou partie des biens du débiteur :

a) soit le syndic désigné dans l'avis d'intention ou la proposition;

b) soit un autre syndic;

c) soit, conjointement, le syndic désigné dans l'avis d'intention ou la proposition et un autre syndic.

Duration of appointment

(1.1) The appointment expires on the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) court approval of the proposal.

Durée des fonctions

(1.1) Le séquestre intérimaire demeure en fonctions jusqu'à celui des événements ci-après qui se produit le premier :

a) la prise de possession par un séquestre, au sens du paragraphe 243(2), des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

b) la prise de possession par un syndic des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

c) l'approbation de la proposition par le tribunal.

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

PARTIE XI

Créanciers garantis et séquestres

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l’exécution de la garantie à une date plus rapprochée;

b) qu’il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s’entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d’un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu’une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l’application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s’interprète sans égard à l’alinéa a) et aux mots « ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant ».

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d’un contrat ou d’une ordonnance mentionné à l’alinéa (2)b).

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu’il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l’égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245 (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou partie des biens d'une personne insolvable ou d'un failli, établir une déclaration contenant les renseignements prescrits au sujet de l'exercice de ses attributions à l'égard de ces biens; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

TAB 3

2013 ABQB 432
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Tallgrass Energy Corp

2013 CarswellAlta 1496, 2013 ABQB 432, [2013] A.W.L.D. 4492, [2013] A.W.L.D. 4494, 231 A.C.W.S. (3d) 961, 8 C.B.R. (6th) 161

Alberta Treasury Branches Plaintiff and Tallgrass Energy Corp. Defendant

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

In the Matter of the Alberta Business Corporation Act, R.S.A. 2000, c. B-9, as amended and Tallgrass Energy Corp. Defendant

B.E. Romaine J.

Heard: July 24, 2013
Judgment: August 6, 2013
Docket: Calgary 1301-08759, 1301-08497

Counsel: Thomas Cumming, Jeffrey Oliver for Plaintiff, Alberta Treasury Branches
Howard Gorman for Toscana Capital Corporation
Ryan Zahara, Matthew Beavers for Defendant, Tallgrass Energy Corp.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application

Defendant TG applied for initial order under Companies' Creditors Arrangement Act (Can.) (CCAA) — Plaintiff ATB extended $12 million credit facility to TG, payable on demand and secured by first charge on all company's assets — TC granted TG bridge loan credit facility in amount of $6 million secured by second in priority charge against assets — TG defaulted — ATB and TC issued demands to TG — TG sought initial order under CCAA — Prior to TG's application, secured creditors ATB and TC applied for order appointing receiver over property and assets of company — TG currently had assets of $28,829,874 and liabilities of $28,896,371 — Secured lenders were owed about $18 million and it had unsecured accounts payable of $3 million — Property, plant and equipment were valued at approximately $21.6 million — Defendant's application dismissed; plaintiff's application granted — TG met technical requirements for protection under CCAA — TG breached provisions of ATB credit facility and TC bridge loan facility — Secured lenders were entitled to apply for receivership order — TG failed to establish that there was any reasonable possibility that it would be able to restructure its affairs — Restructuring options proposed by TG were not realistic or commercially reasonable — It would likely be liquidating CCAA — Secured lenders objected to TG management controlling liquidation process under CCAA protection as they had lost faith in management — Secured lenders had not acted precipitously — TG had adequate opportunity to canvas market for refinancing and restructuring options — TG and secured creditors were in adversarial mode, which did not make for efficient and inexpensive CCAA restructuring — CCAA order was not appropriate It followed that application for receivership must succeed.

Bankruptcy and insolvency --- Receivers — Appointment

Defendant TG applied for initial order under Companies' Creditors Arrangement Act (Can.) (CCAA) — Plaintiff ATB extended $12 million credit facility to TG, payable on demand and secured by first charge on all company's assets — TC granted TG bridge loan credit facility in amount of $6 million secured by second in priority charge against assets — TG defaulted — ATB and TC issued demands to TG — TG sought initial order under CCAA — Prior to TG's application, secured creditors ATB and TC applied for order appointing receiver over property and assets of company — TG currently had assets of $28,829,874 and liabilities of $28,896,371 — Secured lenders were owed about $18 million and it had unsecured accounts payable of $3 million

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

— Property, plant and equipment were valued at approximately $21.6 million — Defendant's application dismissed; plaintiff's application granted — TG met technical requirements for protection under CCAA — TG breached provisions of ATB credit facility and TC bridge loan facility — Secured lenders were entitled to apply for receivership order — TG failed to establish that there was any reasonable possibility that it would be able to restructure its affairs — Restructuring options proposed by TG were not realistic or commercially reasonable — It would likely be liquidating CCAA — Secured lenders objected to TG management controlling liquidation process under CCAA protection as they had lost faith in management — Secured lenders had not acted precipitously — TG had adequate opportunity to canvas market for refinancing and restructuring options — TG and secured creditors were in adversarial mode, which did not make for efficient and inexpensive CCAA restructuring — CCAA order was not appropriate It followed that application for receivership must succeed.

APPLICATION by company for initial order under *Companies' Creditors Arrangement Act*(Can.); APPLICATION by creditors for order appointing receiver over property and assets of company.

***B.E. Romaine J.*:**

Introduction

1 Tallgrass Energy Corp applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended. That application was opposed by its secured creditors, Alberta Treasury Branches and Toscana Capital Corporation, which prior to Tallgrass' application for CCAA protection had applied for an order appointing a receiver over the property and assets of the company. I dismissed Tallgrass' application for an initial CCAA order and allowed the receivership application. These are my reasons.

Facts

2 In July, 2012, ATB extended a $12 million credit facility to Tallgrass, payable on demand and secured by a first charge on all of the company's assets. At about the same time, Toscana granted Tallgrass a bridge loan credit facility in the amount of $6 million secured by a second in priority charge against the assets. This bridge loan facility matured on April 30, 2013.

3 In July, 2012, John McAdam, the CEO of Tallgrass, began the process of looking for traditional financing to replace the Toscana bridge financing. In early 2013, Mr. McAdam realized that no conventional financing was available, and Tallgrass began to explore the availability of non-traditional forms of financing.

4 Tallgrass management decided to attempt to obtain $100 million of non-traditional financing, as there were no third parties willing to step into the shoes of Toscana's subordinate position. The company retained an advisor in March, 2013 to aid in the search.

5 After the Toscana facility matured on April 30, 2013, Tallgrass acknowledged that the loan was in default. Toscana agreed to forbear enforcement until May 31, 2013 to provide Tallgrass with additional time to finalize certain financing alternatives that were being explored.

6 On June 17, 2013, Toscana issued a demand to Tallgrass, and on June 25, 2013, ATB followed with its demand. There is no issue that Tallgrass is also in default of the ATB credit facility.

7 On June 27, 2013, at the request of the secured lenders, Tallgrass retained Grant Thornton Limited as financial advisor, on the condition that Grant Thornton would provide financial information and reports to the secured lenders. Grant Thornton provided two reports to the lenders, on July 4 and on July 11, 2013. The lenders granted further forbearance during this period and continuing until July 17, 2013.

8 On about July 15, 2013, on the basis of the information and reports received from Grant Thornton, Toscana advised Tallgrass that it would not be prepared to grant further forbearance, and that it intended to bring an application to appoint a receiver on Wednesday, July 24, 2013. On July 16, 2013, ATB advised Tallgrass that it was taking the same position, and that after July 17, 2013, Tallgrass would have no further access to the remaining $100,000 available under the line of credit.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

9 Tallgrass sought an initial order under the CCAA on July 17, 2013. The application was put over to July 24, 2013 to be heard at the same time as the receivership application, with a temporary stay to preserve the status quo. ATB agreed to allow Tallgrass access to up to $50,000 of the line of credit to pay certain critical suppliers.

10 In its application, Tallgrass represented that it currently has assets of $28,829,874 and liabilities of $28,896,371. The secured lenders are owed approximately $18 million and Tallgrass has unsecured accounts payable in the amount of roughly $3 million, decommissioning liabilities as of March 31, 2013 in the amount of approximately $7.4 million and a financing contract under which approximately $484,000 is outstanding as of March 31, 2013.

11 The company values its property, plant and equipment, including undeveloped land, at approximately $21.6 million.

Analysis

12 As a preliminary matter, it is clear that Tallgrass meets the technical requirements for protection under the CCAA. It is also clear and uncontested that Tallgrass has breached various provisions of the ATB credit facility and the Toscana bridge loan facility, and that the secured lenders are entitled to apply for a receivership order. In fact, there was no question that, if Tallgrass's application for an initial order under the CCAA did not succeed, a receivership would follow.

13 As I indicated in *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (1 August 2006), Docket No. 060108395, a section 11 order under the CCAA is not granted merely upon the fact of its application. Tallgrass must satisfy the court that circumstances exist that make the order appropriate, and that it has acted and is acting in good faith and with due diligence. The CCAA therefore requires that the court hearing the application exercise discretion in making these determinations.

14 A key issue here is whether Tallgrass can establish that there is any reasonable possibility that it will be able to restructure its affairs. The burden placed on an applicant for an initial CCAA order in this regard is not a very onerous one, in that it is not necessary for an applicant company to have a fully-developed plan or the support of its secured creditors, although either or both are desirable and helpful. However, there must be some evidence of what Farley J. in *Inducon Development Corp., Re*, 1991 CarswellOnt 219 (Ont. Gen. Div.) referred to as the outline of a plan, what he called the "germ of a plan": para 14. I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon Development Corp., Re* at para 13, the CCAA is remedial, not preventative, and it should not be the "last gasp of a dying company". Unfortunately, Tallgrass appears to be at that desperate stage.

15 While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

16 The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruitation, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

17 I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2. Company management decided in March of this year to pursue $100 million in non-traditional debt rather than merely retiring existing secured debt of $18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately $800,000 and existing assets worth roughly $29 million, which has already encountered difficulties finding sources of funding to take out Toscana's subordinate position, to attempt to obtain $100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;

3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

a) a letter dated July 23, 2013 from a financing broker that purports to be a "commitment letter". This "commitment" to lend $100 million states that the broker will source the finding through an unnamed "top 25 bank". It requires an upfront "bank guarantee fee" of $2 million. The letter provides that the broker shall have no liability to Tallgrass "under any theory of law or equity" for the failure of any transaction contemplated by the loan commitment letter. The secured lenders have pointed out the many unusual provisions of this letter, and ask, reasonably enough, why a "top 25 bank" would contemplate a loan of $100 million to Tallgrass in its present circumstances. Tallgrass management has had no direct discussion with any financial institution and is relying on assurances from the broker that the source of funding would be reputable.

This "commitment letter" lacks credibility. At any rate, Tallgrass is unable in its current financial state even to fund the $2 million bank guarantee fee necessary to take the proposal to a next step. This leads to the next proposal.

b) Tallgrass has obtained a letter from a friend of its CEO that indicates that he has obtained verbal commitments from Chinese investors in the amount of $10 million for the purpose of investing in the company, and that they are willing to fund the $2 million required by the above-noted proposal. The secured lenders note that this potential funding source has no track record or experience with respect to Canadian oil and gas assets, and that, even if the commitment became firm, the amount is insufficient to pay off existing indebtedness.

c) Tallgrass has identified a further option, a potential loan in the process of negotiations with a broker, not a source lender, that would involve the broker earning approximately $16 million in fees to find a source for a $100 million loan. This is an even softer proposal, with no real commitment. Tallgrass' CEO concedes in understatement that this would be "expensive funding".

18 Given that these options are not commercially realistic, I must conclude that the secured lenders are correct in their view that this would likely be a liquidating CCAA. While this does not in itself preclude the use of the statute, the secured lenders object to Tallgrass management controlling the liquidation process under CCAA protection as they have lost faith in such management. The secured lenders have identified concerns about management's estimate of the value of Tallgrass' oil and gas assets, concerns about the effect of abandonment liabilities on realization values, and concerns about discrepancies between the Cost Flow Projections contained in the CCAA application as compared to those prepared by Grant Thornton. The secured lenders also have concerns with respect to how management is executing its alternate financing strategy, particularly its decision to pursue financing from the kind of sources it has identified, and what they feel is a lack of attention from senior management to realistic alternatives and options. They are critical of management's decisions with respect to covering short-term liabilities in the course of these applications.

19 Tallgrass submits that the opinions given by an officer of Toscana, Dean Jensen, on behalf of the secured lenders with respect to the value of its oil and gas assets should be given little weight as Mr. Jensen does not have the proper expertise to comment on the reserve reports. I take Mr. Jensen's comments to be the opinions of a banker experienced with loans in the oil and gas sector and with familiarity with reserve reports. What Mr. Jensen is really questioning is whether Tallgrass would be able to achieve a price for these assets equal to management's projections, and whether such projections are reliable. He thus questions whether the secured lenders are assured of recovery or whether they are at risk.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

20 The concern expressed by Mr. Jensen with respect to cost flow projections relates to whether the costs of a CCAA proceeding will be as projected by Tallgrass, and, again, a lack of confidence with respect to management's projections in that regard. While it appears that Mr. Jensen may have misunderstood some of the calculations, there remain unanswered questions about the projections.

21 This is not a case where the secured lenders have acted precipitously, or where the debtor has not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. This process has been ongoing for more than a year under Tallgrass management, which was not able to obtain take-out financing for Toscana's bridge loan, nor obtain sufficient financing to satisfy its licensee liability rating report requirements and provide funding necessary for further development activities. It is also clear that Tallgrass and its major secured stakeholders are in an adversarial mode, which does not bode well for an efficient or relatively inexpensive CCAA restructuring. Tallgrass was most likely a liquidating CCAA, and given the lack of confidence and the adversarial relationship between the company and the secured lenders at risk, I was not satisfied that a CCAA order would be appropriate in the circumstances. I dismissed Tallgrass' application.

22 It thus followed that the secured lenders' application for a receivership order must succeed.

Company's application dismissed; creditors' application granted.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 4

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., Schrager J.C.A. (C.A. Que.)

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

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

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

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

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

I. Overview

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

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

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc.,

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

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

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

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

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

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

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

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

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

B. The Initial Competing Plans of Arrangement

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

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

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

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

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

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

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

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

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

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

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

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

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

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

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

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

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

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

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

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

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

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

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

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

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

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

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

IV. Issues

37 These appeals raise two issues:

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

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

V. Analysis

A. Preliminary Considerations

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

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

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

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

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

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

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

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

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

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

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

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

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

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 305 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

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

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

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

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

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

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

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

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

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

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

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

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

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

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

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

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

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

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

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

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

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

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

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

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

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

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

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

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

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

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

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

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

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

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so [4] . The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

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

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

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

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

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

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

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

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

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

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

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

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

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

> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

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

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

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

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

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

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

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

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

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

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

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

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

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

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

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

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

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

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

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

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

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

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

• the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

• the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

• the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

• the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

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

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

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

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

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

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

. . . . .

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

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

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

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

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

VI. Conclusion

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

Appeal allowed.

Pourvoi accueilli.

Footnotes

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

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

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of Section 36" (2012) 52 *Can. Bus. L.J*. 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

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

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

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

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 5

2009 BCSC 145
British Columbia Supreme Court

Marine Drive Properties Ltd., Re

2009 CarswellBC 285, 2009 BCSC 145, [2009] B.C.W.L.D. 2022, [2009] B.C.W.L.D. 2023, [2009] B.C.J. No. 207, 175 A.C.W.S. (3d) 323, 52 C.B.R. (5th) 47

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

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

And In the Matter of Marine Drive Properties Ltd., Wyndansea Hotel Inc. and 0707624 B.C. Ltd.

Butler J.

Heard: January 29-30, 2009
Judgment: February 10, 2009
Docket: Vancouver S090306

Counsel: Mary I.A. Buttery, Owen J. James for Petitioners
E. Jane Milton, Q.C. for Ernst & Young Inc.
John I. McLean, V. Florianova for Bancorp Financial Services Inc., Bancorp Balanced Mortgage Fund Ltd., Cooper Pacific Mortgage Investment Corporation, Liberty Holdings Excell Corp.
Mark M. Davies for Liberty Holdings Excell Corp.
Peter Vaartnou for CareVest Capital Inc.
Gordon M. Elliott for Gulf & Fraser Fishermen's Credit Union
Kimberly S. Campbell for Folio Hotel & Resort Architecture, Ronald Lea Architect Ltd., William J. Reid Architect Ltd., Mark Whitehead Architect Ltd., Jacques Beaudreault Architect Ltd., Mark E.B. Thompson Architect Ltd.
Paul Hildebrand for Bigleaf Ventures Ltd., Samel Holdings Ltd., Adrian Karasz, Andriana Karasz, Cy McCullough, Caralyn Patricia Bennett, Dennis Robert Ohman, Leanne Claire Ohman, Keith Charles Shearer, Shelley Rose Price-Shearer

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Debtor wished to develop property — Debtor became insolvent and entered protection under Companies' Creditors Arrangement Act on ex parte proceedings — Creditors brought application to set aside order — Application granted — Application for original order should not have been made on ex parte basis — Creditors were known and service on them was not impracticable — Situation was not so urgent as to require ex parte proceedings — Although order nisi of one creditor was about to expire and foreclosure proceedings were possibility, process was ongoing and before court — Existence of equity in lands was not determinative factor in granting protection under Act, rather lack of pending moves by creditor was important factor — Possibility existed that land held little to no equity — No circumstances existed which made it appropriate to continue order — Extremely unlikely that any arrangement would be acceptable — Debtor had been unable to secure financing — Interest on various loans of creditors approached $500,000 monthly and proceedings could create unnecessary expenses — Debtors undertook protection under Act to attempt to secure new funding at expense of current creditors — Development project had halted and was not ongoing business — Ordering partial stay inappropriate — Potential benefit to community not important factor for consideration.

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Debtor wished to develop property — Debtor became insolvent and entered protection under Companies' Creditors Arrangement Act on ex parte proceedings — Creditors brought application to set aside order — Application granted — Application for original order should not have been made on ex parte basis — Creditors were known and service on them was not impracticable — Situation was not so urgent as to require ex parte proceedings — Although order nisi of one creditor was about to expire and foreclosure proceedings were possibility, process was ongoing and before court — Existence of equity in lands was not determinative factor in granting protection under Act, rather lack of pending moves by creditor was important factor — Possibility existed that land held little to no equity — No circumstances existed which made it appropriate to continue order — Extremely unlikely that any arrangement would be acceptable — Debtor had been unable to secure financing — Interest on various loans of creditors approached $500,000 monthly and proceedings could create unnecessary expenses — Debtors undertook protection under Act to attempt to secure new funding at expense of current creditors — Development project had halted and was not ongoing business — Ordering partial stay inappropriate — Potential benefit to community not important factor for consideration.

APPLICATION by creditors to set aside order under *Companies' Creditors Arrangement Act.*

***Butler J.*:**

1 On January 15, 2009, I granted an initial order in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") proceeding ("the Order"). The Order authorized Marine Drive Properties Ltd. ("Marine Drive"), Wyndansea Hotel Inc. ("Wyndansea"), and 0707624 B.C. Ltd. (collectively "the Petitioners") to file a formal plan of compromise or arrangement and stayed all proceedings against the Petitioners. The Petitioners appointed Ernst & Young Inc. as monitor and created a directors' charge of $75,000 and an administration charge of $500,000. The Order gave both of these charges rank in priority to the existing registered mortgage security interests against the Petitioners' real property. The Order provided that the Petitioners' application for debtor in possession ("DIP") financing be heard after service on the Petitioners' creditors of the Order and the originating materials.

2 The Petitioners brought their application on an *ex parte* basis. A number of the Petitioners' secured creditors have now brought this application to set aside the Order on a *nunc pro tunc* basis or, alternatively, to amend its terms to limit the administrative charge to $50,000 and to require a meeting of creditors to take place on February 13, 2009. The Petitioners oppose that application. They seek an order granting $1.7 million of DIP financing having priority over all other registered charges.

3 The Petitioners are all private companies incorporated under the laws of British Columbia. Elke Loof-Koehler is the sole director of all three companies. Marine Drive is a developer of resort and residential property on Vancouver Island. 0707624 B.C. Ltd. holds land in Rocky Point subdivision near Nanaimo as a bare trustee for Marine Drive. Wyndansea holds lands near Ucluelet, B.C. as a bare trustee for Marine Drive ("the Wyndansea Lands"). Marine Drive intends to develop the Wyndansea Lands as a luxury resort, including a Jack Nicklaus golf course, a 275 unit hotel, a lodge with 125 units, 561 resort condominiums, a deep-water marina, and 30 exclusive oceanfront home sites, referred to as "the Signature Circle".

4 Marine Drive has a number of additional real estate holdings. These include strata lots in the Tauca Lea Resort and Spa, unsold condominiums in The Ridge ocean view development, other oceanfront and ocean view lots on the West Coast, ocean view home sites near Nanaimo, and five 10-acre home sites in the Cariboo.

5 The Order covered all of the business interests of the Petitioners and stayed proceedings in respect of all of the assets of the Petitioners.

6 The Petitioners have six primarily first mortgage lenders. By far, the largest is a syndicate headed by Bancorp Financial Services Inc. (the "Syndicate"). The Syndicate mortgages secure approximately $37.5 million of debt. The loans of the other five first mortgagees total about $6.1 million. The total liabilities of the Petitioners, as set out in the petition, are $52,097,498. This includes second charges and liens of about $6.1 million and unsecured debt of about $3.3 million. The petition stated that the value of the property, based on appraisals or assessments from 2007 and 2008, was approximately $139,500,000. Based on these figures there would be equity of about $87,000,000.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Positions of the Parties

The Syndicate

7 The Syndicate argues that the Order should be set aside because:

(a) the Petitioners failed to make full and frank disclosure at the *ex parte* hearing;

(b) the application for the Order should not have been brought on an *ex parte* basis as there was no urgency; or

(c) the Petitioners, in any event, did not meet the test under s. 11 of the *CCAA*.

8 The Syndicate alleges that some of the factual assertions put forward by the Petitioners at the *ex parte* hearing were not correct. As a result, it says that there was no proper underpinning for the Order. In addition, it says that the assertions failed to highlight the true status of other proceedings and wrongly characterized the Petitioners' situation as urgent. There is some overlap in these arguments, but the main features of these two arguments include:

(1) the Petitioners' assertion that there was substantial equity in their real estate holdings was incorrect. In particular, the Syndicate says that the Wyndansea Lands had no equity and that this was known to the Petitioners as a result of their futile efforts to sell the properties, or to refinance or find an equity partner for the development. The Syndicate submitted an appraisal of the Wyndansea Lands dated January 27, 2009, prepared by Altus Group Ltd., in support of its argument that there is no equity in the real property holdings ("the Altus appraisal");

(2) the Petitioners' assertion that it was imperative that their business and the development work on the Wyndansea Lands continue to be maintained and operated in the upcoming months was false. The Syndicate says that there is, in fact, no ongoing business or development work at the Wyndansea Lands; no such work has been carried on for more than a year. The Petitioners have almost no employees. The only ongoing work is the attempt to sell or refinance the properties;

(3) the Petitioners' assertion that the current difficulties were caused by the credit crunch that occurred in the last few months, just as the prime Signature Circle lots were being released for sale, was false. The Syndicate notes that the work on the golf course stopped in 2007. A $1.9 million lien by the golf course contractor was filed in November 2007. The Signature Circle lots have been marketed since early 2007. While a number were sold, those sales, with one exception, did not complete. The marketing consultant, S & P, has a $900,000 charge filed against the lands. The Syndicate argues that the Petitioners ran out of money long ago and it was disingenuous to blame their difficulties on the global credit crunch;

(4) the Petitioners' assertion that any plan or arrangement would be acceptable to the creditors was simply not true. In July 2008, the Syndicate and the Petitioners came to a tentative arrangement that was predicated on the agreement of the subsequent Wyndansea chargeholders. Their agreement could not be obtained. The Syndicate also notes that at the present time, the ***CCAA*** proceedings are opposed by more than 90% of the creditors, so it is extremely unlikely that any plan could receive the necessary support;

(5) the Petitioners' assertion that there was an immediate risk of the lenders attempting to enforce their security and realize on the Wyndansea Lands to the detriment of the overall development is inaccurate. The Syndicate says that foreclosure proceedings had been commenced by all lenders between April and August 2008. The Syndicate obtained an order nisi and a $23 million judgment against the Petitioners in July 2008. No further steps had been taken, but the Syndicate advised the Petitioners that it had ordered an appraisal and that it would be applying for an order for conduct of sale. Of course, to bring that application, the Syndicate would have had to give at least 11 days' notice. The other foreclosure proceedings were at a similar stage to the Syndicate's proceedings; and

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(6) while there was no urgent reason for an *ex parte* application, the Petitioners would also have had no difficulty serving the respondents.

9 The Syndicate argues that even if there was proper disclosure, the Petitioners cannot show that they have met the test under s. 11 of the *CCAA*. It says that the Petitioners do not have an active business operation, only land holdings. There is no ongoing development work and no circumstances that justify *CCAA* protection. It says that the foreclosure proceedings provide sufficient protection to the Petitioners. The court can regulate the appropriate length of the redemption period, and oversee the conduct of sale and sale approvals. The Petitioners will continue to have the opportunity to seek joint venture partners or raise additional financing. Of course, under the foreclosure proceedings, this can be done without the additional cost of the directors' and administration charges and the DIP financing.

The Petitioners

10 The Petitioners argue that the Order can only be set aside on two bases: 1) non-disclosure of material facts that, had they been known, the Order would not have been made; or 2) new facts have been presented that convince the Court that the Order ought not to continue. With regard to the latter, the Petitioners say that the test is whether the restructuring is doomed to failure.

11 The Petitioners say that the standard for disclosure is not perfection but, rather, realistic full and frank disclosure. They say that standard has been met here. In response to the suggestion that the Petitioners should not have brought the motion without notice, they argue that it would have been impractical to have done so. In support, they state at para. 13 of their argument, the fact that "none of the parties were willing to proceed last Wednesday, January 21, 2009 (six days after the Order was pronounced), illustrates that none of the parties would have been willing to proceed on a day or two's notice of the application for the Initial Order".

12 The Petitioners rely on the first report of the monitor of January 28, 2009. In that report, the monitor says that in its view "the Petitioners are acting in good faith and with due diligence during this *CCAA* proceeding". The monitor says that this is demonstrated by the Petitioners' agreement to release 0707624 B.C. Ltd. and the assets of Marine Drive from the stay of proceedings. The Petitioners ask that the Order be amended to reflect this change. This would leave only the Wyndansea Lands subject to the stay and the terms of the Order. The Petitioners acknowledge that it would be novel to have a stay order that operates only against some of the assets of a debtor company. However, they say that novelty alone is no reason to refuse to make the order.

13 In response to the suggestion that there is no equity in the Wyndansea Lands, the Petitioners say that they have not had an opportunity to respond to the Altus appraisal, which was delivered to them only a day before this application. While they admit to knowing for some time that the Syndicate had commissioned an appraisal, they do not have funds to retain an appraiser to respond. One of the proposed uses of the DIP mortgage funds is to retain an appraiser for this purpose. They also say that it cannot be concluded that there is no equity in the Wyndansea Lands in the face of the appraisal information put forward by the Petitioners. While the Altus appraisal opines that there is little or no equity, the information relied upon by the Petitioners suggests that there is substantial equity.

14 In response to the suggestion that there is no possibility of a plan being acceptable to creditors, it says that a number of the unsecured creditors support the *CCAA* proceedings. Further, the Court is entitled to take into account the stakeholders in the community who stand to benefit from the economic activity and municipal infrastructure that the project will bring to Ucluelet.

15 Finally, the Petitioners argue that it is appropriate for them to be given an opportunity to attempt a restructuring during the initial 30 day stay period. The intent of that initial 30 day stay is to give the debtor the chance to muster support for and justify the relief granted in the Order. It has not had the time it needs to do that, given the need to respond to the Syndicate's application. The Petitioners say that the stay should continue at least until the comeback hearing scheduled for February 12, 2009. In the meantime, the order for DIP financing should be made to allow them to respond to the Altus appraisal.

Issues

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

16 There are numerous contentious issues raised by these applications. The question of whether full and frank disclosure was made would require careful examination of the materials relied upon at the hearing on January 15, 2009, and careful review of the statements made by counsel. I do have serious concerns regarding the disclosure made at the time of the initial application. However, given the conclusions I have reached on the other issues, I have not undertaken that close review. I have considered the following two issues:

(1) Should the application for the Order have been made on an *ex parte* basis?

(2) Have the Petitioners met the test under s. 11 of the *CCAA* for an order such that the stay should continue?

17 For the reasons set out below, I have concluded that the application should not have been brought without notice and that, in any event, the Petitioners cannot meet the test under s. 11 of the *CCAA*. Accordingly, I am setting aside the Order.

Issue 1: Should the application for the Order have been made on an ex parte basis?

18 The *CCAA* provides in s. 11(1) that an application may be made "on notice to any other person or without notice as it may seem fit". The Petitioners took the position on both applications that it is the norm for *CCAA* proceedings to be commenced by an *ex parte* application.

19 While the Order on many *CCAA* proceedings is obtained on an *ex parte* application, that does not mean that an applicant does not have to establish that it was appropriate or "fit" to have the application heard without notice.

20 These proceedings are brought by petition. Rule 52(12.1) of the *Rules of Court*, B.C. Reg. 221/90, provides as follows:

> If the nature of the application or the circumstances render service of a petition or notice of motion impracticable or unnecessary, or in case of urgency, the court may make an order without notice.

21 The Rule sets out the circumstances under which it is appropriate or fit that an order be made without notice. In this case, the Petitioners were required to show that service of the petition was impracticable or that there was urgency requiring an immediate order.

22 Here, there could be no suggestion that service of the petition on the respondents was impracticable. All of the secured creditors and lien claimants had counsel known to the Petitioners. The Petitioners' rationale for the *ex parte* application was the existence of an urgent situation. In Ms. Loof-Koehler's affidavit, she referred to the Syndicate's order nisi, obtained on July 14, 2008, and to the existence of orders in the other foreclosure proceedings. She described the urgency in the following way:

> Given these orders, there is immediate risk that the lenders will attempt to enforce their security and realize on the Wyndansea lands. Such an application would be very detrimental to the overall development and would prejudice all of the stakeholders from maximizing realization from the assets.

23 While the redemption period in the order nisi was about to expire, there was no real urgency in the situation. As noted by the Syndicate, they were in a position to apply for an order for conduct of sale or for an order absolute of foreclosure, but in either case, the Petitioners would have notice and a full opportunity to respond. I was not told at the initial application that the Syndicate had advised the Petitioners that it was in the process of having the Wyndansea Lands appraised and that it would be applying for an order for conduct of sale. Indeed, the Petitioners had been supplying information to the appraiser for some time prior to the initial application. They had also advised the Syndicate that they would oppose the order for conduct of sale. The foreclosure proceedings were ongoing under the supervision of the court. There was no reason for the Petitioners not to give notice of the *CCAA* application, just as the Syndicate would have to give notice of the application for conduct of sale.

24 The Syndicate relies on *Encore Developments Ltd., Re*, 2009 BCSC 13 (B.C. S.C.), a very recent decision of Brenner C.J. that was not available at the time of the Order. In *Encore*, an order had been obtained in circumstances similar to the present case. The debtor was a real estate developer with a number of development projects in the Okanagan area. When the order

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

was made, "no work was underway on any of the projects: a number were substantially completed; the others consisted of bare land": *Encore* at para. 2.

25 The Chief Justice set aside the order on a *nunc pro tunc* basis. He found that the application should not have been brought without notice to the respondents. His reasoning is set out at paras. 27-30, which I have set out in full:

> This application was filed and heard on an *ex parte* basis. On such an application where the relief sought affects the rights of others, the applicant must demonstrate to the court the need for urgency and the reason why those against whom relief is sought *ex parte* are not being given notice. In addition, the applicant must use utmost good faith to disclose to the court fairly and frankly all of the relevant information, particularly as to urgency and the reason as to why notice should not be given.
>
> Here there was no urgency. Encore was not operating; it was effectively shut down. Because of Encore's representation to the court that it had equity of approximately $2.5 million, the true exposure of the secured lenders to the costs of the ***CCAA*** was not disclosed. With the true equity being zero or negative, it is clear that this ***CCAA*** could only be run by priming the mortgage lenders.
>
> In this case where the cost of the ***CCAA*** proceeding was to fall solely on the shoulders of one creditor group, there was no justification for filing and proceeding *ex parte*. If Encore were an operating company with many employees, and if it were faced with being shutdown by the security enforcement steps of one or more of its lenders, then an *ex parte* application might have been understandable. No such circumstances exist in this case.
>
> In the absence of such factors, proceeding *ex parte* was simply unjustified. There was no evidence that any creditor had seized any assets, or was on the verge of seizing any assets. Neither was the petitioner's condition emergent, in the sense that a payroll was about to be missed or that Encore's viability was about to end.

26 The Petitioners say that *Encore* is distinguishable because, in this case, there is equity in the Wyndansea Lands and the secured creditors cannot say that they are being "primed". I will comment on the issue of equity below, but in the present circumstances, whether notice should have been given does not depend upon the existence, if any, of equity in the Wyndansea Lands. Here, as in *Encore*, there was no operating business, no ongoing development work, and no group of employees facing the sudden loss of their jobs. There were no pending moves by the creditors that required an *ex parte* order.

27 This application should not have been brought without notice to the respondents. Initial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation. Counsel must be careful to fairly present the situation to the court if the application is made on an *ex parte* basis.

28 As I have determined that there is no basis for an order under the *CCAA*, I do not have to decide what remedy flows from the failure to give notice.

Issue 2: Have the Petitioners met the test under s. 11 of the CCAA for an order such that the stay should continue?

29 I do not accept the Petitioners' submission that the only two bases for setting aside the Order at this time are material non-disclosure at the time of the Order or new facts that convince me that it should not be continued. A court may set aside an order made under s. 11 of the *CCAA* at any time if it concludes that the circumstances do not exist, or no longer exist, to make such an order appropriate. In this case, there are particular reasons to consider the respondents' applications to set aside the Order at this time. These are:

(1) the changes to the Order that are proposed by the Petitioners are so significant that a reconsideration is appropriate;

(2) the Order was granted on an *ex parte* basis; and

(3) the application for DIP financing would result in an additional $1.7 million of debt ranking in priority to other creditors. In order to consider that application, I must determine if it is appropriate for the Order to continue.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

30 I have concluded that there are no circumstances present in this case that make it appropriate to continue the Order under the *CCAA*. I now turn to the circumstances and factors that I considered in arriving at this conclusion.

Purpose of the CCAA

31 The purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to enable the company to stay in business or to complete the business that it was undertaking. The court must play a supervisory role, preserving the status quo until a compromise or arrangement is approved, or until it is evident that it is doomed to failure: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311 (B.C. C.A.).

32 In this case, it is evident at this stage that a compromise or arrangement is very unlikely to be acceptable to the respondents who would have to vote in favour of any arrangement if it is to be approved. The Petitioners ran out of money more than a year ago; they have been attempting, without any success, to sell their land holdings, arrange financing, and find a new partner during that time. Their inability to find financing, the subsequent falling real estate market in B.C. and the global credit crunch, have seriously impacted the Petitioners. There can be no doubt that the situation is worse now than it was six months ago. At that time, the Petitioners and the Syndicate could not get subsequent chargeholders to agree to a proposed arrangement regarding some of the Wyndansea Lands. The chances of any kind of agreement now being reached are much less. In addition, all of the first mortgagees are now opposed to any compromise. A number have brought motions to set aside the Order, while others have indicated their support for this application. They represent well over two-thirds of the secured creditors. In these circumstances, there is no reason to continue the Order. I am satisfied that any arrangement is doomed to fail.

Equity Situation

33 When the Order was made the Petitioners submitted that there was likely significant equity in the Wyndansea Lands based on appraisals from 2006 and 2007. The Petitioners argued that if those appraisals were discounted by 50% and the Signature Circle lots were discounted by an additional 30%, there would still be more than $8 million in equity. It was clear that these "discount" figures were arbitrary choices. The Altus appraisal raises serious doubt about the Petitioners' assertion. The Petitioners argue that I should not place any reliance on the Altus appraisal, in part because they have not had an opportunity to respond to it.

34 I have reviewed the new Altus appraisal and find it to be a considered, detailed, current appraisal of the Wyndansea Lands. There is no reason for me to disregard it. I can place much more reliance on the opinion contained in the Altus appraisal than I can on the values asserted on the basis of the older appraisals discounted arbitrarily. It is evident from the length of time that the Petitioners have attempted to raise financing or sell the properties that the older appraisals should be disregarded. While I cannot conclude that there is no equity in those lands, I can conclude that there is a serious risk of that.

35 In addition, I note that interest on the two Syndicate loans amounts to approximately $460,000 per month. Taking into account the other debt owing, the total interest charges per month will approach $500,000. The position of the creditors will erode rapidly with the passage of time. This is especially so in the current market. The risk that there is no equity in the assets would, of course, be increased if the DIP financing is approved. While I cannot say, as Brenner C.J. noted in *Encore* at para. 28, that the *CCAA* proceeding "could only be run by priming the mortgage lenders", I can conclude that there is a serious risk that the *CCAA* proceeding could only be run at the expense of many of the creditors.

Nature of the Petitioners' Business

36 The Petitioners argued strenuously that there is no reason why the *CCAA* should not apply to a real estate development company. They stressed that the decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.), and *Encore* do not prevent a real estate developer from making application for protection. I agree. As noted by Tysoe J.A. in *Cliffs* at para. 25, "the nature and state of [the debtor's] business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay".

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

37 The present circumstances are similar to those in both *Cliffs* and *Encore*. There is no development work in progress on any of the Petitioners' properties. The work on the golf course ceased long ago. The Signature Circle lots have been the subject of an extensive and expensive marketing program for at least 1 1/2 years. The hotel site is subdivided and serviced. The first subdivision plan is complete and serviced. However, the only real ongoing work is an attempt to raise new financing or sell properties. The development work on the properties, other than the Wyndansea Lands, was completed some time ago. On those properties, the Petitioners are attempting to sell either serviced lots or completed strata lots.

38 To put it bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the Petitioners stated in argument, they need time to "try to pull something out of the hat". They have sought DIP financing so that they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

39 In *Redekop Properties Inc., Re*, 2001 BCSC 1892, 40 C.B.R. (5th) 62 (B.C. S.C. [In Chambers]), Sigurdson J. came to the same conclusion while considering the applicability of a *CCAA* proceeding to a company that was effectively a real estate holding and development business. He stated as follows at para. 63:

> It is also a factor that this type of company is not the classic ongoing business to which ***C.C.A.A.*** protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

40 Similar observations were made by Tysoe J.A. in *Cliffs* at para. 36:

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

41 The nature of the Petitioners' business and financing arrangements are such that it is extremely unlikely that the protection of the *CCAA* could facilitate a compromise or arrangement between the Petitioners and their creditors.

Foreclosure Proceedings

42 All of the Petitioners' developments are currently subject to ongoing foreclosure proceedings. The Petitioners' desires to raise new funding or sell some of their assets can be, and are being, pursued in the course of those proceedings. Their desire to buy time to do so can be the subject of application in the foreclosures. They already have sufficient protection of their interests in the existing court proceedings.

43 This issue was dealt with in *Redekop*, where Sigurdson J. stated at para. 61:

> ... I am satisfied that the protection the company wishes to obtain is equally available in practical terms in a foreclosure proceeding, and the foreclosure proceeding allows the secured creditors to begin to enforce their security. The options of seeking a joint venture partner or selling are just as available in a foreclosure as they are under the protection of a ***C.C.A.A.*** proceeding.

Limiting the Proceedings to the Wyndansea Lands

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

44 The Petitioners sought an order amending the Order to limit it to only the Wyndansea Lands. This is opposed by the Syndicate. I am not aware of any precedent for such an order. I have not seriously considered how a partial stay might work in this case. Even on a cursory review, it would appear to create unnecessary disputes between creditors as the realization progressed on other assets of the Petitioners. This would complicate and prolong resolution of those proceedings. I question whether the *CCAA* can apply to only one part of the operations of a company rather than to all of it. I do not have to decide that issue here as I am not prepared to make such an order.

Other Stakeholders

45 The Petitioners have argued that the interests of the community should be a significant factor in the decision made on this application. I do not agree. While the development will bring employment and other benefits to the community of Ucluelet when it proceeds, the interests of the community are not directly engaged by the dispute that is currently before me.

46 The Petitioners' reliance on *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), is misplaced. The situation here bears no similarity to the circumstances that were faced by the communities affected by the Skeena Cellulose operations. It was estimated that 8,000 direct and indirect jobs depended upon the continuation of that business. Here, there are no existing jobs that will be impacted by a failure to continue the stay of proceedings. Further, the potential of future benefits for the community remains the same whether or not the stay is continued. If the golf resort is the best use of the lands, then it is likely that the project will proceed in the future when circumstances permit.

Summary

47 There are no circumstances present that make it appropriate to continue the Order. In addition, the Order should not have been sought on an *ex parte* basis. The Order will accordingly be set aside. As I have not found a failure to make full and frank disclosure on the part of the Petitioners, I decline to make the order effective *nunc pro tunc*.

48 The parties are scheduled to appear before me on February 12, 2009, at 9:00 a.m. I will consider arguments regarding costs at that time.

Application granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 6

2009 ABQB 500
Alberta Court of Queen's Bench

Octagon Properties Group Ltd., Re

2009 CarswellAlta 1325, 2009 ABQB 500, [2009] A.W.L.D. 4033, [2009] A.J. No. 936, 180 A.C.W.S. (3d) 18, 486 A.R. 296, 58 C.B.R. (5th) 276

IN THE MATTER OF THE Companies' Creditors Arrangement Act, R.S.C. 1985,c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF OCTAGON PROPERTIES GROUP LTD., 1096907 ALBERTA LTD., 880512 ALBERTA LTD., 5448710 MANITOBA LTD., and 5433801 MANITOBA LTD.

C.A. Kent J.

Heard: August 26, 2009
Judgment: August 28, 2009
Docket: Calgary 0901-12182

Counsel: Larry Robinson, Q.C., Lance Williams for Applicants
Sean Collins, Dean A. Hutchison for GE Canada Real Estate
Brian O'Leary, Q.C., Simina Ionescu-Mocanu for Alberta Treasury Branches
Russell Avery for Canada ICI
John Ircandia for HSBC Bank Canada
Charles Russell, Q.C. for Canadian Western Bank
Andrew Maciag for Citizens' Bank
Josef Kruger for Servus
Clifford J. Shaw, Q.C. for First Calgary
Bruce Milne for 1st Choice Savings
Stephen Raby, Q.C. for Trumpet Capital
Chris Simard for Echo Merchant Fund Ltd.
Kelly Bourassa for Proposed Monitor, Alger & Associates Inc.

Subject: Insolvency; Property; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application
Real estate company owned 20 properties that each had at least one mortgage on it — Company was unable to make all mortgage payments as result of tenants defaulting on leases during economic downturn — Some properties were in foreclosure — Company brought application for relief pursuant to Companies' Creditors Arrangement Act (CCAA) — Application dismissed — It was highly unlikely that any compromise or arrangement proposed by company would be acceptable to first mortgagees — There was no incentive to mortgagees to agree to compromise — If mortgagees were permitted to proceed with foreclosure procedures, they would emerge reasonably unscathed — There was no other reason for CCAA relief such as existence of large number of employees or significant unsecured debt in relation to secured debt — Company could obtain relief under court-supervised foreclosure proceedings if reasonable.

APPLICATION by real estate company for relief pursuant to *Companies' Creditors Arrangement Act*.

***C.A. Kent J.*:**

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

1 Octagon Properties Group Ltd. and related entities apply for relief pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 as amended (*CCAA*). Octagon is the parent company and sole shareholder of the remaining applicants. Throughout these reasons reference to Octagon will include the subsidiaries. Octagon is a real estate company which purchases, holds and sells property. It is not a development company. Currently, it owns 20 properties, all of which would fall under the *CCAA* proceedings if granted. In addition, there is a property entitled Blackfalds which Octagon proposes not fall under the *CCAA* proceedings.

2 Each of the 20 properties has at least one mortgage on it and in some cases a second and third mortgage. At the application, counsel for the mortgagees appeared and made representations. The majority of the first mortgagees opposed the application for relief under the *CCAA*. One mortgagee, Canada ICI, which has mortgages on 2 properties supported the application and one mortgagee, ATB, was essentially neutral but applied for an adjournment to deal with issues arising out of the proposed DIP financing.

3 The reason that Octagon has applied for *CCAA* protection is that it has been unable to make all of its mortgage payments. This is a result of the economic downturn which in turn has meant that several tenants of properties owned by Octagon have defaulted on their lease. The cash flow has diminished which in turn means that the bills, specifically taxes and the mortgage interest payments, have not been paid. Some of the properties are currently in foreclosure.

4 The company says that should *CCAA* protection be granted, its proposed plan is to market some of the properties which will not only reduce some of its mortgage obligations but also provide the equity to deal with the remaining properties. As part of its application, it proposes that DIP financing be ordered. It has a commitment from Echo Merchant Fund Ltd. for a total amount of $3,500,000.00, with the first draw being up to $1.5 million with 3 subsequent $500,000.00 draws. The interest rate in the letter of commitment is 15% per annum. A standby fee of 6% per annum on the undrawn portion of the DIP, a facility fee of 2.75% of the DIP facility and $10,000.00 deposit for lender expenses.

5 The cash flow summary provided by Octagon shows that the majority of debt is a combination of mortgage arrears and unpaid property taxes. If the *CCAA* order permitted drawing $1.5 million of the DIP financing, the majority of that financing would go to pay the taxes and the arrears which Octagon says is for the benefit of the first mortgagees. From August to November, the cash flow summary shows a shortfall from $210,000 to $290,000 per month depending on the month.

6 In support of its application Octagon provided a property summary which lists the 20 properties, their book value, the latest appraisal value, a company valuation and the outstanding amount of the mortgage which then results in a summary of the equity available on book value, latest appraisal value and the company's estimate. Because of the sensitive nature of some of that information the affidavit attaching that information was sealed. Generally, however the summary reveals that the latest appraisals for any of the properties occurred in November and December 2008 with most of the appraisals in either early 2008 or 2007. The summary also reveals that on the current company valuation there is some equity in most of the properties although in some cases it is a very small amount of equity. There is no equity in a few properties.

7 The majority of the first mortgagees oppose the application. They argue that each of the mortgagees negotiated their arrangement individually with Octagon. Part of each of those agreements include remedies for default under the mortgage. The foreclosure remedy which is available under each of the mortgages should be permitted to run its course. The *CCAA* order would take away the mortgagees' right to exercise those remedies and in a situation where there is no other reason to grant the *CCAA*. They argue that the plan proposed by Octagon is really not a plan. In this case there are no employees. The only stakeholders beyond the secured lenders are shareholders and a small number of unsecured creditors (about $300,000.00). On the other hand, granting *CCAA* protection would mean that Octagon would incur professional fees estimated at about $300,000.00 to take the company to the end of December. They say that the proposed DIP financing is particularly onerous and of concern to the first mortgagees. It would prime them and there is no proposed explanation for how the DIP financing would be allocated amongst the various properties.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

8 The mortgagees also argue that *CCAA* relief is a drastic remedy and unprecedented in the context of a business where reasonable commercial remedies are available. There is no public policy reason such as a business that is crucial to the economy or where there is a large group of employees affected that would require that *CCAA* proceedings trump those ordinary commercial remedies.

9 In support of their opposition, the first mortgagees cite 3 cases. In *Marine Drive Properties Ltd., Re* (2009) (B.C. S.C.), Justice Butler allowed an application to set aside an *ex parte* order under the *CCAA* on the basis that the debtor's proposal was an inappropriate use of the *CCAA*. Justice Butler noted that the purpose of the *CCAA* was to facilitate the making of a compromise or arrangement between an insolvent debtor and its creditors to allow the company to stay in business (para. 31). In that case as in this case the major creditors were unlikely to approve any compromise proposed by the debtor. He found that the arrangement was doomed to fail.

10 He also found that the debtor had sought *CCAA* protection to buy time in an attempt to raise new funding. He says at para. 38:

> To be it bluntly, the petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the petitioners stated in argument, they need time to "try to pull something of the hat." They have sought DIP financing so they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

11 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 323 (B.C. C.A. [In Chambers]), the debtor was a business involved in a single land development. The Chambers judge had extended a *CCAA* stay and authorized financing. The Court of Appeal allowed an appeal from that order. Three points relevant to this case emerge from the Court's reasons. First, the fundamental purpose of the *CCAA* is to facilitate a compromise or arrangement and granting or continuing a stay is ancillary to that purpose. (paras. 26 and 27)

12 Second, the court questions whether it should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted on by the creditors if the plan of arrangement intended to be made by the debtor will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. (para. 32)

13 Third, if the sole business of a company is a single land development, the company may have difficulty proposing an arrangement that would be more advantageous to the secured lenders than their exercise of remedies available pursuant to their security. In such circumstances the fundamental purpose of the *CCAA* to reach a compromise or arrangement is likely to be thwarted by the secured creditors who have no incentive to do anything other than demand their right to exercise their remedies under their security. (para. 36)

14 The final case is *Encore Developments Ltd., Re* (2009), 2009 BCSC 13 (B.C. S.C.). Encore was a developer where the projects were either bare land or completed subdivisions awaiting sale. There was no active business being carried out. Chief Justice Brenner found that there was no reason for putting in place or maintaining a stay which would ... "prevent the real estate lenders from enforcing their security in the conventional manner should they so choose." (para. 24) He also held that in those circumstances it had not been appropriate to apply *ex parte* particularly since the terms of the DIP financing were particularly onerous on the secured lenders who would bear the costs of the restructuring.

15 In response to those submissions counsel for Octagon urged that a 30 day stay under the *CCAA* would give the company breathing time and hopefully affect a sale. He also said that it would not be necessary during that 30 day period to grant an order allowing for the full amount of DIP financing to be available.

16 I should note that I have not summarized the submissions made by or against ICI or ATB since these may reveal otherwise confidential information. I do, however, agree with the submissions of the other first mortgagees.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

17 This is not a case where it is appropriate to grant relief under the *CCAA*. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted *CCAA* relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for *CCAA* relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

18 In the result, the application of Octagon is denied.

Application dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 7

2008 BCCA 327
British Columbia Court of Appeal

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.

2008 CarswellBC 1758, 2008 BCCA 327, [2008] 10 W.W.R. 575, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, [2008] B.C.J. No. 1587, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 46 C.B.R. (5th) 7, 83 B.C.L.R. (4th) 214

Cliffs Over Maple Bay Investments Ltd. (Respondent / Petitioner / Respondent) and Fisgard Capital Corp. and Liberty Holdings Excel Corp. (Appellants / Respondents / Applicants)

Frankel, Tysoe, D. Smith JJ.A.

Heard: August 12, 2008
Judgment: August 15, 2008
Docket: Vancouver CA036261

Counsel: G.J. Tucker, A. Frydenlund for Appellants
H.M.B. Ferris, P.J. Roberts for Respondent
M. Sennott for Century Services Inc.
M.B. Paine for Monitor, Bowra Group

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 of CCAA is not free standing remedy that court may grant whenever insolvent company wishes to undertake restructuring — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — Stay of proceedings freezing rights of creditors should only be granted in furtherance of CCAA's fundamental purpose — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — Chambers judge failed to take this important factor into account.

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

Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 is not free standing remedy that court may grant whenever insolvent company wishes to undertake "restructuring" — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — If stay under CCAA should not be extended because debtor is not proposing arrangement or compromise with creditors, it

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

followed that DIP financing should not have been authorized to permit debtor to pursue restructuring plan that did not involve arrangement or compromise with its creditors.

APPEAL by creditors from order of chambers judge granting debtor's application to extend stay of proceedings and to authorize debtor-in-possession financing.

Tysoe J.A. **(orally):**

1 The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

2 The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the *CCAA*, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the *CCAA*, the stay contained in the order was expressed to expire on June 25.

3 The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

4 The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

5 The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

6 Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

7 The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

8 There are four mortgages registered against the development. The first two mortgages are not significant — the first mortgage secures an amount of $900,000 that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

9 The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

10 In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000	— trade creditors
1,700,000	— equipment leases
1,135,000	— loans from related parties
45,000	— unpaid source deductions
$7,340,000	

11 The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008 when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

12 It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

13 The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the *CCAA* proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the *CCAA* and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

14 When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the *CCAA* (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation — $10 million;

(b) liquidation value with a source of water for irrigation — $28 million;

(c) going concern value with completion of the development — $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

15 In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

with respect to the completion of the development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

16 The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the *CCAA* because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the *CCAA*, which reads as follows:

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

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

17 The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

18 Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

19 The affidavit of the principal of the Debtor Company filed at the time of the commencement of the *CCAA* proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

20 In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

21 Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In *Reza v. Canada*, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61 (S.C.C.), the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

22 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1 (S.C.C.), the Court quoted the following statement in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 (U.K. H.L.) at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the *CCAA*, *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 (B.C. C.A.) at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

23 In my opinion, the comments of Newbury J.A. in *New Skeena* were directed at ongoing *CCAA* matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of *CCAA* proceedings.

Analysis

24 On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the *CCAA* should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the *CCAA* applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the *CCAA* and it satisfies the criterion contained in s. 3(1) of the *CCAA* of having liabilities in excess of $5 million. The *CCAA* clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the *CCAA*. The real question is whether a stay of proceedings should have been granted under s. 11 of the *CCAA* for the benefit of the Debtor Company.

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

27 The fundamental purpose of the *CCAA* is expressed in the long title of the statute:

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

28 This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141 (B.C. C.A.). The first is *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75 (S.C.C.), where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

29 The second decision is *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 315-16, where Gibbs J.A. said the following:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. ll.

30 Sections 4 and 5 of the *CCAA* provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the *CCAA* to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at ¶ 7 and *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at ¶ 11), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.) at ¶ 32. I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

33 Counsel for the Debtor Company also relies upon the decision in *Skeena Cellulose Inc., Re* (2001), 29 C.B.R. (4th) 157 (B.C. S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the *CCAA* proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48 Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the *CCAA*. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

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

37 The failure of the chambers judge to consider the fundamental purpose of the *CCAA* and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the *CCAA* should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

39 In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

41 I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

***Frankel J.A.*:**

42 I agree.

***D. Smith J.A.*:**

43 I agree.

***Frankel J.A.*:**

44 The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

Appeal allowed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 8

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

2017 CarswellAlta 1631, 2017 ABQB 550, [2017] A.W.L.D. 4936, [2017] A.W.L.D. 5003, [2018] 2 W.W.R. 731, 283 A.C.W.S. (3d) 214, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103

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

AND In the Matter of a Plan of Arrangement of Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd (Applicants)

J.E. Topolniski J.

Heard: August 11, 2017
Judgment: September 11, 2017
Docket: Edmonton 1703-12327

Counsel: Darren R Bieganek, Q.C., for Monitor, Ernst & Young
George F Body, for Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue
Jeffrey Oliver, for Business Development Bank of Canada
Stephanie A Wanke, for Applicants, Canada North Group Inc, Canada North Camps Inc, Campcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd, and 1919209 Alberta Ltd

Subject: Income Tax (Federal); Insolvency; Tax — Miscellaneous

Headnote

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

RULING on Canada Revenue Agency's motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National for unremitted source deductions.

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

Introduction

1 This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1] (*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

2 Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which subordinate its deemed trust claims arising under the *Income Tax Act (ITA)* [2], *Canada Pension Plan Act* [3] *(CPP Act)*, and *Employment Insurance Act* [4] *(EI Act)* (collectively, the Fiscal Statutes) [5].

3 CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

4 In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

5 For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The Factual Landscape

6 No surprise given the nature of the proceedings, matters have unfolded quickly.

7 The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*) [6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

8 The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

9 On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

10 On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

11 On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

12 By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

13 Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

14 Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

15 On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

16 Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

17 On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508 (Alta. Q.B.)). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The CCAA and Judicial Decision Making

18 The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

19 The *CCAA* process "creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all." [7]

20 When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival. [8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, *Sun Indalex Finance, LLC v. United Steelworkers*, [9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. [10]

21 The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail. [11] Typically, this requires balancing multiple interests.

22 *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in *Century Services*, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring. [12]

23 The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in *Century Services*:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit [13] .

24 In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play. [14]

A Brief History of Deemed Trust Litigation

25 While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with *Royal Bank of Canada v. Sparrow Electric Corp*. [15]

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

26 The contest in *Sparrow Electric* was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act* [16] and the Alberta *Personal Property Security Act.* [17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently, CRA's deemed trust had no property to attach to when it later arose. In response to *Sparrow Electric*, Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

27 The next noteworthy case is *First Vancouver Finance v. MNR*, [18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

28 The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in *Sparrow Electric*) (at para 27-28).

29 The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

> . . . to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

30 *First Vancouver* was considered in the 2007 decision, *Temple City Housing Inc (Companies' Creditors Arrangement Act)*, [19] and again in June 2017 in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*. [20]

31 In *Temple City*, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

32 Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

33 The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

34 Next is the seminal decision in *Century Services*, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA). [21] Despite the different deemed trust at issue, *Century Services* is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

35 *Rosedale Farms* concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of *Temple City*. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

36 I will return to the conflicting views expressed in *Temple City* and *Rosedale Farms* in the context of the priority analysis.

The Statutory Provisions

37 The relevant statutory provisions are set out below. All emphasis is mine.

38 *CCAA* s 2(1) defines the term, "secured creditor" as including:

> **a holder of . . . a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

39 *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

40 The *EI Act* and *CPP Act* cross-reference these definitions.

41 The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
>> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>>
>> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

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

42 *CCAA* s 37, previously s 18.2, reads:

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") . . . .

43 *ITA* ss 227(4) and (4.1) read:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada,** any enactment of a province or any other law, **where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid** to Her Majesty in the manner and at the time provided under this Act, **property of the person and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust **is deemed**

(a) *to be held*, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, *in trust for Her Majesty whether or not the property is subject to such a security interest*, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

44 *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

45 With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

46 The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

47 The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

48 The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause.[22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

49 CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

50 Recourse through the comeback clause is available when circumstances change. As explained in *Pacific National Lease Holding Corp., Re*:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems.[23] [emphasis added]

51 Likewise, in *Re Royal Oak Mines Inc*, Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring.[24]

52 Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause.[25]

53 An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence.[26]

54 Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

55 Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of *Re Algoma Steel Inc*,[27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

56 Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*.[28]

57 Next, I will discuss service and timing concerns.

Service

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

58 It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence. [29]

59 As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

60 Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

61 Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

62 CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

63 The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

64 Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

65 The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

66 These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

67 In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, *Algoma Steel* supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

68 While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question." [30]

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

69 Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

70 CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

71 The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

72 Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

73 I turn next to who bears the onus.

The Onus

74 The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding." [31]

75 In *General Chemical Canada Ltd., Re*, [32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

76 In contrast, in *Re Target Canada Co*, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied." [33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

77 Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.
- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

78 I now turn to the substantive priority issue.

Who has priority?

79 It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

80 Two principal questions arise:

i. What is the nature of CRA's interest?

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

81 CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act . . . property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

82 CRA asserts that these words take it beyond a mere secured creditor because they do not just *deem* the Crown to be the owner of the interest, but rather, says that it *is* the owner.

83 This is the same position CRA advocated in *Temple City*, where Romaine J distilled these features of tax deemed trusts from *First Vancouver* :

> • The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and
>
> • In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

84 Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*. [34]

85 Moir J in *Rosedale Farms* disagreed finding instead that:

> • The analogy of the deemed trust to a floating charge in *First Vancouver* was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted. [35]
>
> • The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust. [36]
>
> • Reliance on the *ITA* definition of "secured interest" is misguided. [37]

86 Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in *First Vancouver* . However, as I read *Temple City*, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

87 *Rosedale Farms* is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment . . . and includes a ... deemed or actual trust ... ."

88 Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

89 For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

90 It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

91 *ITA* s 227(4.1) opens with these words:

> **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law**, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty notwithstanding any security interest in such property . . . . [emphasis added] (Notwithstanding Provision)

92 CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in *Century Services* (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

93 While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

94 CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] . . . is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

95 The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

96 In *Thibodeau v Air Canada*, [39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "*only* when the existence of the conflict, in the restrictive sense of the word, *cannot be avoided by interpretation*" [40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

97 Further, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .

(P. -A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)

As in any statutory interpretation exercise . . . courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102. [emphasis added]

98 Deschamps J observed in *Century Services*, at para. 15:

. . . the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

99 She also quoted with approval the reasons of Doherty JA in *Elan Corp v Comiskey* [42] (Doherty JA was dissenting):

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

100 In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders. [43]

101 In *Indalex*, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

. . . case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. [44]

102 The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

103 Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

104 Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

105 Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

106 Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> . . . priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

107 CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": *First Vancouver* at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment (as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

108 The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

109 CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

110 The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

111 It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

112 I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority *only* to those charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over *all other* security interests, but those ordered under ss 11.2, 11.51, and 11.52.

113 A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

114 For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Order accordingly.

Footnotes

1 RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

2 RSC, 1985, c 1 (5th Supp) 6.

3 RSC 1985, c C-8.

4 SC 1996, c 23.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

5 Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.

6 RSC 1985, c B-3.

7 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 77, [2010] 3 S.C.R. 379 (S.C.C.).

8 *Century Services* at paras 15, 17.

9 *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205, [2013] 1 S.C.R. 271 (S.C.C.).

10 ***Indalex*** at para 105.

11 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.) at 140, (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.).

12 *Century Services* at paras 64-66.

13 ***Century Services*** at para 70.

14 *Century Services* at paras 65 and 70.

15 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) .

16 *SC 1991, c 46.*

17 SA 1988, c P-4.05.

18 *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720 (S.C.C.).

19 *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274 (Alta. Q.B.), leave to appeal denied *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 43 C.B.R. (5th) 35 (Alta. C.A.).

20 *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.).

21 *RSC 1985, c E15.*

22 *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para 5; *Comstock Canada Ltd., Re*, 2013 ONSC 4756, 4 C.B.R. (6th) 47 (Ont. S.C.J.) at para 49; *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.); *CanaSea PetroGas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283 (Ont. S.C.J.) at paras 13-14.

23 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) at para 30.

24 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para 28.

25 *Re CanaSea PetroGas Group Holdings Ltd.*

26 *Elias v. Hutchison* (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.) (at para 6), (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.), aff'd (1981), 121 D.L.R. (3d) 95, 37 C.B.R. (N.S.) 149 (Alta. C.A.); *Christiansen v. Paramount Developments Corp.*, 1998 ABQB 1005 (Alta. Q.B.) (at para 24), (1998), 8 C.B.R. (4th) 220 (Alta. Q.B.); *Fitch v. Official Receiver* (1995), [1996] 1 W.L.R. 242 (Eng. C.A.); *Lyall, Re* (1991), 8 C.B.R. (3d) 82 (B.C. S.C.).

27 *Algoma Steel Inc., Re*, [2001] O.J. No. 1994 (Ont. S.C.J. [Commercial List]), leave to appeal refused, (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.).

28 At para 14.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

29 *Concrete Equities Inc., Re*, 2012 ABCA 266 (Alta. C.A.) at paras 19, 24.

30 *Muscletech*, at para 5.

31 *Royal Oak*, at para 28.

32 *General Chemical Canada Ltd., Re* (2005), 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) at para 2.

33 *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.) at para 82.

34 *Temple City*, at para 13.

35 *Rosedale Farms*, at para 39.

36 *Ibid*, para 35.

37 *Ibid*, para 29.

38 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21.

39 *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.).

40 *Thibodeau* at para 92.

41 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.).

42 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.) at para 57.

43 Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.

44 ***Indalex*** at para 59.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 9

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

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

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

***Morawetz R.S.J.*:**

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

> a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
>
> b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
>
> c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
>
> d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

> a) Should the stay be extended to the Partnerships?
>
> b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
>
> c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
>
> d) Should the Court approve protections for employees?
>
> e) Is it appropriate to allow payment of certain pre-filing amounts?
>
> f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
>
> g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
>
> h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)]*, and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16,

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 10

2012 ONSC 6087
Ontario Superior Court of Justice [Commercial List]

Dondeb Inc., Re

2012 CarswellOnt 15528, 2012 ONSC 6087, [2012] O.J. No. 5853, 223 A.C.W.S. (3d) 772, 97 C.B.R. (5th) 264

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Dondeb Inc. and the Additional Applicants Listed on Schedule "A" Hereto (collectively, the "Applicants"), Applicants

C. Campbell J.

Heard: October 11, 15, 17, 18 2012
Judgment: November 22, 2012
Docket: CV-12-00009865-00CL

Counsel: David P. Preger, Lisa S. Corne, Michael Weinczok for Applicants
Jeffrey J. Simpson, A. Ronson for Pace Savings & Credit Union Limited
Gary Sugar for David Sugar, et al
D.R. Rothwell for RMG Mortgage/MCAP Financial Corporation
Harry Fogul for Regional Financial
Robin Dodokin for Empire Life Insurance Co.
Beverly Jusko, M.R. Kestenberg for TD Bank Canada Trust
Roger Jaipargas for Faithlife Financial
R.B. Bissell for Vector Financial Services Limited
Jeffrey Larry for First Source Mortgage Corporation
Douglas Langley for Virgin Venture Capital Corporation
David Mende for Addenda Capital Inc.
J. Dietrich, W. Rabinovitch for A. Farber & Partners Inc.
M. Church for SEIU (Union)

Subject: Insolvency; Property

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application
Debtors were group of companies which owned and managed properties — Debtors brought application for initial order under Companies' Creditors Arrangement Act — Application dismissed — Unlikely that plan could be developed that sufficient number of creditors would agree to — Application was opposed by approximately 75 per cent of creditors, who had concerns about principal of group of companies' plan to transfer certain properties to secure additional funding, and did not wish debtor-in-possession financing to occur — Principal had not engaged with creditors from early date and was to some extent author of own misfortune — Goal of protection under Act was liquidation, which could be achieved by appointing receiver.

APPLICATION by debtors for protection under *Companies Creditors Arrangement Act*.

***C. Campbell J.*:**

1 The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company Dondeb Inc. The proposed relief would include a stay of proceedings in respect of the various companies which own and or operate businesses and real property in Ontario.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2 The application is vigorously opposed by numerous secured creditors which have mortgage or other security on property beneficially owned by one or more of the companies in the Dondeb "group".

3 The applicants seek the protection of the *CCAA* to enable an orderly liquidation of the assets and property of the various companies to enable what is asserted to be the remaining equity after sale and expenses to accrue to the benefit of the Dondeb Group.

4 It is urged that the flexible mechanism of the *CCAA* is appropriate as there are common expenses across some of the companies', common security across others and that any order in liquidation would prevent the incurrence of added cost should individual properties and companies placed in liquidation with the loss of remaining equity.

5 The applications propose a Debtor in Possession (DIP) financing and administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application is opposed by approximately 75% in value of the secured creditors.

6 The basis of the opposition can be summarized as follows:

> i) That in many instances the properties over which security is held is sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants.
>
> ii) That the proposed DIP/financial and administration changes are an unwarranted burden to the equity of specific properties are evidence of the inappropriate application of the *CCAA*.
>
> iii) That in the circumstances individual receivership orders for many of the properties is a more appropriate remedy where the creditors and not the debtor would have control of the process.
>
> iv) That the creditors have lost confidence in the Dondeb family owners of the Dondeb group for a variety of reasons including for breach of promise and representation.
>
> v) That it is now evident that the applicants will be unable to propose a realistic plan that is capable of being accepted by creditors given a difference in position with respect to value of various properties.

7 Those who support the applicants in the main wish to see those businesses that are operating on some of the properties such as in one instance, a school, and others like retirement homes continue in a way that may not be possible in a bankruptcy.

8 During the course of the submissions on the first return date an alternative was proposed by a number of secured creditors, namely a joint or consolidated receivership of the various entities to maximizing creditor control of the process and ensure that costs of administration be allocated to each individual property and company.

9 The application was adjourned to be returnable October 15, 2012 to allow both the applicants and the opposing creditors to consider their positions hopefully achieve some compromise. In the meantime 4 notices of intention under the BIA were stayed.

10 The return of the application on October 15, 2012 did produce some modification of position on both sides but not sufficient to permit a *CCAA* order to be agreed to.

11 The applicants revised the proposed form of Initial Order to allow for segregation of accounts on the individual properties an entitlement.

12 The rationale of the applicants for the original Initial Order sought was that if liquidated or otherwise operated in an orderly way by the debtor and a "super" monitor, greater value could be achieved than the secured debt owing in respect to at least a number of the properties which could be available (a) to other creditors in respect of which guarantees or multiple property security could enhance recovery and or (b) the equity holders.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

13 The second major reason advanced by a significant number of creditors appearing through counsel was that they no longer had any confidence in Mr. Dandy, the principal of Dondeb Inc. Significant examples of alleged misleading supported the positions taken.

14 I accept the general propositions of law advanced on behalf of the applicants that pursuant to s.11.02 of the *CCAA* the court has wide discretion "on any terms it may impose" to make an Initial Order provided the stay does not exceed 30 days [see *Nortel Networks Corp., Re* [2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List])], 2009, CanLII 39492 at para 35 and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) CF 33.

15 The more recent decision of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15 confirms the breadth and flexibility of the CCAA to not only preserve and allow for restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. See also *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para 49-50 (leave to appeal denied 2012 ONCA 552 (Ont. C.A.)).

16 I also accept the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that that an Initial Order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the "enterprise" may be themselves insolvent but a number are and to propose of the restructuring is to restore financial health or maximize benefit to all stakeholders by permitting further financing. Such process can include liquidation. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) and also *Edgeworth Properties Inc. (Re)* CV-11-9409-CL [Commercial List].

17 I also accept that while each situation must be looked at on its individual facts the court should not easily conclude that a plan is likely to fail. See *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]) at paras 7-10.

18 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C. C.A.), the British Columbia Court of Appeal overturned the decision of the chambers' judge extending a stay of proceedings and authorizing DIP financing under the *CCAA* in the case of a debtor company in the business of land development because:

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

19 Similarly, in *Octagon Properties Group Ltd., Re*, 2009 CarswellAlta 1325 (Alta. Q.B.) paragraph 17, Kent, J. made the following comments:

> This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

20 A similar result occurred in *Shire International Real Estate Investments Ltd., Re*, 2010 CarswellAlta 234 (Alta. Q.B.) even after an initial order had been granted.

21 In Edgeworth, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

22 At the conclusion of oral submissions which followed on a hearing of the application which commenced on Friday October 11, 2012 continued on October 15 with additional written material and concluded on Wednesday October 17, 2012 again with additional written material and oral submissions the following conclusions were reached.

(i) The application for an Initial Order under the CCAA based on the material filed be dismissed.

(ii) The issue of costs incurred by the proposed Monitor Farber and of counsel to the debtor be reserved for further consideration (if not resolved) basis on material to be provided to counsel for the creditors and their submissions.

(iii) The request for a more limited *CCAA* Initial Order which like the Original Application is opposed by a significant body of creditors is also rejected.

(iv) A Global Receivership Order which is supported by most of the creditors appearing to oppose the application and which has the support of Farber which will become Receiver of those companies and properties covered by the application will issue in a format to be approved by counsel and the court.

23 For ease of administration the Global Receivership Order will issue in Court File No. CV-12-9794-CL and make reference to the various companies and properties to be covered by the Order.

24 In order to further facilitate administration the following proceedings, each being Notices of Intention to make a proposal

Dondeb Inc.	31-1664344
Ace Sel/Storage & Business Centre	31-1664774
1711060 Ontario Ltd.	31-1664775
2338067 Ontario Ltd.	31-1664772
King City Holdings Ltd.	31-1671612
1182689 Ontario Inc.	31-1671611
2198392 Ontario Inc.	31-1673260

hereby stayed and suspended pending further order of the court.

25 The request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

26 In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

27 Under the proposed Initial Order the fees of the proposed monitor and of counsel to the debtor were an issue as well as leaving the debtor in possession with the cost that would entail.

28 Counsel for each of the various creditors represented urged that their client's individual property should not be burdened with administrative expenses and professional fees not associated with that property.

29 Counsel for the debtor advised that to the extent possible his client and the monitor would keep individual accounts. This proposal did not appease the opposing creditors who did agree that their clients could accept what was described as a "global" receiver and that the Farber firm would be acceptable as long as the receiver's charge was allocated on an individual property basis. In other words, the opposing creditors are prepared to accept the work of the professionals of the receiver but not fund the debtor or its counsel.

30 The issue of the fees of Farber incurred todate in respect of preparation of the *CCAA* application was agreed between the opposing creditors, Farber and its counsel and are not an issue. Counsel for the debtor requested that the court consider a request for fees and costs on the part of the debtor. In order to give an opportunity for the parties to consider the details of such request and possible resolution the issue was deferred to a later date.

31 Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.

32 Counsel are to be commended for the effort and success in reaching agreement on the form of order acceptable to the court.

33 The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

34 In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

Schedule "A"

1. Dondeb Inc.

2. Ace Self Storage and Business Centre Inc.

3. 1182689 Ontario Inc.

4. King City Holdings Inc.

5. 1267818 Ontario Ltd.

6. 1281515 Ontario Inc.

7. 1711060 Ontario Ltd.

8. 2009031 Ontario Inc.

9. 2198392 Ontario Ltd.

10. 2338067 Ontario Inc.

11. Briarbrook Apartments Inc.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

12. Guelph Financial Corporation

Application dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 11

2020 ABCA 118
Alberta Court of Appeal

CWB Maxium Financial Inc. v. 2026998 Alberta Ltd.

2020 CarswellAlta 513, 2020 ABCA 118, [2020] A.W.L.D. 1277, 316 A.C.W.S. (3d) 607

2026998 Alberta Ltd, Grandin Prescription Centre Ltd, 517751 Alberta Ltd, 1396987 Alberta Ltd, and 1396966 Alberta Ltd (Applicants) and CWB Maxium Financial Inc (Respondent) and MNP Ltd, in its Capacity as the Court-Appointed Interim Receiver of 2026998 Alberta Ltd, Grandin Prescription Centre Ltd, 517751 Alberta Ltd, 1396987 Alberta Ltd and 1396966 Alberta Ltd (Respondents) and Harold Douglas Loder (Not a Party to the Appeal)

Dawn Pentelechuk J.A.

Heard: March 18, 2020
Judgment: March 20, 2020
Docket: Edmonton Appeal 2003-0053-AC

Counsel: J. Schmidt, for Applicants
T.M. Warner, S. Norris, for Respondent, CWB Maxium Financial Inc.
R.F.T. Quinlan, Z. Soprovich, for Respondent, MNP Ltd. in its capacity as Court-Appointed Receiver

Subject: Civil Practice and Procedure; Insolvency

Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Secured creditor received notice to pay from Canada Revenue Agency regarding debtor's unpaid source deductions — Secured creditor's application for appointment of interim receiver was granted — Debtor brought application for leave to appeal appointment — Application dismissed — Trial judge applied proper test for appointment of receiver — Appointment of interim receiver does not require proof by preponderance of evidence of actual and immediate danger of dissipation of debtor's assets, to detriment of creditor — Trial judge's findings were entitled to deference — Debtor's value was as ongoing concern and appointment of interim receiver would facilitate continuation of business — Issue would be moot by time matter was heard by court as appointment was for 30 days.

APPLICATION by debtor for leave to appeal appointment of interim receiver.

***Dawn Pentelechuk J.A.*:**

1 The applicants, collectively referred to as "Grandin", apply for permission to appeal the decision of a commercial duty judge to order the appointment of an interim receiver. Grandin also applies, if necessary, for a stay of proceedings.

2 The parties agree that permission to appeal is required under s 193(e) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. The parties disagree on whether, pursuant to s 195 of the *BIA*, an automatic stay is triggered should permission to appeal be granted.

3 On March 2, 2020, a commercial duty judge granted an order appointing MNP Ltd (MNP) as interim receiver under s 47 of the *BIA*. The test is outlined in s 47(3):

> An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

4 CWB Maxium Financial Ltd (CWB Maxium) is a secured creditor of Grandin which operates a pharmacy in St Albert. CWB Maxium's application for appointment of an interim receiver was triggered by it being served with Requirements to Pay (RTPs) by Canada Revenue Agency (CRA) for Grandin's unpaid source deductions that exceeded $350,000.

5 The application was made on short notice to Grandin, who opposed the application.

6 In short oral reasons, the commercial duty judge alluded to the test under s 47 of the *BIA* and noted the evidence from both sides was "somewhat deficient." Nonetheless, he was satisfied there was a debt owing to CWB Maxium and a default by Grandin, and that the operation of the pharmacy was in jeopardy. He was satisfied there were significant concerns regarding CWB Maxium's security and that an appointment of an interim receiver was necessary to protect its interest. The commercial duty judge noted that CWB Maxium was prepared to fund the interim receiver up to $250,000 in order to allow Grandin to continue to operate as a going concern and to meet its financial obligations.

7 The commercial duty judge found the evidence of Grandin's president did not sufficiently address how the debtor's estate could be protected in the absence of the appointment of an interim receiver. In doing so, he expressly stated he was not reversing the onus onto Grandin.

8 Grandin seeks permission to appeal on the following questions:

a) whether the commercial duty judge applied the wrong legal test in determining whether an interim receiver ought to be appointed;

b) whether the commercial duty judge erred in failing to find that CWB Maxium had breached its good faith obligations under the *BIA*;

c) whether the commercial duty judge made a palpable and overriding error in determining that CWB Maxium had made an effective demand for payment from Grandin; and

d) whether the commercial duty judge erred by failing to find that CWB Maxium was estopped and precluded by its own conduct from seeking the appointment of an interim receiver.

9 The test for permission to appeal under s 193(e) of the *BIA* is well known. The factors are:

a) whether the point on the proposed appeal is of significance to the bankruptcy practice;

b) whether the point on the proposed appeal is of significance to the underlying action itself;

c) whether the proposed appeal is *prima facie* meritorious or, on the other hand, frivolous;

d) whether the proposed appeal will unduly hinder the progress of the action itself; and

e) whether the judgment from which an appeal is proposed to be taken appears contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice for which there is no remedy: *Smith v. Pricewaterhousecoopers Inc.*, 2013 ABCA 288 (Alta. C.A.) at para 11.

10 The second, third and fourth proposed grounds of appeal were not strenuously pursued in the application before me. Grandin's brief of law and argument before the commercial duty judge raises these arguments. While the commercial duty judge's reasons do not expressly address these arguments, I am satisfied he considered them in the context of the overarching

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

issue before him: whether the appointment of an interim receiver was necessary for the protection of Grandin's estate *or* the interests of CWB Maxium.

11 In any event, the second, third and fourth proposed grounds of appeal do not, in my view, meet the test for permission to appeal.

12 The heart of Grandin's argument is that the commercial duty judge applied the wrong test in determining whether the appointment of an interim receiver was necessary. Grandin argues that the appointment of an interim receiver requires proof by a preponderance of evidence that an actual and immediate danger of dissipation of Grandin's assets, to the detriment of CWB Maxium's security, exists. Grandin relies on*Royal Bank v. Canadian Print Music Distributors Inc.*, 2006 CanLII 21048, (2006), 23 C.B.R. (5th) 42 (Ont. S.C.J.) [*Royal Bank v Canadian Print Music*]; *Trez Capital Corp. v. UC Investments Inc.*, 2013 NSSC 381 (N.S. S.C.) [*Trez Capital*]; and *Royal Bank v. Zutphen Brothers Construction Ltd.* (1993), 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) [*Royal Bank v Zutphen Brothers*] in support of this proposition.

13 A reading of these cases does not support the proposition suggested by Grandin and at least one decision expressly rejects this proposition: see *Bank of Nova Scotia v. D.G. Jewelry Inc.*, 2002 CanLII 12477, (2002), 38 C.B.R. (4th) 7 (Ont. S.C.J.) at para 1.

14 In *Royal Bank v Zutphen Brothers*, the Bank argued there was an immediate danger of dissipation of the company assets. This alleged risk of dissipation grounded the Bank's application for the appointment of an interim receiver. The company had already retained a trustee in bankruptcy to assist in preparation of a plan of reorganization. The court concluded there was insufficient evidence to establish a risk of dissipation of assets and denied the application for the appointment of an interim receiver.

15 In *Royal Bank v Canadian Print Music*, the appointment of an interim receiver was ordered. The court concluded that the Bank had met the onus of establishing a strong *prima facie* case of bankruptcy in as much as the respondents could not meet their liabilities as they became due. The court simply noted that the evidence showed "a significant danger that assets may disappear." The court did not expand the test beyond the wording of s 47(3) of the *BIA*.

16 In *Trez Capital* , the issue considered was whether or not the notice under s 244 of the *BIA* had been properly served. Whether the applicant had met the test under s 47(3) of the *BIA* was considered in the alternative. While the dicta in *Royal Bank v Zutphen Brothers* is referenced, the court in *Trez Capital* articulates the test for the appointment of an interim receiver in para 57:

> The burden under s 47.1(3) of the *BIA* is on the applicants to show that the appointment is necessary to either protect the respondents' estate or to protect the interests of one or more creditors, or of creditors generally.

Trez Capital does not stand for the proposition that evidence of dissipation of assets is necessary for the appointment of an interim receiver.

17 Grandin's argument necessitates reading a provision into s 47(3) that, on plain reading, does not exist.

18 The commercial duty judge's decision is entitled to deference. He identified the correct test. While noting that the evidence was somewhat deficient on both sides, it is an indisputable fact that CRA had served TRPs under the *Income Tax Act*, RSC 1985, c 1 (5 th Supp), for unpaid source deductions in excess of $350,000, and in doing so, created a super-priority to CRA ahead of CWB Maxium's position as a secured creditor. While the president of Grandin deposed that various options existed to secure alternate financing, the evidence was not compelling. The affidavit affirmed March 12, 2020 was silent on this issue.

19 Grandin's value is as a going concern. The business requires both a licensed pharmacist and continued service from its main supplier. The placement of an interim receiver facilitated that. Funds have been lent by CWB Maxium to allow the interim receiver to meet Grandin's liabilities and to facilitate continued operation of the business.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

20 More to the point, even if permission to appeal is granted, the issue would be moot by the time any appeal was heard by this Court. The interim receivership order terminates 30 days after the date of the order (March 2, 2020).

21 Section 195 of the *BIA* states that "all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of." In other words, the stay of proceedings imposed under s 195 of the *BIA* is limited to a stay of all proceedings *under the order appealed from*: *Canada (Attorney General) v. Moss*, 2001 MBCA 166 (Man. C.A. [In Chambers]) at para 4. The stay would not preclude an application for the appointment of a permanent receiver.

22 In the alternative, Grandin argues the common law test for a stay is met: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) , 1994 CanLII 117. I disagree. Grandin has not satisfied me it will suffer irreparable harm if the stay is refused, and the balance of convenience clearly favours CWB Maxium.

23 The application for permission to appeal and for a stay of proceedings is dismissed.

Application dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 12

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Personal property security --- Statutory liens — Miscellaneous

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value. [3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

(1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> > (a) is appointed under subsection (1); or

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and

(c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) [6].

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; 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* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report"). [7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009. [8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following <u>if it considers it to be just or convenient to do so</u>:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) <u>take any other action that the court considers advisable.</u> [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. <u>This gives the court the ability to make the same wide-</u>

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order 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.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests. [9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. <u>A royalty is an unencumbered share or fractional interest in the gross production of such working interest</u>. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction. [10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tool & Mould Inc. (Trustee of), 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(1) The appellant formed an intention to appeal before the expiration of the 10 day period;

(2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;

(3) There was a continuous intention to appeal during the period when the appeal should have been commenced;

(4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;

(5) The respondent will not be prejudiced by extending the time;

(6) There is an arguable ground or grounds of appeal;

(7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 13

2014 ONSC 2781
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. 6711162 Canada Inc.

2014 CarswellOnt 5836, 2014 ONSC 2781, [2014] O.J. No. 2146, 13 C.B.R. (6th) 136, 240 A.C.W.S. (3d) 646, 2 P.P.S.A.C. (4th) 332, 35 C.L.R. (4th) 167

Romspen Investment Corporation, Applicant and 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

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

In the Matter of 6711162 Canada Inc., and Those Other Companies Listed in Schedule "A" Hereto

D.M. Brown J.

Heard: May 2, 2014
Judgment: May 5, 2014 *
Docket: CV-14-10470-00CL, CV-14-10529-00CL

Proceedings: additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 CarswellOnt 7939, 2014 ONSC 3480, D.M. Brown J. (Ont. S.C.J. [Commercial List])

Counsel: S. Jackson for Romspen Investment Corporation
D. Magisano, S. Puddister for Respondents / CCAA Applicants, 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc.
A. Bouchelev for Altaf Soorty and Zoran Cocov
E. Tingley for Pezzack Financial Services Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.
Construction law --- Construction and builders' liens — Trust fund — Miscellaneous
Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application
Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.

APPLICATION by lender for appointment of receiver and construction lien trustee; APPLICATION by borrowers for initial order under *Companies' Creditors Arrangement Act*.

***D.M. Brown J.*:**

I. Competing applications for the appointment of a receiver and the making of an initial order under the Companies' Creditors Arrangement Act

1 Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

2 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

3 The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario — a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

4 For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

II. Evidence about the debt and secured assets

5 Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

6 By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

> The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

7 The funds were to be used "for general corporate purposes...to retire existing mortgage indebtedness [on two properties]...to pay fees and transaction costs, to set up an interest reserve, and up to $10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

8 The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was $28.1 million. The Loan was also secured by general security agreements.

9 A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of $470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

10 However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

> I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnessess' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

11 Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional $470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

12 After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedalled from his forgery allegation, now contending that:

> I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the *CCAA* application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the *CCAA* application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

13 Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear — there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

14 To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender) (approximately $7,000,000) and to pay further fee and transaction costs."

15 Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

16 The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

17 The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

18 According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

budgeted $7 million and that a funding gap of about $3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*. (emphasis added)

19 Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

20 The Borrowers did not invest the $3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further $270,000 on June 20, 2013 and paid a supplier's $89,383 invoice on June 14, 2013.

21 Rompsen stopped making any further advances under the Loan in October, 2013.

22 In December, 2013, suppliers to the Midland Condo Project registered liens totaling about $2.248 million.

23 On January 3, 2014, Romspen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of $11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

24 On March 28, 2014, Romspen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was $12.284 million.

25 On March 4, 2014 Romspen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Romspen's receivership application was set by the Court on April 11, 2014.

26 Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the "CCAA Applicants"), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the CCAA Applicants

27 Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

28 The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

29 The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts acquiring the already-started project in power of sale proceedings in June, 2012 for $4 million, with a mortgage back for $3.1 million.

30 Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

31 There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 "short narrative appraisal" prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at $18 million (the "RE Appraisal"). That appraisal consisted of an "as is" appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs to complete from an appraised "as if complete" sellout value for the 53 condo units. The RE Appraisal also contained "as if" appraisals of the other two Midland parcels assuming "all approvals for the proposed development are in place and the subdivisions registered" (Vindon and Victoria Streets).

32 The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner — i.e. Hugel Lofts:

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> . . .
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.*
>
> (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

33 The RE Appraisal used a "cost to complete" for the Midland Condo Project of $6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra's schedule recorded a total value for its construction contract of $7.452 million, with the value of work done to that date of $1.145 million.

34 Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

35 Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

36 The CCAA Applicants contended that the four Ramara Properties — 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road — were worth about $27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a "hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development" as of October 6, 2012 of $27.1 million.

37 The Schaufler Appraisal noted that the four properties had been acquired for $4.4 million.

38 A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

39 Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

40 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are "brown-field" lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding $300,000 in first mortgages on those properties.

III. Evidence about the owners' approach should the Court grant a CCAA initial order

41 Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be "sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal":

> The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

> ... I believe that Zoran and I should have the opportunity to restructure the Applicants' affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants' assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

42 As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of $8 million. He deposed that Harbour Mortgage had "agreed to increase the loan amount to $11,250,000, thereby providing 1026517 Ontario Limited with an additional $3,250,000. I intend to use these funds to finish the construction at the Midland Property".

43 The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The "loan amount" of $11.25 million was "not to exceed 65% of the appraised value and/or value as determined by the Lender" of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the "use of funds" as follows:

> The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

44 Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for $4.8 million: "I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario."

45 Cocov attached to his affidavit an April 11, 2014 "Discussion Paper" from National Bank which stated: "This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

nor (ii) an agreement to provide financing". The Discussion Paper only referenced the Oshawa property, and it described the "purpose of proposed loan" as "refinancing", with the "type of facility" as "first rank conventional mortgage financing". The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

46 Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

47 The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

48 Soorty deposed that the CCAA Applicants would require $250,000 to complete four model suites, together with $50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to $300,000 in "drip" financing, provided their financing was given a DIP Priority Charge.

49 The filed CCAA Cash Flow statement contemplated using $150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

50 Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about $254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

51 As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project's general contractor, Sierra Construction (Woodstock) Limited:

> [I]s prepared to complete the Condo Project for $5.5 million plus H.S.T. (the "Project Completion Costs"). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty's assertion. Sierra Construction did write that "the all in number to complete should be $5,500,000.00 (HST is not included)". However, it continued:

> Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

52 In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.

Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

53 The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at $6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of $5.5 million.

54 Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

55 Romspen filed its own internal calculations which placed all of the costs to complete — both "hard" and "soft" — several million dollars higher than the $5.5 million referred to by Sierra.

C. Summary

56 In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of $17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

57 Soorty also deposed that the CCAA Applicants proposed "...leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at $15.98 million, consisting of $12 million due to Romspen, $958,000 due to lien claimants, and $3 million due to unsecured creditors, including related parties. Soorty deposed:

The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

58 Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

59 Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [1]

60 The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. [2]

61 Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, the British Columbia Court of Appeal stated:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing. [3]

62 More recently, C. Campbell J., in *Dondeb Inc., Re*, after quoting the above passage from *Cliffs Over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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

A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.

In *Edgeworth*, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

. . .

[In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

. . .

Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity. [4]

B. Applying the legal principles to the evidence

63 The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan — the Midland Condo Project — the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

64 In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

on two main grounds. First, they argued that by its conduct Rompsen had caused the Borrowers to default under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

65 First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

66 While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations, [5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

67 The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*.

68 In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

69 The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014 email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly...the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

> Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever*. (emphasis added)

70 The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan — internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. $3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his *CCAA* initial affidavit when he deposed: "As

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

a sign of our good faith, I was prepared to put $2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

71 Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

72 At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses — they want to carry on just as they have in the past.

73 I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

74 Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

75 Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

76 Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

77 Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

78 For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

79 Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties — 6711162 Canada Inc. and 1794247 Ontario Inc. — the companies which own the Cambridge Properties — 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. — and the company which owns the Midland Properties - Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

80 One of the Ramara Properties — 4271-4275 Hopkins Bay Road, Rama — is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen's counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

81 Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its *PPSA* registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

82 Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

83 Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

84 A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

V. Costs

85 I would encourage the parties to try to settle the costs of these applications. If they cannot, Rompsen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

86 Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air". [6]

Application for appointments granted; application for initial order dismissed.

Footnotes

* Additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 ONSC 3480, 35 C.L.R. (4th) 193, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]).

1 (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), paras. 10 and 12.

2 [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services Inc. v. Canada (Attorney General)], para. 14.

3 2008 BCCA 327 (B.C. C.A.), para. 36.

4 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), paras. 19-21, 25, 26 and 31.

5 *Royal Bank v. Chongsim Investments Ltd.* (1997), 46 C.B.R. (3d) 267 (Ont. Gen. Div.)

6 (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States v. Yemec*, [2007] O.J. No. 2066 (Ont. Div. Ct.), para. 54.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 14

2020 ABQB 332
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd., Re

2020 CarswellAlta 966, 2020 ABQB 332, [2020] A.W.L.D. 2058, 318 A.C.W.S. (3d) 537, 80 C.B.R. (6th) 97

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

And In the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

M.H. Hollins J.

Heard: May 7, 2020
Judgment: May 21, 2020
Docket: Calgary 1901-13767

Counsel: Robert J. Chadwick, Caroline Descours, Andrew Harmes, for Bellatrix Exploration Ltd.
Sean F. Collins, for Winslow Resources Inc.
Tom Cumming, Caireen Hanert, Warren Foley, Ram Sankaran, for Yangarra Resources Ltd.
Kelly Bourassa, James Reid, Peter Bychawski, for First Lien Lenders
Michael Hanlon, Adam Maerov, Kourtney Rylands, for U.S. Bank National Association, in its capacities as Second Lien Notes Trustee and Third Lien Notes Trustee
Ed Halt, for First Lien Lenders
Josef G. A. Kruger, Robyn Gurofsky, for Monitor
Maria Lavelle, for Alberta Energy Regulator
Howard A. Gorman, Q.C., Gunnar Benediktsson, for BP Canada Energy Group ULC
Guy Martel & Danny Vu, for EIG/KKR
Michael Shakra, Kevin J. Zych, Chris Simmard, Kristopher Hanc, for Ad Hoc Committee of Second Lien and Third Lien Noteholders
Alexis Teasdale, Karen Dawson, for Bull Moose Capital Ltd.
Randal Van de Mossalaer, Emily Paplawski, for Keyera Patrnership
Brad Angove, for Nelson Brothers Oilfield Services 1997 Ltd. and Gen7 Environmental Solutions Ltd.
Joseph Reynaud, Leland Corbett, for Stream Asset Financial Lumos LP, by its General Partner Stream Asset Financial Lumos Corp
Kelsey Meyer, for SCCP Ferrier Facility LP
Louis Belzil, for Jo-Anne Reynolds
Shane King, for Bidell Gas Compression
Marian Baldwin Fuerst, for Delaware Trust Company
Mikkel Arnston, for Thomas Group Inc.
Jennie Buchanan, Frankie Deni, for Mark Stephen
Christa Nicholson, Andrew MacGregor, for TAQA North Ltd
Colin Feasby, for Bank of Montreal
Jordan Milne, Lori Williams, for Indian Oil and Gas Canada (IOGC)
Jeffrey Poole, Ian Carruthers, for O'Chiese First Nation

Subject: Insolvency

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Headnote

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

B Ltd. was oil and gas company that sought Companies' Creditors Arrangement Act (CCAA) protection — Initial Order and Sales and Investment Solicitation Process (SISP) were approved — First phase of SISP was to solicit non-binding expressions of interest in purchase of the assets or shares of B Ltd. — Phase one ran to end of November 2019 — B Ltd. received no qualifying binding bids by February 2020 but, along with Bank and Monitor, continued to consult with interested parties — B Ltd. received bid from S Corp. to purchase substantially all of B Ltd.'s oil and gas assets for $87,357,000 — Asset Purchase Agreement (ASP), if approved, would produce sufficient funds to pay CCAA priority charges and substantial portion of first lienholder notes, as well as providing for assumption of other contractual and statutory obligations — ASP would generate funds not be sufficient to pay entire first lienholder debt and would leave nothing for second or third lien note holders — Majority of second lienholders opposed sale — B Ltd. brought application for approval of S Corp. ASP — Application granted — There was no evidence of impropriety that affected sales process or result — Sales process was reasonable — Monitor supported proposed sale of B Ltd. assets to S Corp. — While Monitor, among others, was engaged in ongoing discussions for sale of assets, those discussion did not culminate in binding bid — Under SISP, Monitor and Bank expressly retained ability to vet information given to any credit bidder — That right was not given to creditors — Interests of all parties and particularly creditors were considered — Sufficient efforts were made to find best possible price — While satisfying only small portion of B Ltd.'s entire debt, S Corp. ASP was only unconditional offer in play.

APPLICATION for approval of asset purchase agreement.

***M.H. Hollins J.*:**

1 Bellatrix Exploration Ltd. is an oil and gas company involved in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 (*CCAA*). It has been soliciting offers to purchase its assets or shares over approximately the last six months. On Thursday, May 7, 2020, I heard Bellatrix' application for an Order approving the Asset Purchase Agreement it signed with Winslow Resources Inc. on April 22, 2020. Winslow's offer was backed by its parent company, Return Energy Inc. doing business as Spartan Delta Corp. For consistency with other material filed in this Action, that purchaser is referred to herein as Spartan.

2 The Spartan Asset Purchase Agreement, if approved, would produce sufficient funds to pay the *CCAA* priority charges and a substantial portion of the first lienholder notes, as well as providing for the assumption of other contractual and statutory obligations. It would not be sufficient to pay the entire first lienholder debt and would leave nothing for the second or third lien note holders.

3 The application to approve was opposed by a group of creditors holding the majority of the second lien notes of Bellatrix, namely FS/EIG Advisor LLC and FS/KKR Advisor LC (EIG/KKR), as well as the remaining minority of second lien noteholders, separately represented.

4 EIG/KKR cross-applied for an adjournment of Bellatrix' application for a period of just less than 3 weeks in order to put an alternative, and in their opinion, better offer before the Court. The adjournment application was opposed by all the parties supporting the Spartan bid, namely Bellatrix, the Monitor PricewaterhouseCoopers Inc. (PWC), the first lien noteholders and their lenders, the prospective purchaser and by numerous other parties with which Bellatrix does business.

5 I dismissed EIG/KKR's application for the adjournment and approved the Spartan Asset Purchase Agreement. I provided brief oral reasons on May 8, 2020 with these written reasons to follow.

Background

6 Bellatrix Exploration Ltd. is a Calgary-based oil and gas company with assets in Saskatchewan, Alberta and British Columbia. Its President/Chief Executive Officer deposed to a number of market conditions which have depressed commodity prices and created uncertainty in the market, resulting in Bellatrix seeking *CCAA* protection. An Initial Order under the *CCAA*

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

was granted on October 2, 2019. That was quickly followed by the Order approving the Sales and Investment Solicitation Process (SISP) on October 9, 2019.

7 The first phase of the SISP was to solicit non-binding expressions of interest in the purchase of the assets or shares of Bellatrix. From those received, Bellatrix and the court-appointed Sale Advisor, Bank of Montreal Capital Markets (BMO), would then select parties to participate in second phase, during which those parties would complete their due diligence and formulate binding bids.

8 Under the SISP, Phase I ran to November 13, 2019. The parties proceeding to Phase II were to submit binding bids by a date to be chosen by the Bellatrix, called the Binding Bid Deadline (ultimately February 6, 2020). The SISP required Binding Bids to be, *inter alia*, irrevocable and accompanied by an irrevocable financial commitment from any entity financing a particular bid.

9 Bellatrix' existing creditors were also entitled to participate in the sales process. These creditor bidders were not required to participate in Phase I of the SISP and in fact were not required to submit their bid by the Binding Bid Deadline. They were entitled to be advised whether any third-party bids being considered would be sufficient to pay out the Secured Notes (defined as the first, second and third lien noteholders collectively) and to receive detailed information about any such third-party bids.

10 Bellatrix and the Monitor were permitted, but not required, to consult with any bidders, including the potential creditor bidders, after the Binding Bid Deadline. Subject to consulting with the Monitor, Bellatrix retained discretion to reject any bid, regardless of compliance with the SISP.

11 The second lien noteholders had negotiated some provisions into the SISP to protect their position in the bidding process. One, referred to above, was their ability to submit bids after the third-party bidding was concluded. A second advantage was their ability to include the value of their debt as part of an offer. However, any credit bid was still required to have any financing firmly in place. The language of Clause 13 of the SISP is as follows:

> For certainty, a Potential Credit Bidder shall provide written evidence of all required funding or financing to advance the cash consideration necessary to satisfy such priority payments and the New Money Notes [defined in the second note indenture] in full in cash or otherwise assume such obligations in full, and that any such credit bid shall not be conditional upon obtaining financing, acceptable to each of the Sale Advisor and the Monitor in their sole discretion.

12 EIG/KKR had indicated as early as December of 2019 that they might participate in the bid process, depending on the extent to which the Binding Bids received addressed their financial interests.

13 Bellatrix received no qualifying Binding Bids by February 6, 2020 but, along with BMO and the Monitor, continued to consult with interested parties, including EIG/KKR. The resulting bid from Spartan was to purchase substantially all Bellatrix' oil and gas assets for $87,357,000 (the Spartan Bid). This would pay all amounts owing under the Key Employee Retention Plan (KERP) approved in the Initial Order, all priority charges of BMO, the Monitor, the Bellatrix Directors and the Interim Financing (as described in paragraph 42 of the Initial Order) and a substantial portion of the first lien noteholders' debt, which totaled approximately $90M.

14 On March 10, 2020, the Monitor advised EIG/KKR that the bid under consideration would not generate any payment to them as it was not likely to completely pay out the first lien noteholders. The second lien noteholders held approximately $197M in debt and the third lien noteholders approximately another $66M. Beginning April 1, 2020, counsel for EIG/KKR and for Bellatrix began to trade mark ups of the EIG/KKR proposal.

15 On April 13, 2020, EIG/KKR submitted a draft term sheet proposing a purchase backed by financing from the First Lien Lenders (a syndicate of National Bank, Canadian Western Bank and Alberta Treasury Branches), which financing would be replaced within 12 months of closing, plus some new cash from the second lien noteholders. On April 20, 2020, a revised term sheet was provided by EIG/KKR which replaced the reference to financing from the First Lien Lenders to financing from unidentified third-party lenders with whom EIG/KKR was "in discussions". At some later point, a company name was inserted

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

in that part of the EIG/KKR term sheet but by the time of this application, that had changed again and CIBC was the proposed financier of the EIG/KKR offer.

16 After receipt of the third version of the non-binding bid of EIG/KKR on April 20, 2020, the Board of Directors of Bellatrix met to consider their options. They voted to approve the Spartan Bid and on April 22, 2020, signed the Asset Purchase Agreement, subject to the court approval now sought.

Adjournment

17 The request of EIG/KKR for an adjournment was intertwined with its objection to Bellatrix' approval of the Spartan bid. The additional time requested was for the purpose of finalizing its offer so that it could be more fairly considered alongside the Spartan Bid. By the time of the court application, EIG/KKR confirmed that it was in discussions with Westbrick Energy Ltd, a local oil and gas operator owned mostly by EIG/KKR, about participating in the EIG/KKR bid. It was submitted that, even with financing, a successful purchaser would need to partner with a company with industry knowledge.

18 Westbrick had been one of the early third-party bidders in its own right, having submitted several non-binding bids through Phases I and II but dropping out of the bidding in late February. When the Spartan Bid was received by Bellatrix on March 10, 2020, Westbrick was contacted again but did not participate further until its name came up as part of EIG/KKR's alternative non-binding bid.

19 Westbrick's interest at this approval stage is still subject to confirmatory due diligence. In fact, one of the bases on which EIG/KKR sought the adjournment was the refusal of the Monitor to allow Westbrick into the data room in the days before the application, which EIG/KKR argued had delayed its progress. The Monitor provided no written explanation to EIG/KKR at the time but it became apparent during the course of argument that its reluctance to do so was based, at least in part, on the fact that Westbrick had participated in earlier phases of the process and so already had that information about the Bellatrix assets. The fact that it wanted to do further due diligence as part of a credit bid when it had already failed to capture the interest of Bellatrix, BMO or the Monitor earlier in the process was not compelling to the Monitor, nor to this Court.

20 Westbrick's equivocal commitment was only part of EIG/KKR's problems, second to the lack of any firm financing commitment. As mentioned, CIBC was proposing to lend an amount sufficient to pay the priority charges plus the first lien noteholder debt, with the second lien noteholders proposing to then convert their debt to an equity position in the company. However, the borrower (presumably a partnership of EIG/KRR and Westbrick, or their respective designates) would still need to qualify to assume all the liabilities and obligations of the ongoing business of Bellatrix.

21 More importantly, CIBC expressly was not yet committed to providing that funding. Its willingness to proceed was contingent on a number of outstanding items, including:

a. satisfactory final negotiations;

b. the absence of any material adverse change (which could include the claims already anticipated by at least two of the counterparties to Bellatrix contracts);

c. acceptable arrangements being made between CIBC and Westbrick or another operator; and

d. no adverse change in the capital markets generally.

22 Against the backdrop of the precarious current oil and gas market, all these outstanding conditions limited EIG/KKR's ability to present this proposal as close enough to final to justify putting everything on hold for another few weeks in hopes that all the pieces would fall into place.

23 EIG/KKR quite properly emphasized that they are significant stakeholders in the proceedings generally and the most significant stakeholders at this precise juncture, given the consequences to them if the Spartan Bid is effectively the only option left. EIG/KKR also pointed out that the company had sufficient short-term financing to continue operating during the requested

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

adjournment, courtesy of their agreement to provide the interim financing under the Initial Order. EIG/KKR said that their willingness to provide that interim financing, without which the SISP could not have been conducted, was part of their plan to protect their position, should that become necessary.

24 It appears that EIG/KKR thought they would have more time and more opportunity to finalize a competing proposal than what was afforded to them. They pointed out, legitimately, that the COVID pandemic has created logistical challenges and has introduced even more uncertainty into financial markets, making it more difficult to get the Westbrick bid in a final form.

25 Bellatrix, along with all the other parties backing the Spartan Bid, argued that EIG/KKR had had more than ample time to negotiate the financing for a Binding Bid, having known from October of last year that they could end up needing to put a competing offer forward. More importantly, as of March 10, 2020, EIG/KKR knew unequivocally that the only offer in play was going to see them receive no recovery on their debt at all. From that point, if not before, it was incumbent on them to move quickly, presumably building on work done beforehand, to finalize their competing bid.

26 They were unable to do this. I accept that the COVID pandemic, which was narrowly preceded by a severe and historic drop in the commodity prices for oil, made it very difficult to secure the missing financial and operational commitments. However, it is equally obvious that these factors may continue to affect market conditions negatively for some unknown period of time. Indeed, the uncertainty around the likely duration of these negative market forces is the reason given by the Bellatrix Board of Directors for approving the Spartan Bid. While the Spartan Bid is not ideal — certainly not for Bellatrix' creditors — it does allow the transfer of the company as a going concern to a bidder who had its financing secured and was ready to close on time, removing as much uncertainty around this transaction as possible. It is the proverbial bird in hand.

27 This Court has discretion to allow or deny requests for adjournment of proceedings before it. However, that discretion, as all judicial discretion, must be exercised with a view to the fairness of the proceedings to all parties. The impact of denying EIG/KKR's adjournment application is devastating to them and to the investors they represent. However, putting the *CCAA* proceedings on hold for the next few weeks carries it owns costs and risks to the other participating parties.

28 Spartan, as the successful bidder, was not shy about arguing the unfairness inherent in a process that imposed a number of conditions and deadlines on bidders, all of which it met in order to make a firm financial commitment in the midst of a difficult and uncertain market, only to be forced to unilaterally leave its offer on the table while a competing offer is further developed.

29 Certainly, there is more than ample jurisprudence for considering the integrity of the process itself in this analysis; *Grant Forest Products Inc., Re*, 2010 ONSC 1846 (Ont. S.C.J. [Commercial List]) at paras.28-33. In *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (Ont. C.A.) at para. 22, the Ontario Court of Appeal adopted the caution of the Nova Scotia Court of Appeal in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) at p.11:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

30 The application to approve the sale in a *CCAA* proceeding is not a "rubber stamp" exercise. The Court must retain and execute its mandate to balance the interests of stakeholders affected by any offer, even one arriving late. However, an important factor in that exercise may be protecting the predictability of the process, for these participants and possibly for others in future proceedings. While buyers, including Spartan, know that their purchase is subject to court approval, any arbitrary exercise of that discretion may well discourage similar transactions necessary to promote the purposes of this legislation.

31 While there was no imminent threat of Spartan withdrawing its offer, the Asset Purchase Agreement approved and executed by Bellatrix' Board of Directors has a June 30, 2020 closing date. No one wants to see that date jeopardized and it already appears that there are a number of pre-closing issues that will need to be addressed in short order to preserve this sale.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

32 And practically speaking, while Bellatrix does have access to interim financing, whatever additional costs and losses are incurred over the next few weeks would come directly from the residue of the purchase price going to the first lien noteholders because that financing is a priority charge. They are the ones financing the adjournment and they object to doing so.

33 I am balancing the ongoing costs, not just in Bellatrix' operations but in the continued involvement in this litigation of these many parties, their executives, lawyers and the third-party advisors, as well as the risk, small but serious in consequence, of losing the one Binding Bid made against the chance for EIG/KKR to finalize a proposal in a matter of weeks that has not crystallized in months and still seems somewhat fluid and uncertain.

34 As difficult as the decision is, in my view, the sales process must continue as scheduled. The adjournment request is denied.

Approval of the Asset Purchase Agreement

35 Apart from dismissing the application by EIG/KKR for an adjournment, this Court must still review the Spartan Bid against the statutory and common law criteria for approval. EIG/KKR and the remaining second lien noteholders opposed the sale to Spartan because it provides no recovery to them or any subsequent creditors. Although some parties reserved their rights to argue about the form of Order and their inclusion or exclusion on the anticipated s.11.3 application, no other parties opposed the Spartan Bid.

36 Although the *CCAA* itself contains no description of its objectives, a number of purposes of this legislation have been identified in case law. For our purposes, the most germane include the goal of permitting a company to stay in business and thereby avoid the social and economic costs of liquidation and the goal of giving the company the chance of finding an arrangement acceptable to its creditors or which, at least, seeks to balance the interests of the company's stakeholders.

37 Section 36(3) of the *CCAA* sets out a non-exhaustive list of factors to consider on an application to approve a sale. The related criteria from the common law are included in this list where relevant.

A. Whether the Sales Process was Reasonable

38 There was no real complaint at this application about the form of the SISP approved by this Court in October, 2019. As is often the case, much of the work necessary to proffer the assets for sale had been done prior to the court order. BMO was appointed as the Sale Advisor to assist Bellatrix in soliciting and developing potential bids. The process was to be overseen by the Monitor, as appointed in the Initial Order.

39 The first phase, as mentioned, was just over one month. The deadline for binding bids in Phase II was not included in the SISP or in the SISP Order but was to be set by Bellatrix with the Monitor's consent.

40 The process as envisioned was reasonable. It was also designed to be efficient; *Soundair* at para.16. Bellatrix set the deadline for binding bids at January 13, 2020 and then extended that deadline to February 7, 2020. There was no suggestion that this information was not communicated in a proper and timely way. The period of time between October 9, 2019 and February 7, 2020 was short enough to protect the value of the company assets for sale and long enough to provide Bellatrix with a good look at the market prospects, as discussed *infra*.

41 Not only was there no dispute about the reasonability of the SISP before me, there had been no dispute about the final form of the SISP before the issuing Justice on October 9, 2019. As is often the case, the parties had negotiated their own concessions which were represented in that Order. Indeed, even EIG/KKR made the point that they had negotiated certain concessions in the form of the SISP before it was approved by the Court.

42 I will also address the implementation of the sales process at this juncture, although I realize that is often done separately from a review of the mechanics of the process itself. The relevant cases make it clear, and it is completely intuitive, that the process must not only be designed to be fair but must be fairly implemented.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

43 EIG/KKR complained of a number of developments they felt were unfair; that they provided the necessary interim financing in order to protect their interests and then were "cut out" of the final bidding, that the First Lien Lenders opted to finance the Spartan Bid even though EIG/KKR had approached them first) and that EIG/KKR had made it known throughout the sales process that they might wish to put in a credit bid if whatever offer(s) came out of the SISP did not provide for recovery for the second lien noteholders.

44 While it is true that EIG/KKR did provide the interim financing without which Bellatrix would not have had the opportunity to look for a purchaser under the protection of the *CCAA*, it is equally true that EIG/KKR's *quid pro quo* for doing so are the fees and interest payments they will receive in a priority position. It should not be treated as consideration for a strategic advantage to a credit bidder, at least not beyond what was negotiated in the SISP.

45 The First Lien Lenders chose to back the Spartan Bid, even though that offer meant that the first lien debt advanced by that syndicate would not be paid out to those noteholders in full. It did so knowing that EIG/KKR was working on an alternative that would, if successful, see a more full recovery. It is safe to infer that the certainty of the Spartan Bid outweighed the possibility of increased recovery under a much less certain scenario.

46 The Bellatrix Affidavit filed for this application also indicated that the Monitor had been notified at some prior point in time that Spartan might received confidential information that it ought not to have had. The Monitor investigated and determined that this had not affected the process or provided any advantage to Spartan as a bidder. Given what little information I had about this information and its source, combined with the fact that it was not much pursued in argument, I am similarly convinced that it evidences no impropriety that has affected the sales process or the result.

B. Whether the Monitor approved of the SISP

47 The Monitor supported the Court's approval of the SISP at the October 9, 2019 application.

C. Whether the Monitor Supports the Proposed Sale

48 The Monitor supports the proposed sale of the Bellatrix assets to Spartan for the reasons set out in its Sixth Report. Those reasons included the experience of BMO as the Sale Advisor, the interest expressed in the Bellatrix assets from industry participants, the time taken to market the assets and its own experience in overseeing sales processes similar to this one. The Monitor's opinion was that the process was fair and open. While the Monitor, among others, engaged in ongoing discussions with EIG/KKR, those discussions did not culminate in a binding bid from EIG/KKR or any credit bidder.

49 Because the Monitor is assumed to be independent and experienced, the Court is entitled to rely on the opinion of the Monitor, albeit not blindly. As quoted in *Soundair* at paragraph 21:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role of the Receiver both in the perception of receiver and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers; ***Crown Trust Co v Rosenberg*** (1986), 60 OR (2d) 87 at p.112

50 In my view, the Monitor has discharged its duties to this point and its recommendation that the Spartan Asset Purchase Agreement be approved is entitled to due consideration.

D. The Extent to which the Company's Creditors were Consulted

51 The Monitor's Report and the Affidavit of Mark Caiger of BMO outline the consultations undertaken with the various groups of creditors. EIG/KKR argued that they were not properly consulted because they were not provided with a copy of the final Spartan Asset Purchase Agreement, either as proposed or as signed. They say this was in contravention of Clause 7 of the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

SISP, which entitled them to receive further, detailed information about a competing third-party bid "in a form satisfactory to Bellatrix and the Monitor, more detailed information in respect of any such Binding Bid, including copies of the Binding Bid and any definitive agreement(s) in connection therewith" (Clause 7, SISP).

52 However, a careful reading of that paragraph shows that the Monitor and BMO expressly retained the ability to vet information given to any credit bidder. While no particularly satisfactory explanation was provided to me as to why that document was not provided to EIG/KKR, I cannot conclude that EIG/KKR suffered any disadvantage as a result.

53 In *Soundair*, the unsuccessful bidder complained it was not given needed information, specifically an offering memorandum. However, the Court found the bidder was not prejudiced by that decision of the Receiver, rather its offer was rejected because it contained a condition unacceptable to the Receiver; *Soundair* at paras.50-57. Similarly, the provision of the Spartan Asset Purchase Agreement itself was not necessary for EIG/KKR to get the financing in place that it was missing.

54 The most important thing for EIG/KKR to know as creditors and potential competing bidders was the information given to them on March 10, 2020; that the only offer left was one that would be insufficient to pay anything beyond a portion of the first lien noteholders. Their real complaint is that the SISP afforded them no set period of time in which to finalize their bid and that Bellatrix, the Monitor and BMO should have put Spartan on ice to afford EIG/KKR an adequate and mutually-communicated/accepted period of time in which to finalize their competing bid.

55 While I understand why EIG/KKR would be unhappy about the way things unfolded, I cannot conclude that the process was unfair to them. The SISP, which they negotiated with Bellatrix and others, did not provide that cushion of time — it only said that credit bids could be submitted after third party bids. The SISP further reserved to BMO and the Monitor the "sole discretion" to decide whether the financing arrangements for any credit bid were satisfactory.

56 When the Bellatrix Board of Directors considered the Spartan offer on April 20, 2020, it opted to lock Spartan in by signing the Asset Purchase Agreement. EIG/KKR was not in a position at that time to give the Board any other viable options, nor had that changed appreciably by the time of this application.

57 Service of Bellatrix' application and supporting Affidavit was effected on April 27, 2020 although the date for the hearing was not set or communicated until April 30, 2020. There was almost two weeks between service of the application and the return date of the motion. EIG/KKR certainly moved quickly within that time to put together their own Affidavit and to provide written confirmation of CIBC's interest. However, it was not the timing of the motion that was problematic, it was the failure of EIG/KKR to advance a firm competing offer before that; if not after March 10, 2020 then after April 23, 2020 when they learned more specifics of the Spartan transaction from the public announcement.

E. The Effects of the Proposed Sale on Creditors and Other Stakeholders

58 While this Court is to consider the effect of the proposed sale on all stakeholders, the primary stakeholders are obviously the company's creditors. They have financed the company to their detriment and now hold compromised security for those debts. They have only the process itself to assist them.

59 The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing. While some of the earlier non-binding bids would have been sufficient to pay the first lien debt in full plus some of the second lien debt, making the second lien noteholders the fulcrum creditors, that shifted over time to the point where the only certain offer on the table no longer covered the first lien noteholders. As I understand the Monitor's argument, that meant that the first lien noteholders became the fulcrum creditors and thus their preferences took on more importance.

60 Assuming that I am understanding the meaning of the term correctly, I accept the Monitor's submissions. That does not absolve the Monitor nor the Bellatrix Board from consideration of other creditors, nor was that suggested; *Soundair* at para.21. Rather, it was argued that the Bellatrix Board, with assistance from BMO and the Monitor, did consider the effect on these stakeholders before accepting the Spartan Bid.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

61 The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix' creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.

62 It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. The weighing of these competing interests and the ultimate decision by the Board to accept the Spartan bid are discussed below.

F. Is the Sale Price Fair and Reasonable?

63 For EIG/KKR, the price on the proposed sale does not seem fair or reasonable because it believes that, given more time, it could present an offer to purchase the Bellatrix assets for much more that Spartan has offered. As I said in my brief oral decision, if the Westbrick offer had included committed financing, was unconditional and irrevocable and for a much higher price, that may have changed the assessment of the Spartan bid. Where a substantially higher bid turns up at the approval stage, it may indicate that all reasonable attempts to get the best offer were not made; *Soundair* at para. 28 quoting from *Beauty Counsellors of Canada Ltd., Re* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.).

64 However, the Westbrick offer cannot be said to be truly comparable to the Spartan Bid because of its outstanding conditions. The Bellatrix Board of Directors, the first lien noteholders and all the independent advisors to the company recommended a lower but certain offer over a higher but uncertain offer. The Board of Directors, who have statutory and common law fiduciary obligations to act in the best interests of the company as a whole, considered their options and chose this proposal. In fact, they committed to the sale in order to make sure that the one Binding Bid they did have did not disappear before this application could be heard and decided. The exercise of their business judgment deserves a measure of deference.

65 The directors were assisted, as was Bellatrix and as is this Court, by an independent Monitor and an independent Sale Advisor, both of whom were working to find an arrangement that would benefit the entire economic community, with focus on the creditors. Bellatrix received six conditional non-binding offers during Phase II but no binding bids, plus two additional non-binding bids after February 6, 2020. Bellatrix, BMO and the Monitor then continued to work with all these bidders and with EIG/KKR to try and convert non-binding bids into binding bids.

66 I am satisfied that the sufficient efforts were made to find the best possible price. While it will satisfy only a small portion of the company's entire debt, it is still the only unconditional offer in play, notwithstanding the time anticipated by the SISP plus the additional time since Phase II officially expired in February. As so succinctly put in *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para.49, there is no better viable alternative.

Conclusion

67 The fact that the only offeror willing to make an unconditional, fully financed commitment will still result in a shortfall is not evidence that the process was flawed or unfair, that stakeholders were ignored or that the price is not reasonable. Rather, the fact that a court-approved and competently-managed sales process narrowed to only one viable offer when conditions had to be removed is reflective of the challenges in our economic markets and in this industry in particular.

68 It is understandable, even if not ideal, that the Bellatrix directors ultimately concluded that accepting the Spartan offer was in the best interests of the company and its stakeholders collectively. The fact that that decision is now supported by virtually all affected parties is also important.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

69 I am satisfied that Bellatrix has met the tests, both statutory and common law, for approving the Spartan Asset Purchase Agreement.

Sealing Orders

70 Bellatrix applied to seal confidential portions of and supplements to the Monitors' reports. EIG/KKR applied to seal the Affidavit of Eric Long. No parties opposed any of this relief. As the Spartan Asset Purchase Agreement has yet to close and having reviewed the information sought to be sealed, I am satisfied that the tests for doing so have been satisfied; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para.53

71 The sealing orders requested are granted. Counsel are requested to include in the form of Order time limits for the expiration thereof.

Application granted.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 15

2020 ONSC 3517
Ontario Superior Court of Justice

Choice Properties Limited Partnership v. Penady (Barrie) Ltd.

2020 CarswellOnt 8329, 2020 ONSC 3517, 321 A.C.W.S. (3d) 220, 81 C.B.R. (6th) 302

CHOICE PROPERTIES LIMITED PARTNERSHIP, by its general partner, CHOICE PROPERTIES GP INC. (Applicant) and PENADY (BARRIE) LTD., PRC BARRIE CORP. and MADY (BARRIE) INC. (Respondents)

McEwen J.

Heard: June 2, 2020
Judgment: June 10, 2020
Docket: CV-20-00637682-00CL

Counsel: Michael De Lellis, Shawn Irving, for Applicant
Tim Duncan, Michael Citak, for Respondents
Eric Golden, Chad Kopach, for RSM Canada Limited, in its capacity as Court-appointed Receiver

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

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Receiver of respondents sought order approving sale procedure, related to sale of commercial rental property — Rental property was used as shopping centre — Sale procedure included asset purchase agreement by way of credit bid with applicant lender — Applicant supported sale procedure, while respondents opposed this procedure — Receiver moved for approval or sale procedure — Motion granted — Receiver had obtained proper estimate on property from commercial real estate company — Estimate was comprehensive and took into account conditions, including COVID-19 pandemic — Respondents' appraisals were not current, and did not reflect failure to sell property at higher value — Expense reimbursement was reasonable, and within range typically accepted by court — Required deposits and minimum overbids were also reasonable — Insolvency was not caused by pandemic — There was no certainty of economic improvement that would allow for sale, at price respondents sought — Sale procedure complied with applicable principles, addressing business value and setting realistic timetable.

MOTION by receiver for approval of sale procedure, in bankruptcy proceeding between applicant lender and respondent group of companies.

***McEwen J.*:**

1 This motion is brought by RSM Canada Limited (the "Receiver"), in its capacity as the Court-appointed Receiver of all of the rights, title and interest of Penady (Barrie) Ltd. ("Penady"), PRC Barrie Corp. ("PRC") and Mady (Barrie) Inc. ("MBI") (collectively, the "Respondents") for an order, amongst other things, approving the Sale Procedure outlined in the First Report of the Receiver which features an asset purchase agreement by way of a credit bid (the "Stalking Horse Agreement") with the Applicant.

2 The Applicant, Choice Properties Limited Partnership ("CHP"), by its general partner, Choice Properties GP Inc. ("Choice GP"), supports the Receiver's motion. The Respondents oppose.

3 The asset in question primarily consists of commercial rental property known as the North Barrie Crossing Shopping Centre (the "Barrie Property"). Penady is the registered owner of the Barrie Property. PRC and MBI are the beneficial owners. The Barrie Property essentially consists of a shopping centre with 27 tenants.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

4 Due to the COVID-19 crisis, the motion proceeded by way of Zoom video conference. It was held in accordance with the Notices to Profession issued by Morawetz C.J. and the Commercial List Advisory.

INTRODUCTION

5 Choice GP is the general partner of CHP. CHP is the senior secured lender to Penady. PRC and MBI provided a limited recourse guarantee, limited to their beneficial interest in the Barrie Property.

6 CHP advanced funding to Penady to assist with the development of the Barrie Property. It subsequently assumed Penady's indebtedness to the Equitable Bank, which previously held a first mortgage over the Barrie Property.

7 Currently, Penady is indebted to CHP in the amount of approximately $70 million with interest accruing monthly at the rate of approximately $550,000.

8 As a result of the foregoing, as noted, the Receiver brings this motion seeking approval of the Stalking Horse Agreement and Sale Procedure along with other related relief.

9 I heard the motion on June 2, 2020 and granted, primarily, the relief sought by the Receiver. I incorporated some changes into the Order, with respect to the Sale Procedure, and approved a Sale Procedure, Stalking Horse Agreement, Receiver's Reports and inserted a Sealing Order. At that time, I indicated that reasons would follow. I am now providing those reasons.

PRELIMINARY ISSUES

10 I begin by noting that I granted the Sealing Order sought by the Receiver, on an unopposed basis, with respect to the Unredacted Receiver's Factum dated May 29, 2020 and Respondents' Factum dated June 1, 2020, as well as the Respondents' Confidential Application Record dated March 20, 2020 and the Supplemental Evaluation Information of Cameron Lewis dated March 23, 2020. The test for a sealing order is set out in the well-known decision of *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.), at para. 53. The test is met in this case since the Sealing Order relates to appraisals concerning the Barrie Property and thus it is important that they remain confidential during the Sale Procedure.

11 I also wish to deal with the issue of the affidavit filed by the Respondents that was prepared by Mr. Josh Thiessen. Mr. Thiessen is a Vice-President, in client management, at MarshallZehr Mortgage Brokerage. As I noted at the motion, the Respondents, in my view, were putting forward Mr. Thiessen as an expert witness to provide evidence on the issue of the Sale Procedure. The Respondents failed, however, to provide a curriculum vitae so that I could determine whether Mr. Thiessen had any experience in sale procedures in distress situations or insolvency proceedings. Further, no attempt was made to comply with the requirements of r. 53 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, concerning experts' reports. Mr. Thiessen was also involved in a previous attempt to sell the Barrie Property and had a financial interest in that potential transaction. The Applicant submits that Mr. Thiessen's involvement makes him a partial witness.

12 In all of the circumstances I advised the parties that while I had reviewed Mr. Thiessen's affidavit, I was giving it very limited weight. In short, however, I do not believe that much turns on Mr. Thiessen's affidavit since I granted relief to the Respondents with respect to most of Mr. Thiessen's concerns, for my own reasons.

13 Last, the Respondents, in support of their position, sought to draw comparisons between the Barrie Property and a Brampton Property in which CHP has a 70 percent controlling interest. I accept the Receiver's argument that such a comparison is of little, if any, use given that the Brampton Property is vacant land, currently zoned as commercial, but being marketed with a potential to rezone for residential use. Further, it bears noting, that CHP has a sales process well underway with respect to the Brampton Property, which refutes the Respondents' submission that CHP has meaningfully delayed that sale.

THE LAW

14 The issue on this motion is whether the Sale Procedure is fair and reasonable.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

15 The parties agree that the criteria to be applied are set out in the well-known case of *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), as follows:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been an unfairness in the working out of the process.

16 As further explained by D. Brown J. (as he then was) in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), the approval of a particular form of Sale Procedure must keep the *Soundair* principles in mind and assess:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

ANALYSIS

Introduction

17 Before I begin my review of the Sale Procedure, it bears noting that the Sale Procedure is being contemplated during the COVID-19 crisis. In this regard, however, it further bears noting that the financial difficulties encountered by Penady pre-date the COVID-19 pandemic. Prior to the Receivership Order being granted, Penady had been attempting to sell or refinance the Barrie Property for approximately 16 months. It was in default on its indebtedness to CHP. There were also substantial unpaid realty taxes on the Barrie Property from late 2018 up until the time of the Receivership.

18 At the time the COVID-19 crisis hit, there were 27 tenants at the Barrie Property. Since COVID-19, 16 tenants have temporarily suspended operations, with another 6 tenants offering limited services. The major Barrie Property tenants include TD, Tim Hortons, McDonalds, Dollarama, Cineplex, LA Fitness, and State & Main.

19 It also bears noting that Penady had previously retained Mr. Cameron Lewis of Avison Young Commercial Real Estate (Ontario) Inc. ("AY") to market and sell the Barrie Property. The Receiver agreed to retain Mr. Lewis to continue to market the Barrie Property. Mr. Lewis is well experienced in the area and his previous involvement will allow him to utilize the information he has gathered, including potential bidders. Similarly, the Receiver has retained the existing property manager, Penn Equity, to continue to manage the Barrie Property during the Receivership.

The Disputes Between the Parties

20 I will now deal with the various disputes between the parties, first dealing with the objections that the Respondents have with respect to the Stalking Horse Agreement and then with the Respondents' complaints concerning the Sale Procedure.

The Stalking Horse Agreement

21 The first complaint of the Respondents concerns the credit bid contained in the Stalking Horse Agreement as being significantly below appraisals obtained for the Barrie Property by the Respondents (all amounts are subject to the Sealing Order).

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

22 I do not accept this argument. The Receiver has obtained an estimate on the Barrie Property from a reputable commercial real estate company, Cushman & Wakefield ULC ("CW"). The valuation was prepared by CW on March 25, 2020. It is comprehensive and expressly factors into the valuation difficulties in collecting rental income due to the COVID-19 crisis, which rent collection issues have now materialized. Further, the credit bid contained in the Stalking Horse Agreement will be paid during the Sale Procedure while the valuation placed upon the Barrie Property by CW anticipates a marketing process which will culminate in a sale in approximately 12-18 months. Thus, there is the obvious benefit of having the quicker Sale Procedure undertaken, without the continued, approximately $550,000 per month interest being incurred for another 12-18 months.

23 The Respondents rely upon the two appraisals that they have received which place higher valuations on the Barrie Property. The difficulty with those appraisals is that neither deals with the ramifications of the COVID-19 crisis. Furthermore, it bears noting that Penady was unable to sell the Barrie Property over a protracted period of time leading up to the Receivership, which suggests, partially at least, that the price it was asking was too high.

24 It also strikes me that if CW's valuation is, in fact, on the low-side, it could generate an auction in which the Applicant and others can bid, thus, driving up the price.

25 The second issue that the Respondents have with the Stalking Horse Agreement is the $400,000 Expense Reimbursement payable to the Applicant if it is unsuccessful, while an unsuccessful third-party bidder will receive no reimbursement for participating in the process.

26 In my view, the Expense Reimbursement is very reasonable. It constitutes just 0.8 percent of the purchase price, which is well within the range that is typically accepted by this court. The Respondents submit that they require a breakdown of exactly what the Expense Reimbursement would cover. In light of the modest amount of the Expense Reimbursement and the opinion of the Receiver, it is my view that such an accounting is not required in this case. Expense reimbursement payments compensate Stalking Horse Agreement purchasers for the time, resources and risk taken in developing a Stalking Horse Agreement. In addition to the time spent, the payments also represent the price of stability and thus some premium over simply providing for expenses may be expected. Thus, the Expense Reimbursement claim of 0.8 percent is, in my view, justifiable.

27 Third, the Respondents object to the required deposits of 3 percent and 7 percent at Phase I and II, respectively. They also object to a requirement that potential bidders secure financing at the end of Phase I. In my view, these are entirely reasonable requirements so that only legitimate would-be purchasers are engaged.

28 Fourth, the Respondents object to the Minimum Overbid of $250,000. In my view, the $250,000 Minimum Overbid is reasonable and within the range that is typically allowed by this court concerning properties of significant value. I can see no detriment of having a modest overbid amount in place given the amount of the Applicant's credit bid. It is supported by the Receiver and will generate a sensible bidding process.

29 Last, the Respondents object to the Applicant being involved in the proposed auction if a superior bid is obtained. Again, I disagree. Such auctions are commonplace and ensure a robust bidding process. In this regard, the Respondents also make vague complaints about the auction process. I do not accept these arguments. The auction process proposed is in keeping with those generally put before this court.

The Sale Procedure

30 First, the Respondents complain that the Receiver is prepared to undertake the Sale Procedure without obtaining a valid environmental report, a valid building condition assessment report or any tenant estoppel certificates.

31 The Receiver responds by submitting that there is an existing environmental report that is approximately one and one-half years old, the Barrie Property was recently constructed (2016), and that tenant estoppel certificates will be very difficult to obtain, given the current economic climate and the fact that some tenants are not operating and are seeking rent abatements. The

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Receiver further points out that Penady had neither an environmental report or building condition assessment when it attempted to sell the Barrie Property.

32 While there is some merit in the submissions of the Receiver, it is my view that it would be preferable to obtain an environmental report, valid building condition assessment and tenant estoppel certificates from the seven major tenants. The Receiver, in an alternative submission, agreed to obtain the environmental report and building condition assessment report. It has recently determined that the environmental assessment report can be obtained in three to four weeks and the building condition assessment report in two to three weeks. Both can be obtained at a very modest cost. Normally such reports may not be necessary, given what I have outlined above. It is my view, however, that given the current economic condition, it is best to err on the side of caution and ensure that this information, which may enhance the Sale Procedure, is available to bidders. These reports can be obtained for a modest price, in short order.

33 Similarly, it is reasonable to obtain tenant estoppel certificates from the seven major tenants. Bidders would likely be interested in this information. I accept that it would be more difficult to obtain the certificates from the minor tenants, many of whom are not fully operating at this time. The Receiver shall therefore use best efforts to obtain the tenant estoppel certificates from the seven major tenants as soon as reasonably possible.

34 Second, the Respondents submit that a Sale Procedure should not be undertaken at this time given the COVID-19 crisis. While I have sympathy with the situation the Respondents now face, I do not agree.

35 As noted above, this insolvency was not generated by the COVID-19 crisis. Penady was in financial difficulty for several months preceding the pandemic and had been unsuccessfully attempting to sell the Barrie Property for some time. I do not accept the argument that we should adopt a "wait and see" approach to determine if and when the economic crisis abates. The Applicant continues to see interest accrue, as noted, at approximately $550,000 per month. There is no certainty that the economic situation will improve in any given period of time and it may continue to ebb and flow before it gets better. The Respondents did not adduce any evidence to suggest when the economy may improve, nor likely could they, given the uncertainty surrounding the COVID-19 crisis.

36 In fairness, the Respondents did not propose an indefinite period, but perhaps a 2-3 month pause. Without some certainty, however, I do not agree that this is reasonable given the accruing interest and the risk that the economy may not improve and could worsen.

37 Alternatively, the Respondents seek to extend the timeline in the Sale Procedure. In my view, the timeline proposed by the Receiver for the Sale Procedure is a reasonable one and superior to the timeline Penady had in place when it attempted to sell the Barrie Property before the Receivership. The Receiver Sale Procedure includes a quicker ramp-up, a robust process, including the creation of a data room (which has been done), and overall provides for a longer marketing period than was included in the previous Penady sales process.

38 In light of the fact, however, that I have ordered production of the aforementioned environmental and building condition assessment reports, as well as the tenant estoppel certificates, and in order to ensure that a fair timeline is put in place so as to maximize the chances of competitive bids being obtained (including bidders having an opportunity to secure financing), I am extending the Sale Procedure by two weeks. It is my view, though, that obtaining the aforementioned documentation will result in little, if any, delay in implementing the marketing process.

39 It also bears repeating that the Receiver has acted reasonably in retaining Mr. Lewis of AY. Mr. Lewis has been in contact with prospective bidders given his previous retainer by Penady. The Receiver's retainer of Mr. Lewis allows him to continue on with his work as opposed to having a new commercial real estate agent embark on a learning process with respect to the Barrie Property. Further, Mr. Lewis's commission structure is designed so that he earns a larger commission if a buyer, other than the Applicant, is successful, thus incentivizing Mr. Lewis to ensure that a robust Sale Procedure is undertaken.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

40 The extension of the Phase I Bid Deadline to August 12, 2020 and the extension of the Phase II Bid Deadline to August 26, 2020, constitutes a fair and reasonable timetable which is longer than those usually sought and granted by this court. Further, and in any event, the Receiver can and should reappear before the court, if necessary.

DISPOSITION

41 It is my view that the above Sale Procedure complies with the principles set out in both *Soundair* and *CCM Master*. The Stalking Horse Agreement and Sale Procedure strike the necessary balance to move quickly and to address the deterioration of the value of the business, while at the same time setting a realistic timetable that will support the process.

42 Based on the foregoing, at the conclusion of the hearing, with the above noted amendments, I granted the Receiver's Order authorizing the Stalking Horse Agreement and the Sale Procedure, and authorizing the Receiver to enter into the proposed listing agreement. Furthermore, I approved the First Report and the Supplementary First Report, the Receiver's conduct and activities described, as well as granted the Sealing Order.

43 The parties approved the form and content of the Order which I signed on June 3, 2020.

Motion granted.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.