Court of Appeal File No. M53250
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

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RESPONDING PARTIES' BOOK OF AUTHORITIES
(Plaintiffs' Counsel's Motion for Leave to Appeal)

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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.)

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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., 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.

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.)

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).

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

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

(1) The Evolving Nature of CCAA Proceedings

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

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

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

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R.

(3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

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

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

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

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

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

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA*

proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into 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 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.

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, <u>the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act</u>, on notice to any other person or without notice as it may see fit, <u>make any order that it considers appropriate in the circumstances</u>.

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 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 .... <u>If the *CCAA* is to be interpreted in a purposive way, the</u> <u>courts must be able to recognize when people have conflicting interests and</u> <u>are working actively against the goals of the statute</u>.
>
> ("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.

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 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;

(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 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 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));

- 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.
>
> . . . . .
>
> ... 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 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).

TAB 2

2000 ABCA 149
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 503, 2000 ABCA 149, [2000] A.W.L.D. 563, [2000] A.J. No. 610, 19 C.B.R. (4th) 33, 225 W.A.C. 120, 261 A.R. 120, 80 Alta. L.R. (3d) 213, 97 A.C.W.S. (3d) 844

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Resurgence Asset Management LLC, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Wittmann J.A.

Heard: May 18, 2000
Judgment: May 29, 2000
Docket: Calgary Appeal 00-18816

Proceedings: (May 12, 2000), Doc. Calgary 0001-05071 [Alta. Q.B.]

Counsel: *D. Haigh, Q.C.*, and *D. Nishimura*, for Applicant.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Respondents.
S. Dunphy, for Air Canada.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.
P.T. McCarthy, Q.C., for Price Waterhouse Coopers.

Memorandum of decision. *Wittmann J.A.*:

Introduction

1 This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

2 CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the *CCAA* on March 24, 2000.

3 A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

4 The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the *CCAA* at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect

of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

Leave to Appeal Under the CCAA

5 The section of the *CCAA* governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

6 The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.* (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

7 Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p.397:

> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

Facts

8 On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

9 On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

10 On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total of $92,000,000.00 for all of the issued and outstanding voting and non-voting shares of CAC.

11 On or about January 4, 2000, Air Canada and 853350 acquired 82 per cent of CAC's outstanding common shares for approximately $75,000,000.00 plus the preferred shares of CAIL for a purchase price of $59,000,000.00. Air Canada then replaced the Board of Directors of CAC with its own nominees.

12 Substantially all of the aircraft making up the fleet of Canadian are held by Air Canada through lease arrangements with various lessors or other aircraft financial agencies. These arrangements were the result of negotiations with lessors, jointly conducted by Air Canada and Canadian.

13 In general, these arrangements include the following:

(i) the leases have been renegotiated to reflect contemporary fair market value (or below) based on two independent desk top valuations; and

(ii) the present value of the difference between the financial terms under the previous lease arrangements and the renegotiated fair market value terms was characterized as "unsecured deficiency," reflected in a Promissory Note payable to the lessor from Canadian and assigned by the lessor to Air Canada.

14 In the result, Air Canada has acquired or is in the process of acquiring all but eight of the deficiency claims of aircraft lessors or financiers listed in Schedule "B" to the Plan in the total amount of $253,506.944.00. Air Canada intends to vote those claims as an unsecured creditor under the Plan.

15 The executory contracts claims listed in Schedule "B" to the Plan total $110,677,000.00, of which $108,907,000.00 is the claim of Loyalty Management Group Canada Inc. (Loyalty), an entity with a long term contract with Canadian to purchase air miles. The claim is subject to an agreement of settlement between Loyalty, Canadian and Air Canada. Air Canada was assigned the Loyalty unsecured claim.

16 In the Plan, all unsecured creditors of both CAC and CAI are grouped in the same class for voting purposes.

17 Pursuant to the Plan, unsecured creditors will receive a payment of $0.12 on the dollar for each $1.00 of their claim unless the total amount of unsecured claims exceeds $800 million, in which case, they will receive less. Air Canada will fund this Pro Rata Cash Amount. As a result of the assignments of the deficiency amounts in favour of Air Canada, if the Plan is approved, Air Canada will notionally be paying a substantial proportion of the Pro Rata Cash Amount to itself.

18 The Plan further contemplates Air Canada becoming the 100 per cent owner of Canadian through 853350.

19 On April 7, 2000, an Order was granted by Paperny, J., directing that the Plan be filed by the Petitioners; establishing a claims dispute process; authorizing the calling of meetings for affected creditors to vote on the Plan to be held on May 26, 2000; authorizing the Petitioners to make application for an Order sanctioning the Plan on June 5, 2000; and providing other directions.

20 The April 7, 2000 Order established three classes of creditors: (a) the holders of Canadian Airlines Corporation 10 per cent Senior Secured Notes due 2005 (the Secured Noteholders); (b) the secured creditors of the Petitioners affected by the Plan (the Affected Secured Creditors); and (c) the unsecured creditors affected by the Plan (the Affected Unsecured Creditors).

21 On April 25, 2000, the Petitioners filed and served the Plan, in accordance with the Order of April 7, 2000. By Notice of Motion dated April 27, 2000, Resurgence brought an application, among other things, seeking "directions as to the classification and voting rights of the creditors ... (and) the quantum of the 'deficiency claims' assigned to Air Canada." Resurgence sought to have Air Canada excluded from voting as an unsecured creditor unless segregated into a separate class. Resurgence also sought to have the holders of the unsecured notes vote as a separate class.

22 The result of the April 27, 2000 motion by Resurgence is the Decision.

The Decision

23 In the Decision, the supervising chambers judge referred to her order of April 14, 2000, wherein she approved transactions involving the re-negotiation of the aircraft leases. She referred to "about $200,000,000.00 worth of concessions for CAIL" as "concessions or deficiency claims" which were quantified and reflected in promissory notes which were assigned to Air Canada

in exchange for its guarantee of the aircraft leases. The monitor approved of the method of quantifying the claims and Paperny, J. approved the transactions, reserving the issue of classification and voting to her May 12 Decision.

24 The Plan provides for one class of unsecured creditor. The unsecured class is composed of a number of types of unsecured claims including executory contracts (e.g. Air Canada from Loyalty) unsecured notes (e.g. Resurgence), aircraft leases (e.g. Air Canada from lessors), litigation claims, real estate leases and the deficiencies, if any, of the senior secured noteholders.

25 In seeking to have Air Canada vote the promissory notes in a separate class Resurgence argued several factors before Paperny, J., as set out at pp. 4-5 of the Decision as follows:

> 1. The Air Canada appointed board caused Canadian to enter into these ***CCAA*** proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

26 She then recited the argument made by Air Canada and Canadian to the effect that the legal rights associated with Air Canada's unsecured claims are the same as those associated with the other affected unsecured claimants, and that the matters raised by Resurgence relating to classification are really matters of fairness more appropriately dealt with in a Fairness Hearing scheduled to be held June 5, 2000.

27 After observing that the *CCAA* offers no guidance with respect to the classification of claims, beyond identifying secured and unsecured categories and the possibility of classes within each category, and that the process has developed in case law, Paperny, J. embarked on a detailed analysis and consideration of the case law in this area including *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.); *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626; *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.). Paperny, J. also referred to an oft-cited article "Reorganization under the Companies Creditors Arrangement Act" by S. E. Edwards (1947), 25 Can. Bar Rev. 587. She concluded her legal analysis at pp.12-13 by setting forth the principles she found to be applicable in assessing commonality of interest as an appropriate test for the classification of creditors:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
>
> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the ***CCAA***, namely to facilitate reorganizations if at all possible;
>
> 4. In placing a broad and purposive interpretation on the ***CCAA***, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
>
> 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement <u>as creditors</u> before or after the plan in a similar manner.

The Standard of Review and Leave Applications

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the *CCAA*. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p.95:

> .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In another recent *CCAA* case from this Court, *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the history and purpose of the *CCAA*, and observed at p.341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 ***CCAA***) suggests that Parliament, mindful that ***CCAA*** cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

29 The standard of review of this Court, in reviewing the *CCAA* decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

Statutory Provisions

30 The *CCAA* includes provisions defining secured creditor, unsecured creditor, refers to classes of them, and provides for court approval of a plan of compromise or arrangement in the following sections:

> **2. Interpretation**
>
> . . . . .
>
> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or 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, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> . . . . .
>
> "Unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue 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.
>
> **Compromises and Arrangements**
>
> 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 a manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee

in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the courts directs.

. . . . .

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the ***Bankruptcy and Insolvency Act*** or is in the course of being wound up under the ***Winding-up and Restructuring Act***, on the trustee in bankruptcy or liquidator and contributories of the company.

Classes of Creditors

31 It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the *CCAA*. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

Application of the Criteria for Leave to Appeal

32 The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

33 In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this case, I am prepared for the purposes of this application to treat this element as having being satisfied.

34 The third element is whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be *prima facie* meritorious; if it is not *prima facie* meritorious, this element is not satisfied.

35 I find that the appeal on the points raised from the Decision is not *prima facie* meritorious. In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

36 I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

37 In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to

separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

38 It was strenuously argued before me by the applicant, that deferring classification and voting issues to the Fairness Hearing was an error of law or principle in and of itself.

39 The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the *CCAA* as articulated in many of the authorities in this country.

40 The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either allowed different classes or excluded a vote. See, for example, *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.).

41 The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s.6 of the *CCAA*, provided the creditors vote to adopt the Plan.

42 This element has at its root the purpose of the *CCAA*; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) are particularly apt where he stated as follows at p.272:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

43 In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

44 It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

45 Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

46 The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

Conclusion

47 The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

Application dismissed.

TAB 3

2014 ONCA 824
Ontario Court of Appeal

CanaSea PetroGas Group Holdings Ltd., Re

2014 CarswellOnt 17259, 2014 ONCA 824, 247 A.C.W.S. (3d) 754

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 CanaSea PetroGas Group Holdings Limited, CanaSea Oil and Gas Group Pte. Ltd., CanaSea International Pte. Ltd., CanaSea PetroGas Investment Inc. and CanaSea Oil and Gas Ltd.

Robert Sharpe J.A., In Chambers

Heard: October 31, 2014
Judgment: November 20, 2014
Docket: CA M44375

Proceedings: refusing leave to appeal *CanaSea Petrogas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283, 2014 ONSC 6116, 2014 CarswellOnt 14845, Penny J. (Ont. S.C.J.)

Counsel: Rebecca Huang, Brent McPherson, Martine S.W. Garland for Moving Parties, CanaSea PetroGas Group Holdings Limited
Shawn T. Irving, Andrea Lockhart for Respondent, Equity Ventures International Holdings Limited
Pamela L.J. Huff, Matthew Kanter for Respondent, Blue Energy Holdings Limited

***Robert Sharpe J.A., In Chambers*:**

1 The moving parties seek leave to appeal from a judgment setting aside a *Companies' Creditors Arrangement Act* ("CCAA") Initial Order.

2 The moving parties are five affiliated companies, the "CanaSea Group". The corporate structure was described by the application judge, at para. 6, as follows:

> The applicant CanaSea PetroGas Holdings Limited (CPGH) is a holding company incorporated under the *Canada Business Corporations Act* with its head office in Toronto. The other applicants are all subsidiaries of CPGH. CPGH owns 100% of the shares of CanaSea Oil and Gas Group Pte. Ltd. (COGG), a Singapore company. COGG owns 100% of the shares of CanaSea Investment Inc. (CPII), a CBCA company. CPII owns 100% of the shares of CanaSea Oil and Gas Limited (COGL), the Saskatchewan operating company. CanaSea International Pte. Inc. (CPIL), another Singapore company, is also wholly owned by CPGH.

3 The moving parties applied for and obtained the Initial Order *ex parte*. I pause here to observe that in oral argument on this motion, counsel for the moving parties was unable to offer an acceptable explanation for having moved *ex parte*.

4 The respondents on this motion, Equity Ventures International Holdings Limited ("Equity Ventures") and Blue Energy Holdings Limited ("Blue Energy") are creditors of the Singapore company, COGG. They are owed $13 million, approximately 90% of the debt obligations of COGG and 49% of the total debt obligations of the CanaSea Group as a whole. They oppose any restructuring of COGG and intend to enforce their loans in Singapore where they have initiated proceedings against COGG in accordance with the loan documents which provide for Singapore jurisdiction.

5 Equity Ventures and Blue Energy moved to set aside the Initial Order on the ground that the CCAA court lacks statutory jurisdiction over COGG as well as jurisdiction *simpliciter*.

6 The application judge agreed and set aside his Initial Order.

7 The moving parties argue that they were denied procedural fairness before the application judge. They characterize the basis of the application judge's reasons for setting aside the Initial Order as being their failure to make full and frank disclosure on the *ex parte* application. They argue that had they been put on notice that this was the issue, they could have satisfied the application judge that the disclosure was adequate.

Preliminary Issue: Jurisdiction of a single judge

8 The respondents submit that as a single judge, I should decline to hear this motion for leave to appeal and defer the matter to be dealt with in writing by a panel of the court.

9 The CCAA, s. 13, provides:

> Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

10 It is clear from the wording of s. 13 that a motion for leave to appeal in a CCAA proceeding may be heard either by a judge of the court or by the court: see *1078385 Ontario Ltd., Re* (2004), 16 C.B.R. (5th) 152, 206 O.A.C. 17 (Ont. C.A.), at para. 2: "Section 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, provides the moving party with the procedural option of bringing a leave motion to a single judge"; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]). While the usual practice is to bring CCAA leave motions before a panel in writing (see *Air Canada, Re* (2003), 173 O.A.C. 154 (Ont. C.A. [In Chambers])) and while there are no doubt advantages to proceeding before a full panel in writing, both to the party seeking leave and to the court, I am not persuaded that there is any proper basis shown upon which I should decline to hear this motion.

Should leave to appeal be granted?

11 In my view, the moving parties fail to make out a case for granting leave to appeal.

12 I do not agree with their characterization of the application judge's reasons. While the application judge was plainly troubled by what he regarded as the misleading picture the moving parties had painted on the *ex parte* application, I cannot agree that he set aside the Initial Order on purely procedural grounds not signaled by the respondents' Notice of Motion. I agree with the respondents that the real basis for setting Initial Order is found at paras. 24 to 26 of his reasons where he finds that the evidence filed by the moving parties contains "no evidence of COGL's solvency, independent of COGG" and that "CIPL and COGG, the real debtors in this proceeding, are Singapore companies and have very little connection to Canada."

13 The application judge observes that he granted the *ex parte* order on the basis that:

> (1) each applicant had liabilities in excess of $5 million and was clearly insolvent;
>
> (2) each applicant was unable to meet its obligations as they came due; and
>
> (3) each applicant's finances were inextricably intertwined through intercompany debt obligations.

14 Upon closer examination of the record and with the benefit of opposing argument, he found, at para. 26, that in fact, the situation was entirely different:

> The evidence now produced as a result of the Convertible Noteholders' motion simply does not support those conclusions. These conclusions were, in fact, wrong on the basis of the evidence now available. The evidence only supports the conclusion that CPGH, CIPL and COGG have obligations in excess of $5 million and are insolvent. CPGH, although a Canadian company, essentially carries on no business — it is a holding company.

15 The claim that the finances of all the applicants "were inextricably intertwined through intercompany debt obligations" could not withstand scrutiny in the face of the admission given by the moving parties' principal on cross-examination that there were no documented inter-company loans.

16 The application judge concluded, at para. 36:

> The evidence does not support the conclusion that CPII or COGL qualify as applicants under the CCAA. On the evidence, the only entities which meet the insolvency and $5 million thresholds are at the COGG level or above. COGG is a Singapore company with a tenuous connection to Canada, whose loan agreements provide for the resolution of disputes in Singapore under Singapore law.

17 That finding and conclusion, fatal to the request for CCAA protection, corresponds precisely with the grounds set out in the Notice of Motion to set aside the initial order and I do not accept that the moving parties were taken by surprise.

18 It is firmly established that the test for leave to appeal in insolvency proceedings is stringent where it involves the exercise of discretion as to the assessment of competing interests and the availability of the special protection afforded by the CCAA: see *Country Style Food Services Inc., Re*, at para. 16; *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689, [2004] O.J. No. 2744 (Ont. C.A.) at para. 22.

19 In my view, this case falls squarely within the category in which deference is owed to the CCAA judge and where leave to appeal will be refused. It was for the CCAA judge to assess the evidence as to the nature of the debts from which the moving parties seek relief, the nature of the financial relationship between the various components of the CanaSea Group and the degree of connection between the alleged insolvency and Canada. There was ample evidence in the record to support the findings he made and I am far from persuaded that he made any error in principle or that he misapprehended the evidence.

20 I see no merit to the contention that simply because the debtor Singapore companies are part of a larger group under the umbrella of a Canadian holding company (CPGH), they can somehow claim the benefit of the CCAA in relation to debt they incurred in Singapore that is subject to Singapore law. The moving parties were unable to provide any authority to support their claim that there exists a common law doctrine of "common enterprise insolvency" that goes to such a length.

Disposition

21 Accordingly, I refuse leave to appeal. The respondents are entitled to their costs of this motion fixed at $20,000 for Equity Ventures and $16,000 for Blue Energy, both amounts inclusive of disbursements and taxes.

Motion dismissed.

TAB 4

2001 CarswellOnt 3482
Ontario Court of Appeal

Consumers Packaging Inc., Re

2001 CarswellOnt 3482, [2001] O.J. No. 3908, [2001] O.T.C. 459, 108 A.C.W.S. (3d) 765, 12 C.P.C. (5th) 208, 150 O.A.C. 384, 27 C.B.R. (4th) 197

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of a Plan of Compromise or Arrangement of Consumers Packaging Inc., Consumers International Inc. and 164489 Canada Inc.

McMurtry C.J.O., Finlayson, Austin JJ.A.

Heard: September 27, 2001
Judgment: October 10, 2001
Docket: CA M27743

Proceedings: refusing leave to appeal (), 2001 CarswellOnt 3331 (Ont. S.C.J. [Commercial List])

Counsel: *Peter F.C. Howard*, *Patrick O'Kelly*, *Craig Martin*, for Ardagh PLC.
Robert S. Harrison, *Carole J. Hunter*, for Ad Hoc Noteholders Committee.
Daniel V. MacDonald, *Paul G. Macdonald*, for Consumers Packaging Inc., Consumers International Inc. and 164489 Canada Inc.
L. Joseph Latham, *Elizabeth Moore*, for Toronto-Dominion Bank Syndicate.
Lily I. Harmer, for United Steelworkers of America.
Marc Lavigne, for Anchor Glass Container Corp.
Dale Denis, for Owens-Illinois Inc.
Terrence J. O'Sullivan (Court-appointed Monitor), for KPMG Inc.

***Per curiam*:**

1 Ardagh PLC ("Ardagh"), seeks leave to appeal and if leave is granted appeals the Order of The Honourable Mr. Justice Farley dated August 31, 2001 which approved a sale of certain assets of Consumers Packaging Inc. and Consumers International Inc. and 164489 Canada Inc. (hereinafter collectively "Consumers") to Owens-Illinois, Inc. ("Owens-Illinois").

2 Consumers had filed for protection under the *Companies' Creditors Arrangement Act* (the "CCAA") on May 23, 2001 and Farley J. made an initial order on that date approving an amendment and forbearance agreement between Consumers and its institutional lenders and arranging interim credit. KPMG Inc. was appointed Monitor under s. 11.7 of the CCAA. On June 18, 2001 Farley J. authorized Consumers through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumers' business. Both Ardagh and Owens-Illinois participated in the bid process. The Independent Restructuring Committee, the Chief Restructuring Officer and the Monitor agreed on behalf of Consumers that Owens-Illinois was the preferred bid. On the sale approval motion heard August 31, 2001, Farley J. found as a fact that Consumers was "quite sick" and "financially fragile" and that there "exists a material risk that [Consumers] will be destabilized by a withdrawal of funding by the [consortium of lenders] which have been continuously adamant about a September 2001 deadline for pay out."

3 On the evidence before us, the Owens-Illinois bid approved by Farley J. on August 31, 2001 was the result of a fair and open process developed by Consumers and its professional advisors and carried out, after May 23, 2001, under the supervision of the court and with the participation of Ardagh. The Owens-Illinois bid provides more cash to Consumers' creditors than a proposal

from Ardagh, has the least completion risk, is not conditional on financing, is likely to close in a reasonable period of time, is made by a credible purchaser (the largest glass bottle manufacturing company in the world) and will result in the continuation of Consumers' Canadian business, the retention of a vast majority of Consumers' 2,400 Canadian employees and the assumption by the purchaser of significant obligations under Consumers' employee pension plan. It is supported by all parties before this court with the exception of Ardagh.

4 The respondents on this motion submit that the restructuring proposals put forward by Ardagh were not backed by financing commitments, required further due diligence by Ardagh and its lenders, could not be completed in a timely way, offered less by way of recovery to Consumers' creditors and were no more than proposals to negotiate. It appears to have been the unanimous view of the Monitor, Consumers' Independent Restructuring Committee and Consumers' Chief Restructuring Officer that Ardagh's proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations. This view was accepted by Farley J. who stated in his endorsement approving the Owens-Illinois bid that it was the "only presently viable option better than a liquidation with substantially reduced realization of value".

5 In our opinion, leave to appeal should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly: see *Algoma Steel Inc., Re*, a judgment of the Ontario Court of Appeal, delivered May 25, 2001, (Ont. C.A.) at p. 3. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA. The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA. There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers. Both Farley J. and KPMG Inc., the court-appointed Monitor in the CCAA proceedings, have concluded that the Owens-Illinois bid represents the only presently viable option available to Consumers, which would be better than a liquidation.

6 The transactions contemplated by the Owens-Illinois bid are expected to close on September 28, 2001. If the Owens-Illinois bid does not close before the end of September, 2001, it is uncertain if, and for how long, Consumers would be able to continue its operations. The financial institutions that are prepared to finance these transactions have appeared before this court and have advised, both before and throughout the CCAA proceedings, that they will not fund the operations of Consumers beyond the end of September, the time at which Consumers' credit requirements seasonally increase on an annual basis. There is no evidence on the record, and certainly none from Ardagh, as to the manner in which the operations of Consumers would be funded until the Ardagh proposal contained in its bid, if successful, could be implemented.

7 Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (Ont. C.A.), at 238. O'Connor J.A. went on to say at p. 242:

> There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands [of] a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

8 The position of Ardagh is not advanced by the fact that it did not challenge the order of Farley J. of June 18, 2001 which set out the parameters for the bidding. Instead it participated in the bidding process which it now attacks as being *ultra vires* the CCAA.

9 Finally, while we do not propose to become involved in the merits of the appeal, we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

10 Accordingly, leave to appeal is refused with costs.

Application denied.

TAB 5

2001 CarswellOnt 1258
Ontario Court of Appeal

Cineplex Odeon Corp., Re

2001 CarswellOnt 1258, 24 C.B.R. (4th) 201

In the Matter of the Companies' Creditors Arrangement Act

In the Matter of a Plan of Compromise or Arrangement of Cineplex Odeon Corporation and the other Applicants in Schedule "A"

MacPherson J.A.

Judgment: March 27, 2001
Docket: CA M27138

Counsel: *David M. McNevin*, for Applicant, Mady Development Corporation

***MacPherson J.A.*:**

1 The applicant, Mady Development Corporation ("MDC") seeks leave to appeal from the decision of Farley J. dated March 6, 2001 in which he determined that certain fixtures (seats and screens) located on MDC's premises (a movie Theatre in Windsor) were trade fixtures rather than permanent fixtures. As a result, Farley J. ordered that Cineplex Odeon Corporation ("Cineplex") could remove the trade fixtures from the premises.

2 The application for leave to appeal is made pursuant to ss.13 and 14 of the *Companies' Creditors Arrangement Act* ("CCAA"). The parties are agreed that four factors should be considered on such an application:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the proceeding itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

See: *Re Blue Range Resource Corp.* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.) at 190.

3 I do not think that the issue proposed for the appeal is of significance to the practice generally. Generally speaking, the issue of tenants' trade fixtures does not arise in, or is a very small component of, *CCAA* proceedings.

4 I do not think that the issue proposed for the appeal is of significance to this particular *CCAA* proceeding. The issue relates to theatre seats and movie screens in one theatre in the context of a nationwide re-organization designed to keep a major corporation afloat *and* to deal fairly with all creditors, which will include MDC.

5 I do not think that the proposed appeal is *prima facie* meritorious. Farley J. specifically considered the leading authorities and the relevant provisions of the lease. In my view, his conclusion that the theatre seats and movie screens were trade fixtures is correct.

6 The respondent concedes the fourth factor. This was a proper concession because this court could hear the appeal on an expedited basis in very short order.

7 In *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt J.A. conducted an extensive review of the history and purposes of the *CCAA*. She said, at p 341:

> The fact that an appeal lies only with leave of an appellate court (s.13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

8 I agree with Hunt J.A.'s observation. In my view, the present matter is not one of those clear cases on which leave to appeal should be granted. In the end, I think that Farley J.'s analysis and conclusion are correct.

Application dismissed.

TAB 6

2016 ONCA 138
Ontario Court of Appeal

Essar Steel Algoma Inc., Re

2016 CarswellOnt 2444, 2016 ONCA 138, 263 A.C.W.S. (3d) 583, 33 C.B.R. (6th) 172

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 Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

David Brown J.A., In Chambers

Heard: February 16, 2016
Judgment: February 19, 2016
Docket: CA M46093, M46104

Counsel: Markus Koehnen and Jeffrey Levine, for the Moving parties / Responding parties by way of cross-motion, Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company
Eliot Kolers and Maria Konyukhova, for the Responding parties / Moving parties by way of cross-motion, Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA
Nicholas Kluge, Delna Contractor, for Monitor, Ernst & Young Inc.

***David Brown J.A., In Chambers*:**

I. The Motions

1 Essar Steel Algoma Inc., and certain related companies (collectively, "Essar"), are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"). The Cleveland-Cliffs Iron Company, Cliffs Mining Company, and Northshore Mining Company (collectively, "Cliffs"), move for directions as to whether they require leave to appeal from the order of the *CCAA* judge, Newbould J., dated January 25, 2016 (the "Order"). Whether leave to appeal is required or not, Cliffs seeks a stay of the contract dispute motion Essar has brought against Cliffs before the *CCAA* judge pending Cliffs' exercise of its appeal rights in respect of the Order.

2 Essar brings a cross-motion for an order expediting the hearing of Cliffs' motion for leave to appeal, or its appeal.

3 At the hearing of the motions, I released an endorsement (the "Endorsement") in which I concluded that Cliffs required leave to appeal the Order and its leave to appeal motion should be expedited. I also granted a stay of Essar's contract dispute motion pending the determination of Cliffs' leave to appeal motion. These are my reasons for so ordering.

II. Background

4 Essar manufactures steel in Sault Ste. Marie, Ontario. Iron ore pellets are a key input in its manufacturing process. In 2002, Essar's predecessor entered into a long-term iron ore pellet supply contract with Cliffs (the "Contract"). The Contract obliged Essar to purchase iron ore pellets exclusively from Cliffs until 2016 and to purchase a portion of its pellets from Cliffs from 2017 until 2024.

5 In recent years the business relationship between Essar and Cliffs has been a rocky one, with disputes arising over the quantities of iron ore pellets Essar was obliged to order and take up under the Contract.

6 In January 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern District) (the "Ohio Court") alleging that Essar had breached the Contract by failing to take timely delivery of iron ore pellets in the requisite amounts. In late July 2015, Cliffs brought a motion for partial summary judgment. The motion was decided on October 7, 2015. The Ohio Court dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar's 2014 quantity nomination, but granted its motion to dismiss Essar's counterclaim with respect to moisture content. A trial of all the issues in the Ohio litigation was scheduled to commence on December 7, 2015.

7 On October 5, 2015, Cliffs terminated the Contract alleging multiple material breaches by Essar.

8 On November 9, 2015, Essar sought and obtained an initial order under the *CCAA*. On November 10, 2015, Essar's foreign representative sought and obtained orders under Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C (2010) recognizing and enforcing in the United States the orders granted in the *CCAA* proceeding, which was recognized as the foreign main proceeding.

9 On November 11, 2015, Essar filed with the Ohio Court a notice that the Ohio litigation was automatically stayed in respect of Essar. On December 3, 2015, the Ohio Court dismissed Cliffs' action without prejudice. As a result, the scheduled trial of Cliffs' action did not proceed. Cliffs has moved to vacate that dismissal, but no decision has been rendered on its motion.

10 In mid-November, Essar served a motion under s. 11.4 of the *CCAA* seeking an order declaring Cliffs a critical supplier; the motion did not proceed because Essar was able to find short-term alternate suppliers.

III. Proceedings Under Appeal

11 On December 8, 2015, Essar moved in the *CCAA* proceeding for a declaration that Cliffs' purported termination of the Contract was not effective and Cliffs must supply Essar with iron ore pellets at the Contract price (the "Contract Dispute Motion"). Essar also sought orders directing Cliffs to comply with the Contract and to pay damages resulting from the purported termination of the Contract.

12 On December 23, 2015, Cliffs served a motion seeking an order dismissing Essar's Contract Dispute Motion on the ground that the Ontario court lacks jurisdiction to grant the relief sought or, alternatively, Ontario is not the convenient forum in which to adjudicate the dispute.

13 Cliffs' motion was heard on January 14, 2015 by Newbould J., the judge conducting the *CCAA* proceedings in respect of Essar. The *CCAA* judge dismissed Cliffs' motion in an Order and Endorsement dated January 25, 2016. He held that the Ontario court has jurisdiction over Essar's Contract Dispute Motion and Cliffs had not demonstrated that a clearly more appropriate forum than Ontario existed in which to adjudicate the dispute.

IV. Issues

14 Cliffs moves in this court for directions and for a stay of the Order pending Cliff's exercise of its appeal rights. Cliffs argues that it is not required to obtain leave to appeal the Order. Alternatively, Cliffs submits that in the event "leave is granted from a portion of the decision of" the *CCAA* judge, that appeal should be consolidated "with the other aspects of the appeal which Cliffs has as of right."

15 Essar has brought a cross-motion seeking an order expediting the hearing of Cliffs' leave to appeal motion, if required, or the hearing of the appeal.

V. Whether Cliffs Requires Leave to Appeal the Order

16 Section 13 of the *CCAA* requires that "any person dissatisfied with an order or a decision made under this Act" obtain leave to appeal. The sole issue on Cliffs' motion for directions is whether the Order of the *CCAA* judge was "made under" the *CCAA.*

17 The Order resulted from a motion brought in the Essar *CCAA* proceeding, before the judge seized with hearing all matters in the Essar *CCAA* proceeding, with the judge explaining, in his reasons, how he was exercising his powers as a *CCAA* judge. The Order bears a style of cause stating that it was made "In the Matter of the *Companies' Creditors Arrangement Act*" in respect of a "Plan of Compromise or Arrangement of Essar Steel Algoma Inc." and other companies.

A. Positions of the Parties

18 Nevertheless, Cliffs submits that the Order was not "made under" the *CCAA*, for two reasons. First, the fact that an order is made "in" a *CCAA* proceeding does not necessarily mean that it was "made under" the *CCAA*. Second, an order is not "made under" the *CCAA* if it is one that "could have properly been made in a normal civil action without any regard to the *CCAA* or the *CCAA* proceeding." According to Cliffs, to constitute an order "made under" the *CCAA*, the order must rely upon or be grounded in a specific section of the *CCAA*. In support of its submissions, Cliffs relies on decisions made by Tysoe J.A. in *Sandvik Mining & Construction Canada Inc. v. Redcorp Ventures Ltd. (Interim Receiver of)*, 2011 BCCA 333, 94 C.B.R. (5th) 53 (B.C. C.A. [In Chambers]), and O'Brien J.A. in *Monarch Land Ltd. v. Sanderson of Fish Creek (Calgary) Developments Ltd.*, 2014 ABCA 143, 575 A.R. 46 (Alta. C.A.).

19 Essar submits that *CCAA* proceedings have a wide scope. Consequently, if *CCAA* considerations inform the decision and exercise of discretion of the judge, the decision can fairly be said to be "made under" the *CCAA*. Such considerations informed the making of the Order, so leave to appeal is required.

B. Analysis

The Purpose of s. 13 of the CCAA

20 The analysis must start with an examination of the legislative purpose underlying the leave requirement contained in s. 13 of the *CCAA*. In *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361, 425 A.R. 182 (Alta. C.A.), the Alberta Court of Appeal observed that the requirement for leave to appeal furthers the objects and purpose of the *CCAA*. At paras. 14 and 15, the court stated:

> To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay...The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62, [1999] A.J. No. 185at para. 22, citing *Re Pacific National Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).
>
> The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non- judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 237 A.R. 326at para. 31.

21 More recently, in *AbitibiBowater Inc., Re*, 2010 QCCA 965, 68 C.B.R. (5th) 57 (C.A. Que.), at para. 26, Chamberland J.A. described the purpose of the leave to appeal requirement in s. 13 of the *CCAA*:

> This requirement stems from a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings; an appeal court should be cautious about intervening in the CCAA process. This is not to say that leave will never be granted but it should be so only "sparingly" (*In Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]), at 272).

22 That legislative purpose for the leave requirement supports an expansive interpretation of the term "made under" the Act in s. 13: *Smoky River Coal Ltd., Re*, 1999 ABCA 62, 237 A.R. 83 (Alta. C.A.), at para. 20. Such an expansive interpretation was adopted by Paperny J.A. in *Concrete Equities Inc., Re*, 2012 ABCA 91, [2012] A.W.L.D. 2836 (Alta. C.A.), at para. 16, where

she held that when "*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge ... it can be fairly said that the order was made 'under' the *CCAA* in accordance with section 13 of the Act."

The Decisions in Sandvik Mining and Monarch Lands

23 Cliffs submits that the interpretation given to "made under" the Act in *Concrete Equities* should be limited to the facts of that case, where there was no dispute that the notices of disallowance dealt with by the chambers judge resulted from a claims process ordered under the *CCAA*. Cliffs argues that the *Sandvik Mining* and *Monarch Lands* decisions employed different interpretations of "made under" the Act which are more appropriate for the present case.

24 I agree that both the *Sandvik Mining* and *Monarch Lands* decisions offer guidance on the meaning of "made under" the *CCAA*, but I do not accept Cliffs' submission that the principles emerging from those cases would lead to the conclusion that Cliffs is not required to seek leave to appeal from the Order. Both cases involved exceptional fact situations that lay beyond the boundaries of the usual *CCAA* proceeding.

25 Dealing first with the *Sandvik Mining* decision, Tysoe J.A. concluded that the decision of the judge below regarding the ownership of some equipment was not an order "made under" the *CCAA*, notwithstanding that the order resulted from an application styled as brought in a *CCAA* proceeding involving Redcorp and related companies. Tysoe J.A. wrote, at para. 9: "it does not follow from the fact that the order was made in the *CCAA* proceeding that it was necessarily an order made under the *CCAA*." He continued by observing the judge below "did not rely on any provision of the *CCAA*, and the determination of the issue in question was not incidental to any order made under the *CCAA*." Tysoe J.A. went on to state, at para. 11:

> It was a decision made under general law and the *Sale of Goods Act*, and while the decision may have been made within the *CCAA* proceeding as a matter of convenience, it was a decision that was made independently of the provisions of the *CCAA* and the *BIA* and of any order previously made under the *CCAA*.

26 Those statements must be understood in the specific factual context in which they were made. In *Sandvik Mining*, the debtor companies had secured an initial order under the *CCAA* in March 2009. Two months later, a judge lifted the stay of proceedings against certain creditors, appointed an interim receiver over some of the debtors' assets, and discharged the monitor from most of its duties. A month after that, the debtors were assigned into bankruptcy. Almost two years later, the receiver brought its application seeking a declaration regarding the ownership of the equipment and styled the application as one brought in the *CCAA* proceeding. It was against that background that Tysoe J.A. stated, at para. 8:

> In my opinion, the order or decision of [the judge below] was not made under the *CCAA*. The efforts to reorganize Redcorp had come to an end, and there was no ongoing attempt to have Redcorp file a plan of arrangement. [The receiver] simply filed its application in the *CCAA* proceeding as a matter of convenience. The fact that [the receiver] was appointed in the *CCAA* proceeding did not require the application to be filed in that proceeding. [The receiver] could have, and more properly should have, commenced a separate proceeding. [The receiver] was not appointed as interim receiver or receiver pursuant to the *CCAA*, but rather pursuant to the *BIA* and the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (while the order lifting the stay undoubtedly had to be made within the *CCAA* proceeding, there is a question in my mind about the appropriateness of appointing receivers within *CCAA* proceedings after the reorganization attempt has failed).

27 *Sandvik Mining*, therefore, involved a case where the *CCAA* proceedings had run their course and failed, but the *CCAA* court file had not yet been closed. The receiver, "as a matter of convenience", took advantage of that state of affairs to bring its application in the *CCAA* court file. The message from the *Sandvik Mining* decision is that where the *CCAA* proceedings have come to an end for all intents and purposes, an order made several years later in a dormant *CCAA* court file may well not be an order "made under" the *CCAA*.

28 Cliffs also relies on the decision in *Monarch Land*, which considered whether an order resulting from a trial of issues was "made under" the *CCAA*, and therefore required leave to appeal. Again, the context of that case explains its result.

29 Sanderson was one of a group of companies that obtained an initial order under the *CCAA*. In those proceedings, a trial of issues was directed. Prior to the trial, the list of issues was expanded. As a result, the trial judge considered two issues: (i) an accounting for sale proceeds as between two of the secured creditors of the debtors; and (ii) the ownership of parking stalls pursuant to an agreement between the debtor and a secured creditor.

30 In respect of the first part of the trial order — dealing with the accounting between two secured creditors — O'Brien J.A. stated, at para. 11:

> It is common ground that the accounting issue arises out of a Postponement and Priority Agreement, a separate and distinct agreement between CMI and Monarch. Monarch concedes that this determination, including the limitations issue, "could properly have been made in a normal civil action between Monarch and CMI without any regard to the CCAA", and accordingly that no leave is required with respect to that part of the judgment.

31 However, O'Brien J.A. concluded that the part of the trial order disposing of the second issue concerning the ownership of the parking stalls was "made under" the *CCAA*. Distinguishing the case from *Sandvik Mining*, he wrote, at paras. 7 and 8:

> Here the order of Horner J., the supervising judge in the CCAA proceedings, granted "a trial of an issue ... to determine whether the Purchase and Sale Agreement of December 1, 2010, between [Sanderson] and [Monarch] included parking stalls for the development of phase 3 of the Sanderson project". She lifted the stay in the CCAA proceedings specifically for that purpose. It is common ground that the subject Purchase and Sale Agreement was approved by an order made in the CCAA proceedings...
>
> In my view, it cannot be said, as it was in *Sandvik*, that "the determination of the issue in question was not incidental to any order made in the CCAA". To the contrary, the issue Horner J directed to trial required the interpretation of an agreement that the court had expressly approved in the CCAA proceedings, and involved the need to interpret the order approving the sale. Both interpretations had a potential impact upon other Sanderson's other creditors in addition to CMI and Monarch.

32 Accordingly, *Sandvik Mining* and *Monarch Land* involved circumstances which lay beyond the boundaries of the usual *CCAA* proceeding: in *Sandvik Mining*, the *CCAA* proceeding had run its course long before the order was made, and in *Monarch Land* an issue between two secured creditors was tacked on, as a matter of procedural convenience, to a trial of an issue in the *CCAA* proceeding. Consequently, I do not think that *Sandvik Mining's* distinction between an order "made in" a *CCAA* proceeding and one "made under" the *CCAA* or *Monarch Land's* reference to orders that "could properly have been made in a normal civil action" offers general guidance for considering whether leave to appeal is required under s. 13 of the *CCAA*.

A Purpose-Focused Approach to s. 13 of the CCAA

33 The inquiry, instead, should be purpose-focused. When asked to determine whether an order requires leave to appeal under s. 13 of the *CCAA*, an appellate court should ascertain whether the order was made in a *CCAA* proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the *CCAA* by supervising an attempt to reorganize the financial affairs of the debtor company, either by way of plan of arrangement or compromise, sale, or liquidation: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services], at para. 59. If the order resulted from such an exercise of judicial decision-making, then it is an order "made under" the *CCAA* for purposes of s. 13.

34 To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the *CCAA*. In *Sandvik Mining*, Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the *CCAA*" or "incidental to any order made under the *CCAA*": at paras. 9 and 10. In *Monarch Land*, O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the *CCAA* proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in *Concrete Equities*, Paperny J.A. stated that s. 13 of the *CCAA* would apply if "*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the *CCAA*": at paras. 16 and 17. Finally, additional indicia were identified by this court in *Hemosol Corp., Re*, 2007 ONCA 124 (Ont. C.A.), at para. 3:

> In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the CCAA within the meaning of s. 13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly state that the matter is a CCAA proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding.

Application of the Purpose-Focused Approach

35 Applying those principles to the present case, I conclude that the Order was "made under" the *CCAA*. It was made by the judge supervising an active *CCAA* proceeding in furtherance of the purposes of the *CCAA*. The evidence before the *CCAA* judge disclosed that what, if any, rights Essar possesses under the Contract, which Cliffs purported to terminate on October 5, 2015, is an issue in the *CCAA* proceeding. In its Sixth Report dated January 11, 2016, the Monitor stated that Essar is preparing a business plan that will form part of the information made available to potential purchasers or investors in its Sale and Investment Solicitation Process ("SISP") recently approved under the *CCAA*. The Monitor reported: "A key component of the Business Plan is Algoma's raw material supply strategy, and in particular its strategy for the supply of iron ore pellets... In canvassing the iron ore pellet market and finalizing its supply strategy, Algoma needs certainty concerning the status of the Cliffs Contract." Based on that and other evidence, the *CCAA* judge concluded, at para. 31, that the "claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court." See also, *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 5194 (C.S. Que.), at paras. 17 and 19.

36 Cliffs advances two additional reasons about why the Order was not "made under" the *CCAA*. I do not accept either.

37 First, Cliffs submits that the *CCAA* judge did not, on the face of his reasons, rely on a specific section of the *CCAA* to assume jurisdiction. In *Sandvik Mining*, Tysoe J.A. commented that the judge below had not relied on any provision of the *CCAA*. However, it does not follow, as Cliffs submits, that an order is not "made under" the *CCAA* unless the judge expressly relies on a section of the Act in granting the order. In *Century Services*, the Supreme Court of Canada recognized that a judge supervising a *CCAA* proceeding will draw on both statutory authority under the *CCAA* and the court's residual authority under its inherent and equitable jurisdiction in order to decide specific issues that arise during the *CCAA* proceeding. Deschamps J. stated, at para. 65:

> I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding...

38 In any event, the *CCAA* judge expressly relied on s. 11 of the *CCAA* in his decision on jurisdiction. He stated, at para. 28:

> The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances". A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smokey River Coal Ltd., Re* (1999), 12 C.B.R. (4th) 94 (Alta. C. A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so. [Footnotes omitted.]

39 Whether or not the *CCAA* judge was correct at law in reaching that conclusion is a matter for consideration by the leave to appeal panel, but is not relevant to the inquiry into the proper route Cliffs must follow to appeal the Order. The *CCAA* judge purported to rely on s. 11 of the *CCAA* in making the Order, so the Order was "made under" the *CCAA*.

40 Second, Cliffs argues that because the contractual claim Essar seeks to assert against Cliffs could properly have been made in a normal civil action without regard to the *CCAA*, the Order was not "made under" the *CCAA*. I do not accept this submission. To decide the appeal route Cliffs must follow, the issue is not what claims Essar could have asserted in some hypothetical

proceeding; the issue is how to characterize the Order — was it "made under" the *CCAA*? The purpose-focused inquiry under s. 13 of the *CCAA* must look at the order actually made, not at some order that could have been made in a hypothetical proceeding.

Conclusion

41 For these reasons, I concluded that the Order was "made under" the *CCAA*, and Cliffs therefore required leave to appeal under s. 13 of the *CCAA*.

VI. Order Expediting Leave to Appeal

42 Cliffs' motion for leave to appeal will be heard by a panel of this court on an expedited basis. In the Endorsement, I gave directions that the parties serve and file the completed leave materials no later than Wednesday, February 24, 2016, so that the materials could be placed before the panel on February 25, 2016.

VII. Stay Pending Appeal

43 Cliffs seeks a stay of Essar's Contract Dispute Motion before the *CCAA* judge pending its leave to appeal motion. Essar opposes the request for a stay.

44 As set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.), at p. 334, the three-part test for obtaining a stay pending appeal requires the moving party to demonstrate (a) there is a serious question to be determined on the appeal, (b) the moving party will suffer irreparable harm if the stay is not granted, and (c) the balance of convenience favours granting the stay: *Yaiguaje v. Chevron Corp.*, 2014 ONCA 40, 315 O.A.C. 109 (Ont. C.A.), at para. 3.

A. Serious Question

45 Cliffs has demonstrated that its leave to appeal motion raises a serious question to be determined. Essar conceded as much in its factum when it stated that this was, at best, a "neutral factor." And, at the hearing, Essar advised it was not contesting that the serious question factor had been satisfied. In my view, that was a proper concession to make given the low threshold to meet on this factor. Cliffs' stay motion turns on the other two factors.

B. Irreparable harm

Positions of the parties

46 Cliffs submits if a stay is not issued, it would effectively be deprived of the right to seek leave to appeal because Essar's Contract Dispute Motion would proceed before the *CCAA* judge in the face of Cliffs' jurisdictional challenge.

47 The parties provided an update on what has transpired in that proceeding since the Order was made. Last week, the parties participated in two conference calls with the *CCAA* judge to discuss the procedure by which Essar's Contract Dispute Motion would be adjudicated in the *CCAA* proceeding. Counsel advised that a further videoconference call was scheduled to take place on Wednesday, February 17, 2016 before the *CCAA* judge at which time they expected the judge would render a decision on the adjudication procedure. Cliffs stated it was not participating voluntarily in those scheduling calls, even though it had been permitted to file its procedural proposals with the *CCAA* judge on a without prejudice basis.

48 Cliffs submits that although Essar has undertaken not to treat Cliffs' participation in the scheduling and organization of the Contract Dispute Motion as an attornment to the jurisdiction of the Ontario court, conflicting decisions from this court create the risk that such an undertaking might not be given effect, posing a serious risk to Cliffs' ability to challenge the Ontario court's jurisdiction.

49 In response, Essar argues that a stay is not necessary in light of its agreement to expedite the hearing of Cliffs' motion for leave to appeal and the undertakings it has given on the stay motion.

50 Essar filed an affidavit from its Chief Financial Officer, Rajat Marwah. He deposed that Essar wants the parties to ready themselves for an adjudication of the Contract Dispute Motion. To that end, Essar has proposed to Cliffs that it deliver its responding affidavit evidence on the dispute on "an informal, without- prejudice basis outside the formal bounds of these court proceedings." Essar, in turn, would complete certain documentary disclosure. Mr. Marwah provided the court with three undertakings in order to permit Cliffs to exercise its appeal rights while enabling preparation to continue on the Contract Dispute Motion:

> (i) Cliffs would not be required to file in the *CCAA* court any affidavit or other material delivered in preparation for the contract dispute hearing;
>
> (ii) Essar undertakes not to argue that the delivery of such materials by Cliffs or the taking of any steps toward a hearing of Essar's motion would amount to an act of attornment to the jurisdiction of the Ontario court; and
>
> (iii) Essar would not invoke the jurisdiction of the Ontario court until Cliffs' appeal or motion for leave to appeal has been decided.

Analysis

51 Over the past decade, judges of this court sitting in Chambers on stay motions have expressed different views about whether a party risks attorning to the jurisdiction of the Ontario court by performing court-ordered procedural steps in the face of the party's on-going challenge to the court's jurisdiction. Some decisions have viewed such participation as risking attornment, thereby creating some risk of irreparable harm: *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 72 O.R. (3d) 68, 242 D.L.R. (4th) 139 (Ont. C.A. [In Chambers]), at paras. 27-31; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2014 ONCA 546, 122 O.R. (3d) 472 (Ont. C.A.), at paras. 29-36. On the other hand, in *Van Damme v. Gelber*, 2013 ONCA 388, 115 O.R. (3d) 470 (Ont. C.A.), at paras. 21-23, the court minimized any such risk from court-ordered participation, and in *Yaiguaje v. Chevron Corp.*, at para. 11, MacPherson J.A. regarded any risk as a weak factor in the irreparable harm analysis.

52 I need not express a view on the effect of court-ordered participation in a proceeding on a party's ability to continue to advance a jurisdictional challenge because decisions of this court uniformly have held that where the responding party provides the court with undertakings of the kind given by Essar in this case, the undertakings significantly reduce or remove the risk of irreparable harm.

53 In *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, 283 O.A.C. 321 (Ont. C.A. [In Chambers]), at para. 14, Laskin J.A. described the undertakings given by BTR:

> BTR wants to proceed with the Ontario action. It is content to have LBIE deliver a statement of defence without filing it with the court. It undertakes not to argue that delivery of the statement of defence or participation in examinations for discovery constitute acts of attornment. <u>BTR also undertakes not to invoke the jurisdiction of the Ontario court</u>, by, for example, a motion for summary judgment, while LBIE's leave motion is outstanding.
>
> [Emphasis added.]

54 Laskin J.A. did not consider the delivery of a statement of defence or participation in discoveries outside of the "formal bounds" of the court proceedings as amounting to attornment: at para. 31. Similar undertakings given in *Yaiguaje v. Chevron Corp.*, led MacPherson J.A., at paras. 11 and 16, to follow the decision in *BTR Global* and conclude that the moving parties had made a very weak showing that they would suffer irreparable harm.

55 In light of the undertakings given by Essar to the court in the present case, I conclude that Cliffs have not demonstrated that they would suffer irreparable harm if a stay pending appeal is not granted.

C. Balance of convenience

56 Both parties point to some "big picture" factors as tipping the balance of convenience in their favour. Cliffs contends that Essar will not suffer any prejudice should a stay not issue because to date it has found sufficient quantities of replacement iron ore pellets. As well, Essar did not pursue its critical supplier motion in the *CCAA* proceeding.

57 On its part, Essar stresses the need for an expedited determination of the contract dispute in light of the end of April deadline for bids under the SISP process. Essar also advises that the Chapter 15 court in Delaware has deferred Cliffs' motion to lift the *CCAA* stay until the jurisdiction issue is resolved.

58 Although these factors are relevant to the determination of which party will suffer the greater harm from the granting or refusal of a stay, in my view the most significant factor is much narrower in scope. While the parties did not file on this stay motion the procedural proposals they have presented to the *CCAA* judge, Essar advises that neither proposal contemplates Cliffs delivering any materials over the next two weeks. Instead, during that time Essar will be required to deliver certain productions.

59 In those circumstances, the balance of convenience favours granting a stay. I have ordered Cliffs' leave to appeal motion to be expedited. As a result, within the next two weeks the leave motion will be placed before a panel of this court for determination. If leave is not granted, the Contract Dispute Motion can proceed on the merits with little delay in preparation having occurred. If leave to appeal is granted, then the leave panel will consider whether or not to continue the stay.

D. Conclusion

60 In *BTR Global*, Laskin J.A. stated, at para. 16, that the three components of the stay test "are interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay." In my view, the most significant factor affecting the interests of justice is the balance of convenience. It favours granting a stay. I therefore granted a stay in the terms set out in para. 3 of the Endorsement:

> As to that part of Cliffs' motion which seeks a stay of Essar's contract motion before the *CCAA* judge pending its exercise of appeal rights in respect of the Order, I grant a stay of Essar's contract motion until such time as the panel of this court disposes of Cliffs' motion for leave to appeal. If the panel grants leave to appeal, the panel may consider whether or not to continue the stay based upon the stay motion materials already filed with the court.

61 Having granted a stay, I went on to state in para. 4 of the Endorsement:

> Of course, nothing in this endorsement prevents Cliffs from voluntarily taking steps to prepare for an adjudication of the contract dispute with Essar, without prejudice to its argument that the Superior Court of Justice of Ontario lacks the jurisdiction to adjudicate that dispute. As part of such voluntary steps, it is always open to Cliffs to request, on a voluntary, without prejudice basis, the informal assistance of the *CCAA* judge on any hearing planning or preparation issues, and it is always open to the *CCAA* judge to provide any such requested informal assistance on a without prejudice basis.

VIII. Disposition

62 For the reasons set out above, I ordered (i) Cliffs to seek leave to appeal the Order under s. 13 of the *CCAA*, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion in the terms set out in para. 3 of the Endorsement.

Motion granted; cross-motion granted.

TAB 7

2017 ONCA 478
Ontario Court of Appeal

Essar Steel Algoma Inc. (Re)

2017 CarswellOnt 8668, 2017 ONCA 478, 279 A.C.W.S. (3d) 463, 49 C.B.R. (6th) 259, 65 B.L.R. (5th) 218

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

E.A. Cronk, R.A. Blair, K. van Rensburg JJ.A.

Heard: June 2, 2017
Judgment: June 8, 2017
Docket: CA M47815/M47846

Proceedings: refusing leave to appeal *Essar Steel Algoma Inc., Re* (2017), 2017 CarswellOnt 6582, 2017 ONSC 2585, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter H. Griffin, Matthew B. Lerner, Kim Nusbaum, Robert Trenker, for Moving Parties, GIP Primus LP and Brightwood Loan Services LLC
Patricia D.S. Jackson, Andrew Gray, Jeremy Opolsky, Alexandra Shelley, for Moving Party, Port of Algoma Inc.
Ashley Taylor, Eliot Kolers, Sanja Sopic, for Applicants / Respondents
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Monitor, Ernst & Young Inc.

Motions for leave to appeal from the order of Justice Frank Newbould of the Superior Court of Justice, dated April 28, 2017

***Per curiam*:**

Background

1 GIP Primus LP and Brightwood Loan Services LLC (collectively "GIP") and Port of Algoma Inc. ("Portco") apply for leave to appeal the order of Newbould J. dated April 28, 2017. The order was made in the context of insolvency proceedings under the CCAA [1] involving Essar Steel Algoma Inc. ("Algoma") and related companies. Newbould J. is the supervising CCAA judge in those proceedings.

2 Algoma and its predecessors are no strangers to restructuring proceedings. The first CCAA proceedings were commenced in 1991. A second CCAA restructuring took place in 2001. By 2014 Algoma was in further need of a cash injection and an attempt was made to address the problem through a solvent restructuring under the *Canada Business Corporations Act*. [2] This resulted in a complex transaction in the course of which GIP advanced $150 million which was then paid to Algoma as the major portion of the purchase price in what is referred to by the parties as the "Port Transaction". That overall transaction involved four basic components:

(i) the sale by Algoma to Portco of the port facilities at Sault Ste. Marie, Ontario;

(ii) a lease of the port lands to Portco for a period of 50 years;

(iii) a Cargo Handling Agreement, whereby Algoma was to pay Portco US$36 million annually, in monthly instalments, for use of the port and cargo-handling facilities; and

(iv) a Shared Services Agreement that required Portco to pay Algoma US$11 million annually, in monthly instalments, in exchange for Algoma providing operation and maintenance services at the port.

3 At the end of the day, Algoma received a total purchase price of US$171.5 million. Of that amount, US$150 million was advanced by GIP to Portco which, in turn, used it to pay Algoma. Portco paid a small further amount itself and the balance of the purchase price was paid by way of a US$19.8 million promissory note from Portco to Algoma (the "Note"). Portco's obligation under the Note was subsequently assumed by Essar Global Fund Ltd. ("EGFL"), the indirect parent company of both Portco and Algoma. The structure of the Cargo Handling Agreement and the Shared Services Agreement was designed to provide Portco with a net stream of payments that would enable it to service the GIP loan.

4 Unfortunately, the restructuring was unsuccessful. Algoma filed for protection under the CCAA in November, 2015. DIP lenders provided financing during the proceedings.

5 Under the Initial CCAA Order, Algoma was required to pay post-filing expenses as set out in a cash-flow budget approved by the DIP lenders, and for a period of time after the filing Algoma continued to make regular payments under the Cargo Handling Agreement. These payments stopped in May, 2016, however, when the DIP lenders refused to approve cash-flow budgets providing for those payments so long as the $19.8 million Note remained outstanding.

6 This triggered proceedings that have ultimately led to these motions for leave to appeal.

The First Motion

7 In June, 2016, Portco brought a motion — supported by GIP — for an order requiring Algoma to resume payments under the Cargo Handling Agreement, relying on the provisions of s. 11.01(a) of the CCAA as the basis for the order. Section 11.01(a) permits a company under CCAA protection to make payment for post-filing goods and services provided to it. Portco argued it was providing post-filing services under the Cargo Handling Agreement.

8 There was also an issue raised by the Monitor and the DIP lenders as to whether there was a right, on the part of Algoma, to set off payments due under the Cargo Handling Agreement against the amount outstanding on the Note.

9 The CCAA Judge dismissed the motion. He held that s. 11.01(a) was not applicable because, in fact, it was Algoma and its employees, and not Portco, who were providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. He concluded that it was premature to deal with the set-off issue. In dismissing the motion, he said that the dismissal was "without prejudice to it being brought back on after the set-off issue [had been] determined".

10 No steps were taken to seek leave to appeal from this decision.

The Second Motion

11 Not to be deterred, however, Portco — again supported by GIP — brought a second motion in October, 2016, seeking the same relief. Again Portco and GIP relied on s. 11.01(a). But this time, they presented a different argument. The Cargo Handling Agreement was in reality a licensing agreement, they submitted, and Algoma was not entitled to enter onto the premises without paying under the license.

12 The CCAA Judge dismissed the motion again. First, he held that the issue of s. 11.01(a)'s applicability had been decided on the previous motion — from which no leave to appeal had been sought — and could not be re-litigated under the guise of a different argument which could have been raised on the First Motion. In holding that the s. 11.01(a) issue had already been finally decided against Portco, and with respect to the "without prejudice" aspect of the first order, he was very clear: [3]

I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

13 Secondly, and in any event, the CCAA Judge rejected the licensing argument. He further concluded that even if Portco were free to raise the s. 11.01(a) issue — which it was not free to do — he would not have ordered payment of amounts due under the Cargo Handling Agreement at that stage in the face of related oppression remedy proceedings involving the Port Transaction that were pending before him as well.

14 No steps were taken to seek leave to appeal from this second order.

The Oppression Proceedings

15 In September, 2016, the CCAA Judge had authorized the Monitor to commence oppression remedy proceedings on behalf of Algoma with regard to the Port Transaction. EGFL (the obligor under the Note) asserted a counterclaim in those proceedings, arguing that the amounts owing to Portco under the Cargo Handling Agreement could be set off against the $19.8 million Note and that that amount had then been exceeded, with the result that payments should resume under the Cargo Handling Agreement.

16 The oppression remedy proceedings were heard by Newbould J. as well, in early 2017. On March 6, 2017, he released his reasons. He found the Port Transaction was oppressive and unfairly disregarded the interests of Algoma's trade creditors, employees, pensioners and retirees, but did not set aside the transaction. Instead, he ordered that the transaction documents be amended in various ways, the particulars of which are not important to the leave to appeal issues. He declined to deal with the set-off issue in those proceedings, however, concluding instead that "the appropriate place to make this claim is in the CCAA proceedings."

The Third Motion

17 Very quickly — in April, 2017 — the s. 11.01(a) issue was brought back again, this time by way of a GIF motion, supported by Portco. In an April 28th endorsement, Newbould J. once again dismissed the motion. This time he said: [4]

This is the third time that this argument has been advanced. It was unsuccessfully argued by Portco on two previous motions requesting orders that the payments under the Cargo Handling Agreement resume. On the first occasion, it was argued that Portco was providing services to Algoma on the Port facilities and that section 11.01(a) required immediate payment. I held that Portco was not providing the services but rather Algoma personnel who were doing all of the work. On the second occasion Portco added the argument that Portco was licensing the Port facilities to Algoma and that the payments under the Cargo Handling Agreement were for that purpose and therefore had to be made. I held that it was not open to Portco to make that new argument but that in any event I did not accept it . . .

Portco adds another argument why the access of Algoma to the Port facilities is a licence. Again, that should have been argued in the first go-around on the point. It says that under the Cargo Handling Agreement, Algoma can enter the property only if it makes payment under that agreement. I do not agree. What the Cargo Handling Agreement provides in section 3.3 is that notwithstanding that Algoma's access to the Port is non-exclusive, Algoma shall have priority access so long as it makes its payments due under the Cargo Handling Agreement. That in no way can be construed to be a licence. That section recognizes Algoma's right to access to the Port facilities as provided for in the Lease.

In short, even if it were permissible for Portco or GIP to again raise section 11.01(a), which it is not, I cannot find that there was a licence relationship between Algoma and Portco regarding the Port assets.

18 It is this order that is the subject of these motions for leave to appeal.

Analysis

19 Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the "generally discretionary character underlying many of the orders made by supervising judges in such proceedings" and the deference to be accorded to those decisions. In considering whether to grant leave, the court will consider whether:

(i) the proposed appeal is *prima facie* meritorious or frivolous;

(ii) the point on the proposed appeal is of significance to the practice;

(iii) the point on the proposed appeal is of significance to the proceeding; and

(iv) whether the proposed appeal will unduly hinder the progress of the action.

See *Stelco Inc., Re*, [2005] O.J. No. 4883 (Ont. C.A.), at paras. 15-20; *Nortel Networks Corp., Re*, 2016 ONCA 332, 130 O.R. (3d) 481 (Ont. C.A.), at para. 34.

20 In our view, the leave motions fail on the first two of these factors.

The Merits

21 GIP and Portco propose identical questions to be determined on the appeal if leave is granted:

> (i) Did the motion judge err in concluding that [GIP and Portco were] precluded from arguing that Algoma is required by section 11.01(a) of the CCAA to make payments under the Cargo Handling Agreement?
>
> (ii) Did the motion judge err in his interpretation of section 11.01(a) of the CCAA?

22 The application and interpretation of s. 11.01(a) of the CCAA are precisely the issues that were addressed by the motion judge in the First Motion, and in the Second Motion (in addition to whether those issues were *res judicata*), and in the Third Motion (which led to the order from which leave to appeal is now sought). In spite of the moving parties' attempts on the Second and Third Motions to wrap their arguments in different packaging, the issues remained the same: the interpretation of s. 11.01(a) and its application in the particular circumstances of this CCAA proceeding.

23 Those issues have now been determined adversely against the moving parties three times. No steps were taken to obtain leave to appeal from the motion judge's orders on the First Motion or the Second Motion. We are not persuaded there is *prima facie* merit in the attempt now to seek leave to appeal from a third unsuccessful attempt to invoke s. 11.01(a) of the CCAA.

24 The moving parties argue that the landscape has changed since Newbould J.'s determination of the oppression remedy proceedings. [5] They submit that, in declining to deal with the set-off issue in those proceedings and determining that "the appropriate place to make [that] claim is in the CCAA proceedings", he opened the door for a re-consideration of the s. 11.01(a) issue. The record does not support that submission.

25 Newbould J. dealt with the set-off counterclaim in one paragraph at the end of his reasons in the oppression remedy proceedings. He said: [6]

> Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

26 We see nothing in this disposition to suggest that Newbould J. had somehow signalled that he was re-opening — even if he were entitled to do so — the s. 11.01(a) issues, which he had clearly determined against the moving parties' interests on the First and Second Motions. Nor is there any indication in his reasons provided on the Third Motion — which was heard *after* his decision in the oppression remedy proceedings had been released — that he intended that to be the case. Indeed, as stated in the passage of his reasons on the Third Motion set out above, quite the opposite was the case.

27 The same parties have now joined issue on the same legal questions (the interpretation and application of s. 11.01(a) in the circumstances of the CCAA proceedings) three times. The CCAA Judge, presiding in a court of competent jurisdiction, had finally determined those legal questions twice before the Third Motion was launched, and there were no attempts to appeal. All the relevant factors for the application of issue estoppel are present and the decisions are binding on the moving parties, absent a successful appeal: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.), at para. 25; *Diamond v. Western Realty Co.*, [1924] S.C.R. 308 (S.C.C.), at para. 35. They deprive the proposed appeal of the merit required for leave to appeal to be granted.

28 The moving parties raise an additional argument, however. They submit that, even if the elements of issue estoppel have been established, the court retains a residual discretion to decline to apply the doctrine, and that the CCAA Judge failed to take that factor into consideration.

29 We disagree. In concluding that payments to Portco under the Cargo Handling Agreement should not resume, the CCAA Judge considered and weighed the interests of all stakeholders involved in the CCAA proceeding — including the fact that to allow the payments to resume would be to permit a breach of the DIP financing then in place, thereby jeopardizing that financing — and concluded that it would not be appropriate in the circumstances to lift the CCAA stay in respect of those payments. In doing so, he was exercising the same discretion that would apply to the estoppel issue. We see no error that would justify granting leave to appeal in the exercise of that discretion.

Significance to the Practice

30 We accept that the s. 11.01(a) issues have considerable significance for this particular CCAA proceeding, but we are not persuaded that they have significance for the practice in the circumstances of this proceeding.

31 Whether s. 11.01(a) is available to benefit the moving parties, thereby giving them an advantage over other stakeholders in terms of the servicing of the GIP loan, depends upon the interpretation and application of the particular agreements that underlie the Port Transaction and upon how they are being carried out in practice. Thus, the proposed appeals arise out of the unique and inter-related agreements that formed the Port Transaction. We see little of assistance to the general practice of insolvency law that would arise in the proposed appeals.

Undue Hindrance of the Proceedings

32 We do not think that granting leave to appeal would unduly hinder the progress of the CCAA proceedings, given that the appeals could be heard together with the pending appeal in the oppression remedy proceedings in August. However, in view of the foregoing conclusions, this does not assist the moving parties in the circumstances.

Disposition

33 For the reasons set out above, the motions for leave to appeal are dismissed.

34 The Monitor and Algoma are each entitled to their costs of the leave motions, fixed in the amount of $3,000, as against the moving parties, jointly and severally.

Application dismissed.

Footnotes

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

2 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

3 2016 ONSC 6459 (Ont. S.C.J. [Commercial List]), at para. 9.

4 2017 ONSC 2585 (Ont. S.C.J. [Commercial List]), at paras. 10-12.

5 An appeal from that order is scheduled to be heard in this Court in August of this year.

6 [*Ernst & Young Inc. v. Essar Global Fund Ltd.*] 2017 ONSC 1366 (Ont. S.C.J. [Commercial List]), at para. 147.

TAB 8

2021 ONCA 199
Ontario Court of Appeal

Laurentian University of Sudbury (Re)

2021 CarswellOnt 4320, 2021 ONCA 199, 330 A.C.W.S. (3d) 242, 87 C.B.R. (6th) 243

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

And in the Matter of a Plan of Compromise or Arrangement of Laurentian University of Sudbury

Alexandra Hoy, S.E. Pepall, B. Zarnett JJ.A.

Judgment: March 31, 2021
Docket: CA M52287

Proceedings: refusing leave to appeal *Laurentian University of Sudbury* (2021), 2021 ONSC 1453, 2021 CarswellOnt 4367, G.B. Morawetz C.J. Ont. S.C.J. (Ont. S.C.J.); additional reasons to *Laurentian University of Sudbury* (2021), 2021 CarswellOnt 2019, 2021 ONSC 1098, G.B. Morawetz C.J. Ont. S.C.J. (Ont. S.C.J.)

Counsel: Murray Gold, James Harnum, for Moving Party, Ontario Confederation of University Faculty Associations
Susan Philpott, Charles Sinclair, for Moving Party, Laurentian University Faculty Association
Miriam Martin, for Moving Party, Canadian Union of Public Employees
D.J. Miller, Scott McGrath, Derek Harland, for Responding Party, Laurentian University of Sudbury
Ashley Taylor, Elizabeth Pillon, Zev Smith, for Responding Party, Ernst & Young Inc., acting as the Monitor

***Per curiam*:**

1 Laurentian University of Sudbury ("Laurentian") is a publicly funded, bilingual and tricultural post-secondary institution, serving domestic and international undergraduate and graduate students. Due to recurring operational deficits, it has encountered a liquidity crisis and is insolvent.

2 Laurentian sought and obtained protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36 (“CCAA”), to permit it to restructure, financially and operationally, in order to emerge as a sustainable university for the benefit of all stakeholders. Among the stated reasons for Laurentian's CCAA application was what it described as unsustainable "academic costs", which Laurentian attributes in part to the terms of its collective agreement with its faculty members.

3 Two unions representing Laurentian employees - the Laurentian University Faculty Association ("LUFA") and the Canadian Union of Public Employees ("CUPE") - and the Ontario Confederation of University Faculty Associations ("OCUFA"), an umbrella organization representing faculty associations, seek leave to appeal the decision of the CCAA judge, dated February 26, 2021, which continues a sealing order over two documents that Laurentian filed on its application for CCAA protection.

4 Having reviewed the written submissions of the parties and the sealed documents, we refuse leave for the reasons that follow.

Background

5 On February 1, 2021, the CCAA judge made an order (the "Initial Order”), granting Laurentian initial relief under the CCAA.

6 Four days later, on February 5, 2021, the CCAA judge made an order appointing Dunphy J. as mediator to conduct a confidential mediation among Laurentian's key stakeholders. The mediation is intended to address various issues concerning

Laurentian's restructuring, including a new collective agreement with LUFA, which represents 612 Laurentian faculty, accounting for 60% of the university's payroll. LUFA supported the appointment of the mediator.

7 The Initial Order contained a sealing provision. At the comeback hearing, there was opposition to it. The CCAA judge continued the sealing provision in the Amended and Restated Order, dated February 11, 2021, on an interim basis, pending a supplementary endorsement.

8 The sealing provision, which was identical in both orders, covers two exhibits (Exhibits "EEE" and "FFF") to the affidavit by Dr. Robert Haché, which was filed in support of Laurentian's request for the Initial Order. Dr. Haché is the President, Vice-Chancellor and CEO of Laurentian.

9 The sealing provision states that the Exhibits "are herby sealed pending further order of the Court, and shall not form part of the public record". Both the Initial Order and the Amended and Restated Order provide that any interested party may apply on seven days' notice to vary or amend the order.

10 The sealed Exhibits consist of two letters. Exhibit "EEE" is a letter from the Ministry of Colleges and Universities ("Ministry") to Laurentian, dated January 21, 2021. Exhibit "FFF" is a letter from Laurentian to the Ministry, dated January 25, 2021. Laurentian has described the letters as containing "information with respect to [Laurentian] and certain of its stakeholders, including various rights or positions that stakeholders or [Laurentian] may take either inside or outside of these CCAA proceedings, the disclosure of which could jeopardize [Laurentian's] efforts to restructure."

11 None of the moving parties sought to cross-examine Dr. Haché on his affidavit or the communications between Laurentian and the Ministry.

12 The CCAA judge released his supplementary endorsement on February 26, 2021, continuing the sealing provision. The effect of the sealing provision is that both the broader public and the parties to the CCAA proceeding are prevented from accessing the Exhibits.

13 The CCAA judge held that the sealing provision was authorized under s. 137(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43, and by the application of the principles in Sierra Club of Canada v. Canada (Minister of Finance) 2002 SCC 41, [2002] 2 S.C.R. 522. According to *Sierra Club* , at para. 53, a confidentiality or sealing order should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

14 The CCAA judge summarized the evidence in Dr. Haché's affidavit and noted that he had reviewed the Exhibits in detail. He indicated that the evidence, as contained in Dr. Haché's affidavit, outlines that there has been continuous communication between Laurentian and the Ministry with respect to Laurentian's financial crisis, and that the government is well aware that a real-time solution must be found if Laurentian is to survive. He noted that "the role, if any, that the Ministry will play is at this moment uncertain."

15 Considering the first branch of the *Sierra Club* test, he concluded that disclosure of the Exhibits, "*at this time*, could be detrimental to any potential restructuring of [Laurentian]" (emphasis added). Accordingly, "the risk in disclosing the Exhibits is real and substantial and poses a serious risk to the future viability of [Laurentian]." He also noted that "it is speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian's] position."

16 He found that the commercial interest was that of the entire Laurentian community, including the faculty, students, employees, third-party suppliers and the City of Greater Sudbury and the surrounding area; that it is of paramount importance to these groups that all efforts to restructure Laurentian be explored; and that it is necessary to maintain the confidentiality of

the Exhibits in order to do so. He reiterated that "[t]he disclosure of the Exhibits, *at this time*, could undermine the restructuring efforts being undertaken by [Laurentian]" (emphasis added).

17 He was not satisfied that there were any reasonable alternatives to a sealing order over the Exhibits. Stakeholders were involved in the mediation and the negotiations could or could shortly be at a sensitive stage. It would not be appropriate to implement any alternative to a confidentiality order. To do so could negatively impact the mediation efforts.

18 Turning to the second branch of the *Sierra Club* test, the CCAA judge was also satisfied, based on the evidence, that the salutary effects of the sealing provision outweighed its deleterious effects, including the public interest in accessing the Exhibits.

Leave Test

19 Section 13 of the CCAA provides that any person dissatisfied with an order or a decision made under the CCAA may appeal from the order or decision with leave. Leave to appeal in CCAA proceedings is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. This cautious approach is a function of several factors.

20 First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the *CCAA* proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably": *9354-9186 Qu*, é9354-9186 Québec inc. v. Callidus Capital Corp.2020 SCC 10S.C.C. , 78 C.B.R. (6th) 1, at paras. 53 to 54.

21 Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests": Edgewater Casino Inc. (Re) 2009 BCCA 40, 51 C.B.R. (5th) 1, at para 20.

22 Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.

23 In addressing whether leave should be granted, the court will consider four factors, specifically whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.

See: Nortel Networks Corp. (Re) 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

Leave is Not Warranted

24 As we will explain, we refuse to grant leave because the proposed appeal is not *prima facie* meritorious, granting leave would unduly hinder the progress of the action, and the proposed appeal is not of significance to the action. This is not an appropriate case for this court to explore issues of significance to the practice relating to the granting of sealing orders in the CCAA context.

Leave Not Prima Facie Meritorious

25 The moving parties raise three questions for determination on their proposed appeal, which we paraphrase as follows:

1. Did the CCAA judge err in focussing solely on Laurentian's assertion of an important commercial interest without balancing the various competing interests applicable to a sealing order?

2. Did the CCAA judge err in granting the sealing provision without a sufficient evidentiary foundation?

3. Did the CCAA judge err in concluding that the sealing provision was justified as a result of speculative concerns about the impact that disclosure of the Exhibits that were sealed would have on the CCAA restructuring process?

26 A significant plank of the moving parties' argument is that the sealing provision denies access to the sealed documents to parties to the CCAA process on the ostensible ground that the documents might have an impact on the positions those parties choose to take vis-à-vis the restructuring. They argue that the importance of the documents to the formulation of their positions is the exact reason why they should have access to the documents, not a justification for denying access to them.

27 We note that one of the moving parties, OCUFA, is not a creditor of Laurentian and is apparently not participating in the court-ordered mediation, the aim of which is a consensual restructuring. It is not clear in what sense OCUFA is a party to the CCAA proceeding or is in any different position than any other member of the public who may be interested in the court-filed materials. Yet the moving parties do not differentiate, in their proposed appeal questions or in the relief they propose to seek, between the entitlements of OCUFA to obtain the documents and those of the other moving parties. In other words, although reference is made to the denial of access to "litigants", the underlying theory of the moving parties actually starts and stops with the proposition that there should be no sealing order at all.

28 We are not persuaded that the proposed appeal, challenging what is a discretionary order, is *prima facie* meritorious.

29 The CCAA judge set out the *Sierra Club* test in his reasons. Contrary to the submissions of the moving parties, he was well aware that *Sierra Club* required him to balance the deleterious effects of the sealing order.

30 In earlier reasons, the CCAA judge noted that if the restructuring is to be successful, it will have to be largely completed by the end of April 2021. The timeline is exceptionally short. In exercising his discretion, the CCAA judge concluded that the risk to the potential restructuring of Laurentian within this extremely tight timeframe if the Exhibits were disclosed outweighed other relevant interests.

31 The moving parties were (and are) concerned that they understand the Ontario government's position in relation to the restructuring, yet they did not seek to cross-examine Dr. Haché. The CCAA judge, who reviewed the Exhibits, strove to address that concern, carefully signaling that "the role, if any, that the Ministry will play is at this moment uncertain." Alive to concerns about fairness, he also signaled to the parties that it would be "speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian's] position."

32 The moving parties have expressed particular concern that the sealing order creates an informational imbalance that may hurt them in the mediation process. Nothing before us suggests that the moving parties who are participating in the court-ordered mediation (which appears to be only LUFA) have been hampered by any informational imbalance. The judicial mediator, who was appointed by the CCAA judge, is a bulwark against unfair treatment in the mediation. Should the judicial mediator have concerns that the moving parties have been hampered in the mediation by an informational imbalance or a perceived informational imbalance, it is open to him to raise them with the CCAA judge within the parameters of the February 5, 2021 order appointing the mediator.

33 Nor do we see anything in the sealing provision that would prevent a party from making a request to the CCAA judge, at the appropriate time, for relief on appropriate terms. As noted, the sealing provision is expressly subject to "further order of the Court". The CCAA judge in his reasons of February 26 said only that an alternative to the sealing provision was not appropriate "at this time".

34 In seeking leave, the moving parties have raised questions about how s. 2(d) of the Charter of Rights and Freedoms comes into play, as one of the purposes of the mediation is to conclude a new collective agreement with LUFA. But they do not

dispute Laurentian's submission that this issue was not argued below. It is difficult to fault the CCAA judge for not weighing a competing interest that was not asserted before him.

35 The moving parties also say that the CCAA judge failed to advert to the impact his ruling would have on freedom of expression. We are satisfied he did take that factor into account, as he mentions it in setting out the test and later says that the deleterious effects include "the public interest in accessing the Exhibits."

36 The second and third questions raised by the moving parties ask the court to revisit an issue raised before the CCAA judge. He described the essence of the submissions made to him by those opposing the sealing order as there being no evidence that the sealing order was necessary to protect a valid commercial interest.

37 The CCAA judge was satisfied that there was a sufficient evidentiary basis. He based his conclusion that disclosing the Exhibits posed a serious risk to the restructuring on his review of the Exhibits and Dr. Haché's evidence. The moving parties are correct that Dr. Haché did not opine in his affidavit that disclosure of the Exhibits posed a serious risk to the viability of the restructuring. But Dr. Haché's evidence describes something of the dynamics at play and is clear as to Laurentian's dire position and the timeframe within which the restructuring must be completed, if it is to be successful. It provided the foundation on which the Monitor, an officer of the court, supported Laurentian's position that disclosure posed a serious risk, and the CCAA judge, who has extensive experience in CCAA restructurings, concluded that disclosure posed a serious risk. The CCAA judge exercised his judgment, based on an evidentiary record.

38 The fact the proposed appeal is not *prima facie* meritorious weighs significantly against granting leave.

Appeal Would Hinder Progress of the Action

> 39 As we have said, this restructuring is on an exceptionally short timeline. We are told that the mediation is ongoing, with sessions occurring daily. There is urgency to being able to reach a successful restructuring by the end of April, in light of Laurentian's financial position and the need for certainty regarding the next academic year. There is too great a risk that an appeal would be a distraction from restructuring efforts and thus would unduly hinder the progress of the action, which also weighs significantly against granting leave.

No Significance to the Action

> 40 Given the involvement of a court-appointed mediator and that it is open to the CCAA judge to revisit the sealing provision and possibly revoke it or limit its impact by allowing the parties to the CCAA proceeding to access the sealed documents, the significance of the proposed appeal to the action is insufficient to justify leave.

Significance to the Practice

> 41 The facts of this case highlight some novel and interesting questions about the application of the *Sierra Club* test in the CCAA context.These include questions about granting sealing orders over information filed in support of the application for protection under the CCAA, the granting of sealing orders where interests under s. 2(d) of the Charter are arguably at play, and about the application of sealing orders to parties and stakeholders involved in the restructuring efforts. However, given our view of the merits of the proposed appeal and the other factors, this is not the appropriate case in which to explore these issues.

Disposition

42 Leave to appeal is refused. In the circumstances, there shall be no order as to costs.

Motion dismissed.

TAB 9

2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 16, 2009
Judgment: August 18, 2009
Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Leanne Williams for Flextronics Inc.
J. Pasquariello for Monitor, Ernst & Young Inc.
B. Wadsworth for CAW-Canada
Thomas McRae for Recently Severed Calgary Employees
A. McKinnon for Former Employees
Mary Arzoymanidis for Bell Canada
Alex MacFarlane for Unsecured Creditors' Committee
Gavin Finlayson for Noteholders
Tina Lie for Superintendent of Financial Services of Ontario
Steven Graff, Ian Aversa for Current and Former Employees

***Morawetz J.*:**

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;

(b) the bulk of documentary discovery issues have been worked out;

(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and

(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

TAB 10

2016 ONCA 332
Ontario Court of Appeal

Nortel Networks Corp., Re

2016 CarswellOnt 6785, 2016 ONCA 332, 130 O.R. (3d) 481, 265 A.C.W.S. (3d) 834, 348 O.A.C. 131, 36 C.B.R. (6th) 1

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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Alexandra Hoy A.C.J.O., R.A. Blair, S.E. Pepall JJ.A.

Judgment: May 3, 2016
Docket: CA M45307, M45309, M45310 M45311, M45312, M45313

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175, 2015 CarswellOnt 7072, 2015 ONSC 2987, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 51, 2015 ONSC 4170, 2015 CarswellOnt 10304, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Sheila Block, Scott A. Bomhof, Andrew Gray, Adam M. Slavens, Jeremy Opolsky, for Moving parties, U.S. Debtors(1)
Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Moving party, Ad Hoc Group of Bondholders
David R. Byers, Daniel S. Murdoch, for Moving party, Conflicts Administrator of Nortel Networks S.A.
Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw, Jane Dietrich, for Moving party, Official Committee of Unsecured Creditors of Nortel Networks Inc. et al.
Andrew Kent, Brett Harrison, Laura Brazil, for Moving party, Bank of New York Mellon as Indenture Trustee
Steven L. Graff, Ian Aversa, Miranda Spence, for Moving party, Nortel Trade Claims Consortium
Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra, Andrea McEwan, for Responding parties, Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.
Benjamin Zarnett, Jessica Kimmel, Peter Ruby, Peter Kolla, for Responding party, Monitor, Ernst & Young Inc.
Kenneth Kraft, John Salmas, for Responding party, Wilmington Trust, National Association
Derrick Tay, Jennifer Stam, for Responding parties, Canadian Debtors(2)
Kenneth Rosenberg, Lily Harmer, Massimo Starnino, for Responding party, Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Mark Zigler, Ari Kaplan, for Responding parties, Former Employees of Nortel and LTD Beneficiaries
Arthur O. Jacques, Paul Steep, Byron Shaw, for Responding party, Canadian Creditors' Committee
Barry E. Wadsworth, for Responding party, CAW-Canada
Matthew P. Gottlieb, Matthew Milne-Smith, for Responding parties, Joint Administrators of the EMEA Debtors(3) other than Nortel Networks S.A.

***Per curiam*:**

A. Introduction

1 January 14, 2009 was not a good day. At that time, Nortel Networks Corp. ("NNC") and the other Nortel Canadian Debtors filed for insolvency protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). That same day, Nortel Networks Inc. ("NNI") and other U.S. Debtors filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§1101 - 1174, and other Nortel entities incorporated in Europe, the Middle East and Africa

("EMEA") were placed under administration in England by the High Court of England and Wales under the U.K. *Insolvency Act 1986*, c. 45. Shortly afterwards, courts in Canada and the United States approved a cross-border, court-to-court protocol that established procedures for the co-ordination of cross-border proceedings in Canada and the U.S.

2 More than seven years later, many Januarys have come and gone and these insolvency proceedings continue. During that time:

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of $1 billion has been incurred in costs; and
- Nortel's assets have been sold and some $7.3 billion [1] in sale proceeds have been placed in escrow (the "Lockbox Funds").

3 The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge) of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial. [2] It was held over the course of six weeks. Each judge rendered separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

4 Appeal proceedings were initiated in Canada and the U.S. The moving parties were authorized to file their leave materials in the absence of an issued judgment on the basis that counsel would subsequently file the formal judgment. The formal judgment was issued on April 26, 2016 and filed with this court on April 27, 2016.

5 Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

6 The responding parties, led by the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited ("UKPC"), submit that the record supports the trial judge's factual findings, which were integral to his analysis, including his findings that Nortel's assets were jointly created, that the Nortel group of companies operated on a fully-integrated global basis and that Nortel did not operate separate businesses in separate countries. In their submission, the proposed appeal is not *prima facie* meritorious. In addition, the remaining elements of the test for leave to appeal under the *CCAA* have not all been met.

7 After consideration of each of the factums [3] and other materials filed on the leave motions, we agree with the responding parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

B. Genesis of Dispute

8 NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the "Nortel Group" or "Nortel".

9 NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary was Nortel Networks Limited ("NNL"), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel's operating company in the United States; Nortel Networks UK Ltd. ("NNUK"), Nortel's operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. ("NN Ireland"), Nortel's operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. ("NNSA"), Nortel's operating company in France.

10 Following the insolvency filings, Nortel's initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel's assets.

11 On June 29, 2009, an Interim Funding and Settlement Agreement ("IFSA") was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel's business lines and residual intellectual property ("IP"). The parties, consisting of the Canadian Debtors, the U.S. Debtors [4], and the EMEA Debtors [5], agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

12 Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors [6] or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

13 Meanwhile, over $7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of $3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, $2.85 billion is available for allocation. In June 2011, proceeds of approximately $4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and patent applications, to the Rockstar consortium. In total, approximately $7.3 billion is currently held in escrow.

14 By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a $2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

15 The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors" [7]. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court. [8] Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

16 The issue of allocation of the Lockbox Funds then proceeded to trial.

C. Trial Judge's Decision

(1) Trial Decision

17 The trial judge's reasons may be summarized. He commenced by reviewing the history of the Nortel Group. He described the operations and the four main product groups or lines of business. Before turning to his analysis of the legal issues, he made a number of important findings about the Nortel Group's structure. He found, and repeatedly reiterated, that the Nortel Group operated as a highly-integrated multinational enterprise. For instance, he stated:

> [16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.

> [17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

18 The trial judge also found that R&D, which was performed at labs around the world, was the primary driver of Nortel's value and profit.

19 After reviewing the necessary background, the trial judge turned to the legal issues before him, starting with the interpretation of the Master Research and Development Agreement ("MRDA"). The MRDA dealt with transfer-pricing arrangements, effective from 2001 onwards, among NNL, NNI, NNUK, NNSA and NN Ireland, who were parties to the agreement.[9]

20 The parties took differing and competing positions on the meaning and application of the MRDA:

• The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.

• The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.

• The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.

• The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

21 The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent authority from the Supreme Court of Canada on contractual interpretation, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

22 He concluded that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profits or losses were occurring. Rather, he found that the MRDA was developed for, and driven by, transfer-pricing concepts for tax purposes and did not govern allocation after Nortel ceased operations:

> [177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.
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> . . . . .
>
> [185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

23 Thus, he rejected the primary positions of the Monitor, the CCC, the U.S. Debtors and other U.S. interests, as well as the EMEA Debtors' joint ownership theory.

24 Having found that the MRDA did not govern allocation on Nortel's insolvency and having rejected the joint ownership theory, the trial judge turned to the metric to be used to allocate the Lockbox Funds. He found that the intangible assets that were sold were not separately located or owned in any one jurisdiction. Rather, they were created by all of the so-called "Residual Profit Entities" or "RPEs" (namely, NNL, NNI, NNUK, NNSA and NN Ireland), which were located in different jurisdictions. In addition, the matrix structure allowed Nortel to draw on employees from different functional disciplines worldwide, regardless of region or country, according to need.

25 He held that NNL was not entitled to the proceeds of sale simply because the patents were in its name:

> [197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

26 He determined that he had wide powers under the *CCAA* to do what was just in the circumstances. Section 11 of the *CCAA*, which reflected prior jurisprudence, expressly provides that a court may make any order it considers appropriate in the circumstances, subject to the provisions of the Act. He wrote:

> [208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded $1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction. [Footnote omitted.]

27 He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

28 In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation in this case: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. Gen. Div. [Commercial List]); *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.).

29 Ultimately, he concluded that the Lockbox Funds were to be allocated on a *pro rata* basis in accordance with certain governing principles, which are outlined below.

30 After his reasons were released, the U.S. Debtors supported by the Official Committee, the Ad Hoc Group of Bondholders and the Law Debenture Trust Company of New York filed motions for clarification, reconsideration or amendment in Canada and the U.S. and a number of points were clarified.

31 In the end result, the judgment that was signed, issued and entered on April 26, 2016 provided that the allocation proceed on a *pro rata* basis in accordance with the following principles:

(a) Each Debtor Estate [10] is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.

(b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.

(c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.

i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed Entities, the claim against NNUK will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

(d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.

(e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:

i. the US$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;

ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and

iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.

(f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

D. Analysis

32 Six moving parties now seek leave to appeal from the trial judge's allocation decision: the U.S. Debtors, the Ad Hoc Group of Bondholders, the Conflicts Administrator of Nortel Networks S.A., the Official Committee of Unsecured Creditors of NNI and others, the Bank of New York Mellon as Indenture Trustee, and the Nortel Trade Claims Consortium.

33 We will commence our analysis by discussing the test for leave to appeal under the *CCAA* and then address the moving parties' positions in relation to that test.

(1) Test for Leave to Appeal

34 Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there

are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.

See, for e.g.: *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 24; *Timminco Ltd., Re*, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.), at para. 2; and *Nortel Networks Corp., Re*, 2013 ONCA 427, 5 C.B.R. (6th) 254 (Ont. C.A.), at para. 3.

(a) Whether Appeal is Prima Facie Meritorious

35 The moving parties take the position that leave should be granted because the appeal is *prima facie* meritorious. In making that argument, they raise three main issues — substantive consolidation, the interpretation of the MRDA, and questions of fairness. We will deal with each issue in turn.

(i) Substantive consolidation

Position of the Moving Parties

36 First, the moving parties submit that the trial judge erred in not recognizing that the allocation ordered departed from "corporate separateness" and was a form of substantive consolidation.

37 Secondly, it is alleged that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation.

38 In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA* scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

39 Finally, the Ad Hoc Group of Bondholders makes a related argument. It submits that the allocation decision takes property interests that belong to certain debtor estates and gives them to others. They argue that, even though the authority provided under s. 11 is broad, the *CCAA* does not permit a court to redistribute property in this way.

Analysis

40 The moving parties' arguments on substantive consolidation are not *prima facie* meritorious.

41 Professor Janis Sarra, a leading expert on insolvency law in Canada, describes substantive consolidation in her article "Corporate Group Insolvencies: Seeing the Forest and the Trees" (2008) 24 B.F.L.R. 63, at pp. 80 - 81:

> Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity f or creditors to share in the future upside potential of a restructured entity or entities by centralizing and negotiating an arrangement in respect of their claims. Canadian courts have recognized substantive consolidation under both the *BIA* and the *CCAA* where there is evidence of intertwined assets and liabilities; integrated administrative functioning and operations; a perception by creditors that they are dealing with an integrated entity; common control and governance structures; where it would be impracticable to separate the affairs of related entities; where it is more cost effective and beneficial to creditors

to have the proceedings administered as a single estate; and where it would result in an expeditious and administratively efficient administration of the proceeding.

42 As we have noted, the trial judge concluded that *pro rata* allocation was appropriate, that it did not amount to substantive consolidation, and that even if it could be said that a *pro rata* allocation involved substantive consolidation, it was not precluded by law in the unique circumstances of the case.

43 In reaching those conclusions, he made numerous factual findings, in addition to those already mentioned, including the following:

• "Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope": para. 223.

• "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.

• "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide ... regardless of region or country according to need": para. 203.

• "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.

• "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.

• "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.

• The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.

• There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para 224.

• "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

44 In addition to his factual findings supporting the *pro rata* order, the trial judge explained why the allocation in this case did not constitute substantive consolidation, either actual or deemed:

• The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.

• The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.

• Each entity would maintain its own cash on hand and would be administered separately.

• The inter-company claims would not be eliminated.

45 Similarly, Judge Gross explained at p. 554 of his reasons that the *pro rata* allocation, which was not a distribution, "both recognizes the integrity of the corporate separateness and the integrated synergistic operations of Nortel." Furthermore,

he noted that a "pro rata allocation does not merge the Nortel Debtors into a single survivor and does not erase intercompany claims": p. 554.

46 In our view, there is no *prima facie* merit to the argument that we should interfere with the trial judge's conclusion that the allocation decision did not amount to substantive consolidation. His conclusion was based on the nature and effect of his allocation decision and his factual findings. He made the findings having heard from 36 witnesses and having received and reviewed thousands of exhibits and dozens of deposition transcripts over the course of a six-week trial. Those factual findings were central to the result. Absent palpable and overriding error, those factual findings are afforded deference by this court: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

47 The moving parties also allege that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation in finding that, even if the allocation did constitute substantive consolidation, it was permissible. They point to *Northland* as the leading authority on substantive consolidation but say that it is time to revisit that decision in Canada.

48 The trial judge correctly observed that while the *CCAA* does not expressly address the issue of substantive consolidation, jurisprudence in Canada has recognized substantive consolidation as being appropriate in certain exceptional circumstances: see, for e.g., *Lehndorff General Partner Ltd.*, *PSINet Ltd.*, and *Northland Properties Ltd.*

49 He also correctly observed that the court has jurisdiction to make any order that it considers appropriate in the circumstances under s. 11 of the *CCAA*. Although that section came into effect after the Nortel filing under the *CCAA*, it reflects past jurisprudence: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 68. Specifically, s. 11 states:

> 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.

50 That said, since there is no *prima facie* merit to the argument that the *pro rata* allocation constitutes substantive consolidation, there is no need to re-visit the jurisprudence governing substantive consolidation in Canada or to consider whether the threshold for substantive consolidation should be changed.

51 Furthermore, we see no merit in the argument raised by the Bank of New York Mellon that the trial judge erred by failing to allocate the Lockbox Funds in a manner consistent with the *BIA* scheme, which contemplates distribution on an entity-by-entity basis. Under the *CCAA* allocation decision, distribution to creditors will be done on an entity-by-entity basis.

52 Finally, the argument raised by the Ad Hoc Group of Bondholders and the Official Committee also lacks merit. It presumes that the various Nortel companies had distinct and separable property rights in Nortel's IP. The trial judge repeatedly rejected that proposition. As we explain in the following sections, we see no merit in the argument that the trial judge erred in failing to recognize such distinct property rights. As such, we see no merit in the argument that he exercised his authority in a way that ignored such rights.

53 This ground of appeal is not *prima facie* meritorious.

(ii) The Interpretation of the MRDA

Position of Moving Parties

54 The moving parties take the position that the trial judge erred in concluding that the MRDA has no application to the allocation of the Lockbox Funds. On their reading, the MRDA provides NNI and other "Integrated Entities" with valuable rights to Nortel's IP in their respective exclusive jurisdictions. They note that the trial judge and Judge Gross diverged on the issue of IP rights under the MRDA.

55 The thrust of their contractual argument is two-fold: (1) the trial judge misinterpreted the MRDA by disregarding the words of the agreement; and (2) he failed to apply the Supreme Court of Canada's decision in *Sattva Capital Corp.* by taking an impermissibly narrow view of the scope of factual matrix evidence. In particular, they submit that the trial judge failed to take into account evidence relating to, and explaining, the tax-driven nature of the MRDA and the purposes the parties were trying to achieve through the agreement.

Analysis

56 We reject the moving parties' submissions on the interpretation of the MRDA.

57 On August 1, 2014, the Supreme Court of Canada released *Sattva Capital Corp.* The essence of that decision is best captured by excerpts from the reasons of the court written by Rothstein J.:

- "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.

- "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.

- "[T]his Court in *Housen [v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings .... These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.

- "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law .... Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": para. 53.

- "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.

- "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

58 Justice Rothstein also discussed the need to consider the surrounding circumstances, or factual matrix of a contract, when interpreting a written agreement. The goal of contractual interpretation is to ascertain the objective intentions of the parties. In doing so, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. Recognizing that words do not have an immutable meaning, the court should consider the contract's commercial purpose, taking into account its genesis, background, context, and the market in which the parties are operating.

59 In this case, the moving parties suggest that the trial judge erred in his interpretation of the MRDA and failed to pay heed to *Sattva Capital Corp.* In our view, the moving parties' arguments are not *prima facie* meritorious.

60 We are not persuaded that there is any reason to interfere with the trial judge's interpretation of the agreement on the basis of palpable and overriding error. Nor, in our view, have the moving parties pointed to any extricable legal error warranting intervention by this court.

61 As mentioned, although *Sattva Capital Corp.* was released during the course of the allocation trial, the trial judge nonetheless considered and applied *Sattva Capital Corp.* in interpreting the MRDA. In over 40 paragraphs, he addressed the relevant law on, and evidence of, factual matrix: see paras. 55 - 57, 117 - 157. He properly rejected evidence of subjective intention as being inadmissible.

62 We would also observe that, as noted by the Monitor and the Canadian Debtors, to be fully successful on their appeal, the U.S. Debtors would have to persuade the court that the trial judge should have: (i) concluded that the MRDA controlled allocation of Nortel's assets in the event of insolvency; (ii) adopted the interpretation of the MRDA advanced by the U.S. Debtors; and (iii) accepted the expert valuation evidence tendered by the U.S. Debtors.

63 The trial judge did none of these things. All of his conclusions to the contrary engage questions of fact or mixed fact and law that are well within his province.

64 For instance, the trial judge rejected the U.S. Debtors' valuation evidence as unreliable and the moving parties' factums are silent on how this finding could be overcome. The acceptance or rejection of the evidence of a witness is squarely within the fact-finding arena of the trial judge. The moving parties have suggested no reason why the trial judge's findings on valuation would be reversed.

65 In conclusion, this ground of appeal does not warrant granting leave to appeal.

(iii) Fairness to the Parties and Related Arguments

Position of Moving Parties

66 Next, the moving parties submit that they were denied procedural fairness in various respects and that the allocation decision is, among other things, arbitrary, and inequitable. In this regard, we do not propose to address every argument in the multitude of factums filed. The principal submissions on fairness and related arguments that merit comment are as follows.

67 The moving parties say they were given no notice or opportunity to make submissions on the remedy granted. Moreover, there was no record before the court on the full spectrum of claims asserted against the Selling Debtors and no one proposed the specific remedy granted.

68 The U.S. Debtors also submit that the remedy did not respond to the question before the court, which they say was the allocation of the Sale Proceeds (i.e. the proceeds from a particular Sale Transaction) among the Selling Debtors (i.e. the Nortel parties to a particular Sale Transaction). In their view, the trial judge did not answer that question but instead allocated the Sale Proceeds to Nortel entities that did not transfer assets in a particular Sale Transaction and were, thus, not entitled to any Sale Proceeds.

69 The Ad Hoc Group of Bondholders similarly submits that the trial judge answered the wrong question. For instance, it says that the only question properly before the court was to determine the relative value of the assets, rights and interests that each Selling Debtor sold or relinquished, which generated the Sale Proceeds. Moreover, they say that the decision disregards their legitimate expectations.

70 The U.S. Debtors further submit that the allocation is arbitrary since there is no logical connection between what will be or will not be counted for allocation purposes. In particular, they point to the fact the allocation excludes $4 billion in bondholder guarantee claims from the U.S. Debtors' allocation. They say that, as a result, the U.S. Debtors will receive no allocation of funds on account of approximately two-thirds of their claims.

71 Similarly, the Ad Hoc Group of Bondholders submits the allocation is arbitrary as it produces a redistribution of assets among debtors that violates the rule that equity holders get paid after creditors.

72 The Conflicts Administrator of NNSA also takes issue with the fairness of the allocation decision. It says that NNSA is prejudiced by the decision because of the relatively small quantum of its creditors' claims in comparison with those of other debtor estates.

73 Finally, the Official Committee, which represents all general unsecured creditors of the U.S. Debtors, complains that the trial judge exercised his discretion in an unprincipled way and strayed into improper "commercial judicial moralism".

Analysis

74 We are not satisfied that there is *prima facie* merit to the moving parties' submissions.

75 As explained, the trial judge was required to "determine the allocation of the Sale Proceeds among the Selling Debtors" under the Allocation Protocol.

76 Given the trial judge's conclusion that the MRDA did not govern allocation and his rejection of the EMEA Debtors' joint ownership theory, the trial judge had to determine what other metric should be used to allocate the Lockbox Funds among the U.S., Canadian and EMEA Debtor Estates.

77 The Allocation Protocol permitted submissions on "any theory of allocation". At trial, the UKPC and the CCC, in the alternative, sought a *pro rata* distribution of the funds held in escrow and each submitted expert reports that supported a *pro rata* result. Moreover, the U.S. Debtors, the Official Committee and the Ad Hoc Group of Bondholders all made submissions before the trial judge opposing a *pro rata* allocation and had an opportunity to test the evidence. They submitted a motion to strike the *pro rata* allocation evidence, attacked the reliability of the expert reports and cross-examined the experts.

78 Thus, all parties knew that a *pro rata* allocation was in play. The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties. This is not a situation where the trial judge addressed an issue that was not before him, failed to grapple with the arguments or evidence, or came up with a new theory of the case.

79 The two judges were not required to determine value but allocation. The IFSA provided for a right to receive an allocation of the Sale Proceeds without restricting the basis upon which that allocation might be determined by the two courts. In particular, we note that the trial judges were given authority to decide the issue of allocation. In addition to the terms of the Allocation Protocol, we note s.10(a) of the IFSA:

> [T]his Agreement is not, and shall not be deemed to be, an acknowledgement by any Party of the assumption, ratification, adoption or rejection of the Transfer Pricing Agreements or any other Transfer Pricing methodology employed by the Nortel Group or its individual members for any purpose <u>nor shall it be determinative of, or have any impact whatsoever on, the allocation of proceeds to any Debtor from any sale of assets of the Nortel Group</u>;
>
> [Emphasis added.]

80 We also observe that the trial judge turned his mind to expectations and found that there was no evidence to support the Bondholders' argument that their legitimate expectations would be disregarded by a *pro rata* allocation.

81 Furthermore, we see no basis for the assertion that the allocation framework is arbitrary and unfair since it excludes $4 billion in Bondholder guarantee claims from the U.S. Debtors' allocation. Under the allocation decision, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once for allocation purposes. This principle is applicable to all claims. The allocation decision also specifies that claims on bonds are to be made on the Debtor Estate of the issuer. Claims on those bonds may also be made on the Debtor Estate of the guarantor but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

82 On the reconsideration motion, it was argued that the trial judge's decision should be changed to provide that the claims by the bondholders on the guaranteed bonds against the issuer and guarantor Debtor Estates should be included in the claims for allocation purposes. It was contended that, without such a change, there would be a manifest injustice, especially to the creditors of the U.S. Debtors other than the bondholders.

83 The trial judge rejected that argument, noting that the $2 billion admitted claim against NNL endures. Further, cash on hand in the U.S. Debtors' Estates would be available to their creditors. He also noted that the issue of the treatment of the guaranteed bonds, and whether they should be counted once or twice in a *pro rata* allocation, was a live issue in evidence at trial, which was open to the U.S. Debtors to explore. He found, at para. 16, that "any lack of briefing by the U.S. Debtors and the [Official Committee] was a deliberate tactic taken by them in attacking the pro rata allocation method proposed at trial". He concluded that, even if he were to reconsider the double-counting issue, he would not change his mind:

> I see no injustice in the result.... There must also be considered other claims that could be made against more than one Debtor Estate, including the pension claim by the UKPC against NNUK that could be made against other EMEA Debtors and claims that could be made on bonds issued by NNL and guaranteed by NNC. The allocation decision precludes the double counting of any such claims for allocation purposes. The U.S. Debtors and [Official Committee] do not suggest that any of these other claims should be permitted to be claimed twice for allocation purposes. I see no basis to treat the guaranteed bonds any differently for allocation purposes. The principles that govern allocation should be applied consistently to each debtor.

84 We are not persuaded that there is *prima facie* merit to the argument that the allocation is arbitrary. The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial.

85 We would also observe that there was no other clear answer to the question of who was entitled to receive the sale proceeds. As Judge Gross noted at p. 500 of his reasons, the parties "submitted widely varying approaches for deciding the issue leaving virtually no middle ground." The U.S. Debtors and Bondholders argued that in excess of $5 billion belonged to the U.S. Estate and that the Canadian Estate should receive only $0.77 billion. The Canadian Debtors and the Monitor, in sharp contrast, argued that in excess of $6 billion belonged to the Canadian Estate and that the U.S. Estate should receive just over $1 billion. The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome.

86 Judge Gross's comments in his reasons on the allocation trial, at pp. 532-533, accurately sum up the context in which the two courts came to adopt the *pro rata* allocation approach:

> The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a prorata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.
>
> There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

87 Nor are we satisfied that there is *prima facie* merit to the Official Committee's argument that the trial judge exercised his discretion in an unprincipled way by straying into improper "commercial judicial moralism". To the extent the Official Committee is suggesting that it amounts to judicial moralism when a judge takes into account fairness concerns, we reject that argument. The trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his conclusion.

88 Finally, we are not persuaded that there is any merit to the argument that the allocation violates the rule that equity holders get paid after creditors. The Ad Hoc Group of Bondholders submits that the trial judge's decision results in NNL (NNI's parent company) receiving allocation proceeds from the sale of NNI's assets and rights that ought to have been allocated to the NNI estate for the benefit of NNI's creditors. This argument is premised on NNI having a right to the particular proceeds as a result of the MRDA interpretation advanced by the U.S. Debtors and Bondholders. As we have discussed above, the trial judge rejected that argument.

89 For these reasons, we conclude that none of the fairness and related arguments put forward by the moving parties are *prima facie* meritorious.

(b) Significance of Issues to the Practice

Position of Moving Parties

90 The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders, including creditors. In their submission, an appeal would permit this court to clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva Capital Corp.* on commercial agreements.

Analysis

91 As discussed above, the moving parties have raised three main issues they say warrant leave — namely, substantive consolidation, the interpretation of the MRDA, and fairness. Of the three issues, the moving parties submit that the first two raise issues of significant interest to the practice.

92 We disagree.

93 The facts of this case are unique and exceptional. As we have already discussed, substantive consolidation is not engaged and so this case would not provide an opportunity for this court to provide guidance on that question. Nor does this case engage any issues that require any clarification on the application of *Sattva Capital Corp.* . In short, granting leave would not provide an opportunity for this court to provide guidance on legal issues of significance to the practice.

(c) Significance of Issues to the Action

Position of Moving Parties

94 The moving parties state that the allocation of the Lockbox Funds is the overriding issue in the *CCAA* proceedings.

Analysis

> 95 We accept that the allocation of the Lockbox Funds is a significant issue in this *CCAA* proceeding. That said, we are of the view that, standing alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

(d) Progress of Proceedings

Position of Moving Parties

96 The moving parties submit that the proposed appeal will not unduly hinder the progress of Nortel's *CCAA* proceeding. They state that many steps and issues remain before creditor distributions can be made, including the determination of claims.

In addition, the allocation decisions of the Canadian court and the U.S. court must both be final orders in their respective jurisdictions before funds can be released from escrow. It is argued that this court should grant leave to ensure that it maintains the ability to address any issues should Judge Gross's decision be varied or overturned on appeal.

97 The moving parties also make the point that there are no operating businesses that are in the process of restructuring because the Nortel businesses and assets have been liquidated and the joint trial was a "stand-alone component" of the *CCAA* proceeding. Thus, it is argued that the traditional concerns leading courts to "sparingly" grant leave to appeal in *CCAA* proceedings are not applicable here. In fact, the Official Committee submits that where an appeal would have existed as of right under the *BIA*, it is nonsensical to deny leave here simply because Nortel's liquidation proceeded under the *CCAA*.

Analysis

98 This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *Nortel Networks Inc., Re*, 669 F.3d 128 (U.S. C.A. 3rd Cir. 2011), the Third Circuit Court of Appeals admonished the parties at p. 143:

> We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.
>
> Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

99 Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.

100 Numerous mediations have been ordered but have failed.

101 In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become "an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency", noting that it has "eclipsed all previous Canadian cases in both duration and expense": 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.

102 Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

103 Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.

E. Standing Issue

104 There is the additional issue of the standing of the Nortel Trade Claims Consortium that needs to be addressed. It represents a group of creditors that collectively holds over $130 million in unsecured claims against NNI and certain of its U.S. affiliates. It includes institutional investors and former Nortel employees. Unlike other U.S. creditors, the Consortium's sole recourse is against the U.S. Debtors' estates.

105 At trial, the Consortium was represented by the Official Committee. It says that, given the trial decision, its interests may diverge from those of the rest of the Official Committee. It submits that the Consortium should have standing to seek leave to appeal. It relies on the court's jurisdiction to grant leave to appeal, pursuant to s. 13 of the *CCAA*, to "any person dissatisfied with an order or a decision made under [the] Act". It argues that the trial judge exceeded his jurisdiction by deciding matters that are properly for the U.S. court to decide.

106 It is unnecessary to decide the standing issue. Even if the Consortium had standing, we would dismiss its leave motion for the same reasons we have dismissed the other leave motions. In any event, we see no merit in its argument that the trial judge exceeded his jurisdiction.

F. Disposition

107 In conclusion, we are not persuaded that the test for leave to appeal has been met. For these reasons, we dismiss all of the motions for leave to appeal.

Motions dismissed.

Footnotes

1 All references to dollars are to U.S. dollars, unless otherwise specified.

2 Judge Gross's reasons are reported at 532 B.R. 494 (U.S. Bankr. D. Del. 2015).

3 In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.

4 With the exception of Nortel Networks (CALA) Inc.

5 The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).

6 A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party..."

7 Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."

8 The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.

9 Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.

10 The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

TAB 11

2015 BCCA 426
British Columbia Court of Appeal

North American Tungsten Corp. v. Global Tungsten and Powders Corp.

2015 CarswellBC 3043, 2015 BCCA 426, [2015] B.C.W.L.D. 8117, 259 A.C.W.S. (3d) 617, 378 B.C.A.C. 116, 650 W.A.C. 116, 81 B.C.L.R. (5th) 102, 82 C.P.C. (7th) 109

North American Tungsten Corporation Ltd., Respondent (Petitioner) and Global Tungsten and Powders Corp., Appellant and Alvarez & Marsal Canada Inc., Callidus Capital Corporation, Wolfram Bergbau und Hütten AG, and Government of the Northwest Territories, Respondent

Neilson, Groberman, Fenlon JJ.A.

Heard: September 23, 2015
Judgment: September 30, 2015
Docket: Vancouver CA42990, CA42991

Counsel: R.D.W. Dalziel, K.E. Siddall, for Appellant
J.R. Sandrelli, J.D. Schultz, for North American Tungsten
V.L. Tickle, for Alvarez & Marsal Canada Inc.
W.E.J. Skelly, for Callidus Capital Corporation
A.L. Crimeni, for Wolfram Bergbau und Hütten
M. Buttery, for Northwest Territories

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

1 This is an application to vary an order of a judge in chambers denying leave to appeal in Companies' Creditors Arrangement Act ("CCAA"), R.S.C. 1985, c. C-36, proceedings. The issue that the appellant proposes to argue on appeal is whether a judge acting under the *CCAA* has jurisdiction to stay rights of set-off for a specified period of time.

Background to the Proposed Appeal

2 The essential factual background is straightforward. Global Tungsten & Powders Corp. ("GTP") has a contract with North American Tungsten Corporation Ltd. ("NATC") under which NATC supplies tungsten to it on an ongoing basis.

3 In addition to the tungsten supply contract, GTP and NATC entered into a loan agreement whereby GTP lent money to NATC. Approximately $4.4 million is owing on the loan. The Supreme Court Chambers judge found that, as a result of a past default, the entirety of the loan debt is now due to GTP.

4 On June 9, 2015, *CCAA* proceedings were commenced in respect of NATC. On July 9, 2015 an Amended and Restated Initial Order (commonly referred to as an "ARIO") was made in the *CCAA* proceedings.

5 Up until July 22, 2015, GTP paid NATC for tungsten concentrate deliveries in the ordinary manner. On July 22, however, GTP gave NATC notice that it would be setting off NATC's loan debt against the amounts owing for tungsten concentrate.

6 On July 27, 2015, the parties appeared before the judge administering the *CCAA* restructuring. He made a declaration that GTP was not entitled, under the provisions of the ARIO, to rely on a setoff to refuse to make payment for the tungsten concentrate deliveries.

7 On July 30, 2015, after hearing more complete argument, the judge declared that GTP has a valid right of setoff, but stayed the exercise of that right.

8 By mid-August, 2015, the amount of the setoff was in excess of US$1.2 million.

9 The legal issue that GTP wishes to argue on appeal concerns the jurisdiction of a judge to stay rights of setoff. The relevant legislative provisions are ss. 11 and 21 of the CCAA:

> 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, <u>subject to the restrictions set out in this Act</u>, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> [Emphasis added.]
>
> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

10 GTP wishes to argue that s. 21 is a "restriction set out in" the *CCAA*, and that a judge does not have discretion, under s. 11, to affect rights of setoff.

The Judgment Denying Leave to Appeal

11 The chambers judge began his analysis by setting out a framework determining whether to grant leave:

> [9] The test for whether leave to appeal should be granted focuses primarily on the following considerations:
>
> 1. Whether the appeal is prima facie meritorious or whether it is frivolous;
>
> 2. Whether the point on appeal is of significance to the practice;
>
> 3. Whether the point raised is of significance to the parties;
>
> 4. Whether the appeal will unduly hinder the progress of the action: *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17;
>
> 5. An overriding consideration is whether [it] is in the interests of justice to grant leave: *Wallman v. Gill*, 2013 BCCA 110 at para. 12;
>
> 6. The discretion to grant leave to appeal in *CCAA* cases is to be exercised sparingly: *Edgewater*, at paras. 13, 18;
>
> 7. The *CCAA* judge is seized of proceedings below and is well- positioned to balance the interests of the competing stakeholders, and, accordingly, the decision below is entitled to deference. *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para. 20.

12 With respect to the merits of the case, the judge analysed ss. 11 and 21 of the CCAA. He observed that s. 21 does not explicitly refer to stays, nor does it identify itself as a restriction on the ambit of s. 11. He also considered the context of s. 21, noting that it is contained in a part of the statute dealing with claims, and not in a part dealing with jurisdiction.

13 The judge then contrasted s. 21 with other provisions of the *CCAA*:

> [16] That s. 21 does not restrict the jurisdiction of the court is made clear when it is contrasted with other provisions of the *CCAA* which specifically prevent the court from staying certain rights and proceedings (see ss. 11.04, 11.06, 11.08,

and 11.1). Set-off is clearly a remedy which is specifically stayed by the ARIO, but also generally stayed in insolvency proceedings: see e.g. *Quintette Coal* (1990), 51 B.C.L.R. (2d) 105 at 111-14 2 C.B.R. (3d) 303. Clearly, if an attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding creditors at bay.

14 He concluded that s. 21 did not represent a restriction on the discretionary powers granted by s. 11 of the CCAA:

> [17] ... [G]iven the very broad interpretation given to s. 11, were Parliament intending to specifically limit the right to stay a set-off, it would have done so explicitly, as it did with restrictions contained elsewhere in the *CCAA*.

15 Turning to other considerations on a leave application, the judge acknowledged that the issue that the appellant seeks to raise on appeal is of significance both to the practice and to the parties:

> [18] ... Any interpretation issue, however weak, of the statutory provisions governing *CCAA* proceedings would be of significance to the practice. Of course, it is of significance to the parties here because if leave is granted and a stay ordered, the *CCAA* proceeding will likely fail. It would also have the consequential effect of vaulting the priority of GTP's debts ahead of the general security of Callidus.

16 In this comment, the judge refers to the possibility of the *CCAA* proceedings failing if leave was granted and a stay ordered. Later, he addresses concerns, that, even without a stay, the granting of leave might scuttle attempts at reorganization under the *CCAA*:

> [25] Clearly Callidus will need to continue extending credit if NATC is to continue operating. ... Upon an adverse Court decision, GTP could immediately set off its debt against amounts owing. It would therefore disproportionately benefit GTP while others forbear from exercising their rights. The possibility of this occurring also explains NATC's position that it will stop selling to GTP if leave to appeal is granted.

17 While the appellant reads this paragraph as suggesting that the chambers judge was reluctant to grant leave because he considered success on the appeal for the appellant would be undesirable, I do not read it in that way. Rather, it seems to me that the chambers judge is simply underlining the point that the uncertainty generated by an appeal might destabilize the situation in a way that could threaten the restructuring — a conclusion supported by the evidence that was before him.

18 The judge also addressed the overriding issue of the interests of justice. In that regard, he expressed concern that GTP's conduct, particularly in the timing of its claim to setoff, was unfair to the other participants in the *CCAA* proceedings:

> [19] ... Had GTP raised its claim of set-off at the outset, it would have had nothing to set off against. NATC would not have shipped any product to GTP in the face of that claim, as GTP would not pay for it. By leaving the issue to this late stage, GTP built up its post-filing debt, at the expense of the other stakeholders, against the NATC pre-filing debt.
>
> [20] ... [T]he GTP funds are critical to NATC's ability to continue operations and meet its obligations. The likely result of an order granting leave to appeal and a stay is that NATC will cease operations and fall into bankruptcy. The fundamental purpose of the underlying proceeding is to enable NATC to reorganize and restructure its affairs to allow it to continue operations pending sale. A shut-down and liquidation would terminate the *CCAA* proceedings. The reorganization and restructuring would be at an end.
>
> [21] Where granting leave would be fatal to the company's ability to restructure and would necessitate a shut-down of operations, leave has been denied: see *Canada v. Temple City Housing Inc.*, 2008 ABCA 1at para. 15. As noted by the Court in *Edgewater Casino*, these events are unfolding in real time. In my view, a consideration of the objects of the *CCAA* demonstrates that the position advanced by GTP must fail.
>
> [22] By not raising set-off until a post-filing debt had accrued and a plan was in place, GTP is attempting to do precisely what the *CCAA* is designed to prevent. As Farley J. describes in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Ct. J.):

> ... the intention of the *CCAA* is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed.

Issues on the Review Application

19 It is well established that a review application is not a re-argument or re-assessment of the issues decided by the chambers judge. Rather, the issues on a review application are whether the chambers judge was wrong in law or principle, or misconceived the facts: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 (B.C. C.A.). Only if the court identifies such errors can it proceed to consider whether a variation of the order is appropriate.

20 The appellant has argued that the chambers judge erred in law in several respects. I do not intend to review all of the appellant's contentions. In my view, the arguments that need to be addressed in these reasons can be distilled into four issues:

1. Did the chambers judge apply too stringent a test for leave to appeal?

2. Did the chambers judge err in finding the appellant's interpretation of ss. 11 and 21 of the CCAA is not meritorious?

3. Did the chambers judge err in considering the probable failure of the *CCAA* restructuring as a factor militating against the granting of leave?

4. Did the chambers judge err in considering the appellant's conduct as a factor in denying leave?

The Test for Leave to Appeal in a CCAA Matter

21 In the course of his reasons for judgment, the chambers judge made certain comments that the appellant says show that he considered that a more stringent test applies to leave applications under the *CCAA* than to other applications for leave to appeal. In particular, the appellant points to the following statements of the trial judge:

> [10] I turn now to consider the merits of the proposed appeal. GTP argues the threshold is low and all that is required is that the points raised are "not frivolous". ... While GTP is correct that the threshold is generally low on applications for leave to appeal, the merits requirement is applied strictly on applications made under the *CCAA*....
>
> . . .
>
> [26] ... [L]eave to appeal orders made under the *CCAA* is to be granted sparingly, at least where the court would interfere with an ongoing restructuring. ...
>
> . . .
>
> [28] ... I cannot find that that this is one of the rare circumstances where it is in the interests of justice to grant leave to appeal an order of a *CCAA* judge.

22 The factors that this court generally applies on applications for leave to appeal were succinctly set out by McLachlin J.A. (as she then was) in Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.198819 C.P.C. (3d) 396(B.C. C.A.):

> a) whether the point on appeal is of significance to the parties;
>
> b) whether the point raised is of significance to the action itself;
>
> c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

23 These considerations have been repeated in dozens of decisions of this Court. In addition to these four considerations, the court must take into account, as an overriding factor, the interests of justice.

24 The issue of whether different criteria apply, and the issue whether the criteria are applied differently, in *CCAA* cases was thoroughly canvassed by a division of this Court in Edgewater Casino Inc., Re [2009 CarswellBC 213 (B.C. C.A.)]. Tysoe J.A., speaking for the Court, said:

> [16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA* proceedings should be limited: see *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.) at para. 8.
>
> [17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. ....

25 Tysoe J.A. noted that leave is granted sparingly in *CCAA* cases, but emphasized that this is due to the nature of *CCAA* proceedings, and not due to the application of different standards to those cases. In particular, he said that the highly discretionary nature of *CCAA* orders will typically limit the availability of meritorious appeals, and that the time-sensitive nature of *CCAA* restructuring can make delay of proceedings a particularly important consideration on a leave application.

26 Counsel for the respondents cite passages from *Doman Industries Ltd., Re*, 2004 BCCA 253 (B.C. C.A. [In Chambers]) and *Quinsam Coal Corp., Re*, 2000 BCCA 386 (B.C. C.A. [In Chambers]) (the latter of which was also cited by the chambers judge) to suggest that the standards applied to a leave application in a *CCAA* matter are higher than the standards applied in other types of cases. *Doman* and *Quinsam* were chambers decisions. The precedential value of a chambers decision of this court is very limited. Further, the passages cited have been overtaken by the judgment of the Court in *Edgewater*, which does have precedential effect. To the extent that *Doman* and *Quinsam* suggest different standards for the granting of leave in *CCAA* proceedings, they are no longer good law.

27 Some of the language used by the chambers judge in the case before us indicates that he was of the view that a particularly stringent standard applies to leave applications in *CCAA* matters. The law does not support such a view. I agree with the appellant that, to the extent that the judge's adoption of an incorrect standard affected his decision, the order that he made is the product of an error in principle. I will return to the question of whether the standard he selected affected the result after considering the other issues raised on this review application.

The Merits of the Appeal

28 The judge's main reason for denying leave was that he found that the appeal was not meritorious. After analyzing ss. 11 and 21 of the CCAA, the judge concluded that s. 21 was not a restriction on the trial court's discretionary powers in s. 11 of the Act.

29 The issue, at the leave stage, is, of course, not whether the appellant's interpretation of the statute is the correct one, but rather whether it is sufficiently cogent to found a meritorious (or "arguable") case. I am not persuaded that the chambers judge made any error in finding that the appeal lacks merit.

30 As the judge noted, s. 11 of the CCAA is in Part II of the statute, which deals with the jurisdiction of the court. It has consistently been interpreted as giving the court extremely broad discretion (see, for example, the comments of the Supreme Court of Canada at para. 68 of *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.)).

31 Section 21, by contrast, is in Part III of the statute, under the heading "claims", which is comprised of ss. 19 to 21. Those provisions set out the types of claims that can be dealt with by compromise or agreement, and the quantification of those claims. In that statutory context, there is nothing to suggest that s. 21 is intended to preclude the staying of rights of setoff.

32 Mr. Dalziel points out that, when it was originally enacted, the predecessor to s. 21 (s. 18.1, enacted by S.C. 1997, c. 12, s. 125) was placed in Part II of the statute, under the heading "Jurisdiction". The organization of the Act at that time, however, was much different than the organization that exists today. All of the sections dealing with the quantification of claims were also contained in that part of the statute. It is difficult to draw any inferences from the provision's original place in the statute.

33 Moreover, in 2005, the original provision was replaced by the current provision with the enactment of S.C. 2005, c. 47, s. 131. The various sections dealing with quantification of claims were moved from the "Jurisdiction" section of the statute into the "General" section, and grouped together under the heading "Claims", where they continue to be. Given the legislative history, I am of the view that the chambers judge's analysis of the statutory context is irrefutable.

34 As the judge also recognized, where other provisions of the statute are intended to restrict the powers under ss. 11 and 11.02 of the statute, they do so in unequivocal terms.

35 Reading s. 21 in context, it is clear that the section does not preclude the making of an order such as the one made by the Supreme Court judge in this case.

36 The appellant has not cited any cases that would suggest a contrary interpretation of the legislation. Quintette Coal Ltd. v. Nippon Steel Corp. [1990 CarswellBC 384 (B.C. C.A.)], cited by the chambers judge, supports the idea that claims of setoff may be stayed in *CCAA* proceedings, though it is important to recognize that the case, decided in 1990, predates the enactment of s. 21 of the Act and its predecessors.

37 The appellant suggests that *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 (B.C. C.A.) supports its view that setoff cannot be stayed under the statute. It does not appear to me that the case goes nearly that far. Rather, the case emphasizes that stays should not be granted where they unfairly prejudice a creditor. I note, in particular, the following paragraphs of the judgment:

> [21] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), Huddart J. (as she then was) explained the importance to the continuing vitality of the *CCAA* regime of ensuring that creditors not be permitted to avoid the *CCAA* compromise in an effort to realize the full value of their claim. She emphasized, at pp. 127 and 129, the particular need to ensure that those who purchase companies emerging from reorganization can do so with the confidence that all claims have been compromised:
>
>> [M]odern *CCAA* re-organization plans contemplate the acquisition by third parties of the re-organized debtor company, frequently to the benefit of general creditors, employees, and the general community. I accept that courts should recognize this development. Tax losses are purchased. Liabilities are assumed. There is a need for certainty that all claims have been compromised.
>>
>> This is an important factor in this case because it is absolutely clear that no general creditor would have received anything on a bankruptcy or liquidation by a receiver. 8808's offer, founded on the proposition that all creditors were included in the Plan, came just in time to avert such a result. An extension of the stay of proceedings had been granted only to protect those claiming in tort. All parties were aware that another extension of the stay was unlikely. In a sense 8808's offer gave value to Mr. Lindsay's contingent claim it would not otherwise have had, even as it gave value to the claims of other unsecured creditors.
>>
>> . . .

> Those who participate in *CCAA* proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.
>
> [Emphasis added.]

> [22] Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the *CCAA* compromise. A party claiming set-off, as Cam-Net notes in its factum, realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the *CCAA* proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the *CCAA* reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context. In that regard, see *Re/Max Metro-City Realty Ltd. v. Baker (Trustee of)* (1993), 16 C.B.R. (3d) 308 (Ont. Bktcy.) at 313, where set-off was refused when allowing equitable set-off would have the effect of defeating the intention of the bankruptcy legislation and, in particular, giving the claimant a preference over other creditors.

38 In *Cam-Net*, this Court found that Vancouver Telephone Company Limited had a legitimate claim of set-off, and that it would have been unfairly prejudicial to it to stay its claim. The set-off in that case was intimately connected to the debt, and there was no suggestion of manipulation by Vancouver Telephone Company with a view to "avoid the *CCAA* compromise in an effort to realize the full value". The case, in my view, stands for two propositions of law. First, a set-off, to be considered in *CCAA* proceedings, must meet the common law requirements of a true set-off. Second, where such a set-off exists, and the circumstances show that there has been no attempt to circumvent the *CCAA* compromise, it would be unfair for the courts to penalize the affected creditor by staying the set-off. I do not read *Cam-Net* as suggesting that s. 11 of the CCAA does not extend to the staying of rights of set- off.

39 I note that, in the case before us, in contrast to *Cam-Net*, there is no suggestion that the stay of the set-off constitutes an improper exercise of discretion on the basis that it unfairly penalizes the creditor. Rather, GTP's argument amounts to an assertion that it is, in law, entitled to a set-off, even if the set-off is an attempt to avoid the *CCAA* compromise, and the court has no power to stay the exercise of the set-off.

40 As I have indicated, there does not appear to be any arguable basis for that proposition, either in the language of the statute, or the jurisprudence.

Interference with the CCAA proceeding

41 I agree with the position of the appellant that it will not normally be acceptable for a chambers judge to consider the consequences of a successful appeal as a reason for denying leave. If the law mandates a particular result in an appeal, this court cannot circumvent the result on the basis of a vague notion of unfairness.

42 On the other hand, a judge is entitled to consider whether allowing an appeal to proceed will, itself, have adverse consequences for the administration of justice. Here, the judge assessed the situation, and came to the conclusion that the existence of an appeal would probably undermine restructuring efforts, and effectively scuttle the *CCAA* proceedings. There was a basis for the judge's assessment, and he was entitled to consider it as one factor in deciding the leave application.

43 The appellant argues that the only type of interference with the proceedings in the trial court that may legitimately be considered is delay. In support of that proposition, he notes the emphasis in *Edgewater Casino* on delay.

44 I note, however, that in *Consolidated (China) Pulp* and in virtually all of the subsequent cases that set out the considerations on a leave application, the fourth consideration is described as "undue hindrance of the progress of the action" rather than as "delay". I would be reluctant to accept that the consideration should be narrowed. In *Great Basin Gold Ltd. (Re)* (October 3, 2012), C.A. Docket no. CA40276, Tysoe J.A. said:

> [15] In *CCAA* proceedings, the fourth factor [*i.e.* whether the appeal will unduly hinder the progress of the action] involves a consideration of whether the granting of leave to appeal will adversely affect the ability of the debtor company to reorganize its financial affairs.

45 I agree with that proposition, and would endorse the chambers judge's consideration of that factor in the case before us.

The Conduct of GTP as a Factor in the Leave Application

46 The final factor that I wish to address was the judge's reference to the timing of GTP's assertion of a setoff, and his apparent taking into account of the conduct of GTP in denying leave. In my view, these issues were legitimate considerations for the chambers judge. The possibility that GTP, through its conduct, was manipulating the *CCAA* proceedings to its benefit was a legitimate consideration.

47 As *Cam-Net* recognized, the scheme of the *CCAA* would be subverted if creditors were able to take actions to remove themselves from the compromise. If the timing of a claim to set-off and the bringing of an appeal appear to have been calculated to subvert the reorganization of the debtor company, that is a factor to be considered by the court. The court must be vigilant to ensure that its own processes are not used in that way.

Conclusion

48 The judge erred in principle in his statement of the standards for granting leave to appeal in a *CCAA* matter. His analysis, however, was otherwise sound, and applying the correct standards to his analysis leads to the conclusion that leave ought to be denied.

49 Accordingly, I would refuse the application to vary the order of the chambers judge.

***Neilson J.A.*:**

50 I agree.

***Fenlon J.A.*:**

51 I agree.

***Neilson J.A.*:**

52 The application to vary the order of the chambers is accordingly dismissed.

Application dismissed.

TAB 12

2007 ONCA 268
Ontario Court of Appeal [In Chambers]

Ravelston Corp., Re

2007 CarswellOnt 2114, 2007 ONCA 268, [2007] O.J. No. 1389, 156 A.C.W.S. (3d) 824, 31 C.B.R. (5th) 233

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.O. 1985, c. B-3, AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Borins J.A.

Heard: March 22, 2007
Judgment: April 13, 2007
Docket: CA M34868, C46730

Proceedings: refusing leave to appeal *Ravelston Corp., Re* (2007), 2007 CarswellOnt 755, 29 C.B.R. (5th) 34 (Ont. S.C.J. [Commercial List])

Counsel: George S. Glezos, Bryce Rudyk for Applicant, Conrad Black
Alex L. MacFarlane, Tushara Weerasooriya for Respondent, RSM Richter Inc., Interim Receiver for Ravelston Corporation Limited, Ravelston Management Inc.
Matthew P. Gottlieb, Davit D. Akman for Respondent, Hollinger Inc.
Robyn M. Ryan Bell for Respondent, Sun-Times Media Group Inc.

***Borins J.A.*:**

I

1 Pursuant to the orders of Farley J. of April 20, 2005 and May 18, 2005, RSM Richter Inc. ("Richter") was appointed receiver and manager and interim receiver of the property, assets and undertaking of what is referred to in these proceedings as the Ravelston Companies, including the Ravelston Corporation Limited ("RCL"), Ravelston Management Inc. ("RMI") and Argus Corporation Limited ("Argus"). On April 20, 2005 the court also issued an order granting RCL and RMI protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and appointing Richter as the monitor.

2 Initially, Farley J. was the supervisory judge in this complex and long-term insolvency. The current supervisory judge is Cumming J. From the outset of its appointment as receiver, Richter has regularly filed reports with the court detailing the steps that it has taken in fulfilling its mandate, asking that the court approve each report and the recommendations contained in it and, frequently, asking the court's approval to take a particular step or to follow a particular course of action.

3 The motion before Cumming J., giving rise to this motion for leave to appeal, emanated from Richter's Nineteenth Report recommending the preparation of a report (the "Payments Report") setting out a factual account of the monies received by, and the distributions made by, RCL, RMI and Angus during the respective periods January 3, 1997 to April 20, 2005, July 3, 2002 to April 20, 2005, and January 1, 1999 to April 30, 2005. Pursuant to Richter's motion for authorization to complete and file the Payments Report with the Superior Court of Justice, on January 12, 2007 Cumming J. ordered Richter to complete the Payments

Report, provided that it would not be filed or disseminated to any party until further order of the Superior Court. Pursuant to a further motion brought by Richter, on February 15, 2007, Cumming J. ordered Richter to file the Payments Report with the Superior Court. The Payments Report contains data as to payments made by RCL, RMI and Argus to corporate officers of these companies, including Conrad Black, who is a defendant in ongoing criminal proceedings in the United States District Court in Chicago. Before Cumming J., only Lord Black opposed the filing of the Payments Report.

4 Lord Black subsequently moved under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") for leave to appeal Cumming J.'s order of February 15, 2007 to the Court of Appeal. On March 22, 2007 I dismissed Black's motion with reasons to follow. These are my reasons.

II

5 In its Nineteenth Report, Richter indicated that on December 14, 2006 the United States Attorney's Office ("USAO") asked it to prepare and provide a schedule of payments, including salaries, bonuses and dividends, made by the Ravelston Companies to Lord Black and others between January, 1998 and January, 2004. The USAO is a stakeholder in the Ravelston estate, as is Lord Black. A number of other stakeholders have also requested similar information from Richter. Before Cumming J., and before this court, Lord Black contended that because on its filing the Payments Report would become a public document and available to all stakeholders, including the USAO, the information contained in the Report may assist the prosecution in the ongoing criminal proceedings. He contended that there may be unfairness in the use of the information revealed by the Payments Report. Lord Black, therefore, submitted that the Report should not be filed until the conclusion of the criminal proceedings against him.

6 In his reasons, reported at [2007] O.J. No. 536 (Ont. S.C.J. [Commercial List]), Cumming J. pointed out at para. 26 that in the normal course of events the Payments Report would be filed with the court by the receiver when it is completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. At para. 27, Cumming J. stated that Lord Black had not provided any evidence that the filing of the Payments Report would be to his prejudice as a financial stakeholder having an economic interest in the Ravelston estate. To this I would add that Lord Black has also failed to provide any evidence that the filing of the Payments Report would prejudice the fairness of his criminal trial. As Cumming J. correctly observed, the possible use by the prosecution of any information contained in the Report as evidence against Black is a consideration for the United States District Court in Chicago.

7 In rejecting Black's attempt to seal the Report, at para. 33 Cumming J. stated:

> It is the personal interest of Lord Black at stake in the criminal proceedings which results in his request to delay the release of the Payments Report. The Receiver submits that such a personal interest, as opposed to an economic interest, is beyond the Receiver's area of proper consideration in the administration of the estate. The Receiver is not obliged to protect the interests of stakeholders which are unrelated to the administration of a debtor's estate, such as the interest of a stakeholder to avoid alleged prejudice in criminal proceedings. The Receiver's role is to make business decisions in the best interests of the estate after a careful cost/benefit analysis and the weighing of competing interests. *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

8 In the opinion of Cumming J., the receiver's decision to provide the Payments Report and to file it with the court as relevant information for the benefit of the stakeholders was "within the bounds of reasonableness". At para. 47, he added:

> [A]n Order sealing the Payment Report until the close of Lord Black's criminal trial would be inappropriate. There is not any social value established on evidence by Lord Black which is of superordinate importance to the rights of the public to open access to court records and the interest of the estate's stakeholders to proceed unimpeded with the receivership. There is a strong presumption against any order that restricts public access to court proceedings or records that must be met by an applicant before a sealing order may properly issue. *R. v. Toronto Star Newspapers Ltd.*, [2005] 2 S.C.R. 188.

III

9 In his motion for leave to appeal, Lord Black submits that Cumming J. committed two errors: (1) he erred in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner; and (2) he erred in his understanding of the principle of comity and failed to consider the prejudice to Lord Black, a Canadian resident, arising from the use of the Payments Report in the American criminal proceedings against Lord Black.

10 Lord Black contends that his proposed appeal raises issues significant to bankruptcy practice for which there is no guidance, including the extent and nature of the court's role in supervising the work of a court-appointed receiver whose interests, which are adverse to a major stakeholder, conflict with his duties to act in an even-handed manner, and the appropriate conduct of the receiver where it has consequences to stakeholders beyond the Canadian border. Lord Black also contends that granting leave to appeal will not hinder the administration of the receivership as the receiver conceded in submissions before Cumming J. that there is no need to file the Payments Report now for any reason relating to the administration of the receivership.

IV

11 As Armstrong J.A. noted, at para. 15 of *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) there appears to be a "measure of confusion" in respect to the test for leave to appeal under s. 193(e) of the BIA. However, the caselaw is clear that one factor that is considered in all cases is whether the appeal is *prima facie* meritorious, a factor that Armstrong J.A. relied on in *SVCM*. See, *e.g.*, *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol* (1995), 30 C.B.R. (3d) 90 (Ont. C.A.); *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers])); *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]); *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.). Similarly, this factor is also considered by the court in applications seeking leave to appeal under s. 193(e) from orders made under the CCAA: *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.).

12 *Ravelston*, supra, is a helpful example of the need for a *prima facie* meritorious appeal as the starting point in the application of the test under s. 193(e). If the proposed appeal is found to be *prima facie* meritorious, the court must then consider whether the other elements of the test have been met. At paras. 27-32 of *Ravelston*, Doherty J.A. provided this helpful guidance:

> As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the BIA. The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: [Citations omitted.]
>
> The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.
>
> A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.
>
> In *Re Canadian Airlines Corp.* (2000), 261 A.R. 120 at para. 35 (C.A.), Wittmann J.A. (in chambers) was faced with an application for leave under the CCAA. He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is prima facie meritorious." He described the necessary merits inquiry in this way:
>
>> ... There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.

> I think the same level of merits inquiry is warranted on an application for leave to appeal under the BIA. I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.
>
> The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has prima facie merit. I do not reach those other considerations on this motion.

V

13 As I have indicated, Lord Black's proposed appeal focuses on two aspects of the reasons of Cumming J. He submitted that Cumming J. failed to act fairly and even-handedly in preferring the interests of the other stakeholder, USAO to his interests, thereby possibly prejudicing his right to a fair trial in the American criminal proceedings. Second, he contends that Cumming J. erred in his understanding of the principles of comity. In my view, neither of the proposed grounds of appeal is *prima facie* meritorious.

> 14 There are two important principles that this court has endorsed in considering whether leave to appeal should be granted in bankruptcy and CCAA proceedings. In *Ravelston Corp., Re*, [2007] O.J. No. 749 (Ont. C.A.) at para. 3, the court stated: "It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere." In *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.) at para. 4, Doherty J.A. stated: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all the stakeholders, the court will support the receiver's decision." These principles, necessarily, inform the determination of whether the proposed appeal is *prima facie* meritorious.

15 Turning to the first proposed ground of appeal, as Cumming J. said, the Payments Report is a necessary and normative analysis and part of the receiver's fiduciary duties in determining the financial situation of the bankrupt's estate. It will permit the stakeholders to learn and better understand the historical transactions of the insolvent business. Moreover, the motion judge found that the receiver had considered all relevant interests relating to the administration of the Ravelston estate in its decision to complete the Payments Report and to file it with the court. The interests that are relevant are those that are economic in nature, involving the debtor's assets, property and undertaking.

16 Lord Black has raised no competing economic interest to delay the filing of the Payments Report on its completion. Therefore, Cumming J. was correct in finding that his interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Lord Black's alleged interest is not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the Payments Report is in his capacity as defendant in the American criminal proceedings.

17 It is noteworthy that Lord Black presented no evidence that the filing of the Payments Report would prejudice him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. In my view, this is not surprising as it is difficult to understand how any relevant information in the Payments Report introduced in evidence by the United States Attorney could prejudice Lord Black's right to a fair trial. There is nothing unfair in the prosecution's introduction of relevant and admissible evidence against a defendant in a criminal trial.

> 18 I see no viable argument that Cumming J. erred in principle in the exercise of his discretion in approving the filing of the Payments Report. The proposed appeal has no realistic possibility of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error. In other words, Cumming J. made no apparent error in law or apparent palpable and overriding error of fact in his supervision of the receiver.

19 As for the second proposed ground of appeal, Lord Black contends that Cumming J.'s misapprehension of the principle of comity caused him to refuse to consider the prejudice to him from the use of the Payments Report by the USAO. In my view, this contention is also untenable.

20 The motion judge's comments in respect to comity were general in nature. He stated that comity requires that each society, and its courts, must recognize and respect the legal processes of the courts of other societies, and that, accordingly, it would be for the United States District Court to determine the admissibility of any information contained in the Payments Report that the prosecution may seek to introduce against Lord Black in his criminal trial. Cumming J. was never asked to rule on any foreign law or procedure, nor was evidence of a foreign law or procedure introduced. He made it clear at para. 25 that "[t]he issue as to whether the Payments Report is to be filed in this Court is, of course, a mater for this Court alone". He properly recognized that there was nothing improper in the receiver voluntarily providing the information in the Payments Report to the USAO, especially where the information may be relevant to the administration of justice.

21 I see no viable argument that Cumming J. erred in principle in his comments on the principle of comity. The proposed appeal has no realistic chance of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error.

VI

22 I would confirm the order that I made at the close of argument on March 22, 2007 refusing Lord Black's motion for leave to appeal the order of Cumming J. to this court. The parties have agreed that the successful responding parties should have their costs, and have agreed on the amount of costs as follows: RSM Richter Inc. — $5,000; Hollinger Inc. — $2,500; Sun-Times Media Group, Inc. — $1,500. All costs include disbursements and GST.

Application dismissed.

TAB 13

2012 ONCA 552
Ontario Court of Appeal

Timminco Ltd., Re

2012 CarswellOnt 9633, 2012 ONCA 552, [2012] O.J. No. 596, 219 A.C.W.S. (3d) 11, 2 C.B.R. (6th) 332

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

In the Matter of a Proposed Plan of Compromise or Arrangement with
Respect to Timminco Limited and Becancour Silicon Inc. Applicants

Simmons, Juriansz, Epstein JJ.A.

Judgment: July 20, 2012
Docket: CA M41062, M41085

Proceedings: refused leave to appeal *Timminco Ltd., Re* (2012), 2012 CarswellOnt 1466 , 2012 ONSC 948, 2012 CarswellOnt 1466, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 ((Ont. S.C.J. [Commercial List]))

Counsel: Ashley J. Taylor, Erica Tait for Applicants
Douglas J. Wray, Jesse Kugler for Communications, Energy and Paperworkers Union of Canada
Charles E. Sinclair for United Steelworkers

***Per curiam*:**

1 Leave to appeal is denied.

2 In the CCAA context, leave to appeal is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this Court is required to consider the following four-part inquiry:

- whether the point on the proposed appeal is of significance to the practice;
- whether the point is of significance to the action;
- whether the proposed appeal is *prima facie* meritorious or frivolous; and
- whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.)

3 In our view, the proposed appeals lack sufficient merit to meet this stringent test.

4 This court's decision in *Indalex Ltd., Re* (2011), 104 O.R. (3d) 641 (Ont. C.A.), affirms that a CCAA court may invoke the doctrine of paramountcy to override conflicting provisions of provincial statutes where the application of provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

5 Here, the motion judge recognized that in the circumstances of this case there was a conflict between the federal CCAA and the provincial PBA and SPPA. He found that, "[i]n the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated". Further, he concluded that "to ensure that the objectives of the CCAA are fulfilled, it is

necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA".

6 We see no basis on which this court could interfere with the motion judge's decision, including his unassailable findings of fact that: (1) without DIP financing, Timminco would be forced to cease operating; (2) bankruptcy would not be in the interests of anyone, including members of the pension plan; (3) if the DIP lender did not get super priority, it would not have agreed to provide financing; and (4) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals. In short, he found that there was "no real alternative" to approving the DIP facility and DIP super priority charge.

7 The motion judge also addressed the union's fiduciary arguments, primarily in his earlier reasons released February 2, 2012, that are incorporated by reference into his February 9, 2012 reasons. He concluded that it was in the best interests of all parties to proceed with the restructuring. We see no basis on which this court could interfere with this finding.

8 Costs are to the responding parties on the motions on a partial indemnity scale fixed in the amount of $1,500 per motion inclusive of disbursements and applicable taxes.

Application dismissed.

TAB 14

2009 QCCS 1202
Cour supérieure du Québec

Triton Électronique inc., Re

2009 CarswellQue 2648, 2009 CarswellQue 4972, 2009 J.E. 955, 2009 QCCS 1202, J.E. 2009-955, EYB 2009-156566

Dans l'affaire de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985) ch. C-36, en sa version modifiée: Triton Électronique inc., Triton Électronik Québec inc., 3259862 Canada inc. et Triton Électronik Ontario Ltd., Intimées, c. Axa Assurances inc., Requérante, et Raymond Chabot inc., Contrôleur

Lalonde J.C.S

Heard: 9 mars 2009
Judgment: 27 mars 2009
Docket: C.S. Qué. Montréal 500-11-035371-091

Counsel: *Me Bertrand Giroux*, pour les débitrice-intimées
Me François Beauchamp, Me Éric Lalanne, pour la requérante
Me Denis Ferland, Me Christian Lachance, pour la Banque Royale du Canada

***Lalonde J.C.S*:**

[UNOFFICIAL ENGLISH TRANSLATION]

1 Was the original order issued on January 27, 2009 so prejudicial to AXA Insurance Inc. ("AXA") that it has caused an increasing imbalance between the opposing interests?

2 The Court has before it a motion from AXA to vary the original order as extended or, in the alternative, obtain relief.

CONTEXT

3 On January 27, 2009, the Court gave an original order pursuant to s. 11(3) of the *Companies' Creditors Arrangements Act* [1] (hereafter "*CCAA*") in favour of the debtors/respondents (hereafter the "debtors").

4 On February 27, 2009, the Court extended the original order to be effective until April 25, 2009, pursuant to s. 11(4) *CCAA*.

5 In its motion, AXA argues that the original order issued pursuant to s. 11 *CCAA* causes it undue hardship. The result is discriminatory in its regard compared with other creditors and persons affected by the original order.

6 Essentially, the original order prohibits all persons who have signed contracts with the debtors from declaring forfeiture of term or from terminating, cancelling, suspending, or refusing to amend or extend them on reasonable terms and conditions. [2]

7 The prohibition applies, *inter alia*, to the policy underwritten by AXA for directors' and officers' liability insurance coverage. [3]

8 However, under both s. 96(1) of the *Companies Act* [4] and s. 119(1) of the *Canada Business Corporations Act*, [5] corporate directors are solidarily liable to employees of the corporation for the employees' wages payable while they are directors respectively, to a maximum cash amount equivalent to six months' wages.

9 It is not contested that the term wages includes all amounts payable by the employer to the employee in consideration of his work, including the indemnity relating to annual leave ("indemnities").

10 AXA therefore covers the liability of the debtors' directors for wages, including indemnities, to a maximum of $5,000,000.

11 On January 28, 2009, the day after the original order, the debtors calculated that they owed employees $915,537 in accrued indemnities.[6]

12 Since the original order of January 27, 2009, the debtors continued their business operations, and their plants were operating at approximately 70% of capacity.

13 The cash value of employees' indemnities has continued to increase since the original order was given.

14 To date, the debtors have not created a cash reserve for present and future indemnities due to employees.

15 At this stage in the proceedings, the debtors have not presented any plan of arrangement to creditors. If there is one, it will result from the sale of the company or assets. According to the controller, a few potential buyers have shown their interest in writing. At the moment, there are no concrete offers.

16 However, the debtors are benefiting from the support of their main creditors including Royal Bank of Canada ("Royal Bank"), which concluded a Forbearance Agreement with them that expires on April 25, 2009.[7]

17 In this context, AXA denounces what it sees as discriminatory treatment against it. AXA submits that the Royal Bank will be paid in full at the end of its agreement with the debtors, *i.e.*, on April 25, 2009, whereas between now and this date, AXA's exposure will increase because indemnities are not being paid. It could ultimately be liable for the increasing total of unpaid indemnities if the plan of arrangement fails and the insolvent debtors declare bankruptcy.

18 The effect of the original order and, in particular, that related to the period of suspension of its rights have, according to AXA, a relative consequence unique to it, since the other suppliers of goods and services can for their part demand payment in cash since the original order was given. Their claims are therefore frozen in time at the amounts due on January 27, 2009, which is not the case for AXA.

19 AXA seems to be the only party whose position is deteriorating and whose exposure is increasing from day to day. It sees this as undue disparity in treatment and asks the court to intervene to correct this inequity.

20 For relief, AXA is asking the court to order the debtors to pay the value of the indemnities directly to employees as and when they are earned or to deposit the cash value of amounts due to employees in this regard in a special account.

21 AXA requests that the original order be amended so that it no longer be required to support the increased exposure that could be imputed to it should the plan of arrangement fail.

APPLICABLE PRINCIPLES OF LAW

- **PURPOSE OF THE *CCAA* AND THE POWER TO SUSPEND AGREEMENTS**

22 The *CCAA* is a statute passed by Parliament under its power to make legislation concerning insolvency (see *Companies' Creditors Arrangement Act*, *A.G. Can v. A.G. Que*[8]). With no more than some 20 sections, the *CCAA* is intended to be a [TRANSLATION] "remedial" statute aimed at allowing a company in financial difficulty to propose an arrangement to its creditors so that the company can remain in business.

23 In *Re: Lehndorff General Partner Ltd.*,[9] Farley J. of the Ontario Superior Court of Justice clearly sums up the purpose of the *CCAA*:

. . .

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation.

. . .

(Emphasis added.)

24 It is in this context that " . . . the CCAA is an Act designed to continue, rather than liquidate, companies . . . " (*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* [10]). In *Re: Smoky River Coal Ltd.*, [11] the Court of Appeal of Alberta points out that:

. . .

The courts have underscored that the CCAA requires account to be taken of a number of diverse societal interests. Obviously, the CCAA is designed to "provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both" . . .

. . .

(Emphasis added.)

25 The purpose of the *CCAA* is to balance the social and economic interests of the parties involved for the joint benefit of the debtor company, its shareholders, its creditors, and its employees. [12]

26 It is therefore with this intent in mind that the courts have exercised the jurisdiction conferred by the *CCAA* to promote the continuance of a business. Seeking an arrangement is not done to the detriment but rather to the advantage of the creditors in general, through an exercise in which the interests of the debtor and the creditors as a whole will have been weighted and considered.

27 The conferring of jurisdiction is based on ss. 11(3) and 11(4) of the *CCAA* under which the Court exercises the power to stay proceedings and make orders "on such terms as it may impose". The Court of Appeal of Alberta in *Re: Smoky River Coal Ltd.* [13] comments on these powers in the following manner:

. . .

To summarize, the language of s. 11(4) is very broad. The CCAA must be interpreted in a remedial fashion. Cases support the view that third-party rights may be affected by a stay order . . .

. . .

(Emphasis added.)

28 In this regard, after analyzing the constitutional scope of the *CCAA*, Forsyth J. made the following statement in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*: [14]

. . .

Accordingly, if promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation, it follows that a stay which happens to affect some non-creditors and in pursuit of that end is valid . . . Continuance of a company involves more than consideration of creditor claims. For that reason, I am of the opinion that s. 11 of the C.C.A.A.

<u>can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence</u>.

. . .

(Emphasis added.)

29 Incidentally, this judgment was the spearhead of a development in the case law after which a court exercising powers under the *CCAA* was authorized to make orders affecting the rights of the parties to a contract as well as the statutes governing them.

30 In *Re: Sulphur Corp. of Canada Ltd.*,[15] Levecchio J. of the Alberta Court of Queen's Bench elaborates on the jurisdiction and powers of the court under the *CCAA*. Commenting on his view of the intent of Parliament, he says the following:

. . .

It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CACC, was to <u>help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value</u>.

. . .

(Emphasis added.)

31 In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties. The important thing is the desire to implement the purpose of the *CCAA*, *i.e.*, to foster the emergence of an arrangement for the benefit of the debtor and its creditors.

32 In *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*,[16] Forsyth J., after analysis, reaches the following conclusion:

. . .

These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. <u>grants a court the authority to alter the legal rights of parties other than the debtor company without their consent</u>. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process . . .

. . .

(Emphasis added.)

33 This is why the courts have not hesitated to make use of the powers conferred by the *CCAA* to:

33.1 affect the rights of guaranteed creditors and create security that is prior to that of creditors that hold security;[17]

33.2 terminate leases that are otherwise valid under the terms of the law;[18] and even

33.3 terminate contracts that are prejudicial to the company.[19]

34 In *Re: Pacific National Lease Holding Corp.*[20], in which a court of first instance had ordered the company not to make the payments due to employees under the *Employment Standards Act*, a statute of public order, MacFarlane J. of the Court of Appeal for British Columbia ruled as follows:

. . .

This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd, supra. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

. . .

(Emphasis added.)

34 There is no doubt that this decision did not fail to affect the interests of the insurers of the directors and officers of the company, as in the case at bar.

35 As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another act, whether of public order or not.

• **MAINTENANCE OF THE *STATUS QUO***

36 It is understood that during the stay of proceedings, the Court's role is to maintain the *status quo* for the required period necessary for restructuring.

37 The object is to prioritize the execution of a plan of arrangement so that a debtor placed under the protection of the law can continue its business operations.

38 During the stay of proceedings, the judge charged with special case management must ensure a fair balance between opposing interests.

39 To maximize the prospect of success for a plan of arrangement, the creditors will temporarily be held at bay. Any effort to collect claims will be put on the back-burner by the effect of the original order enjoining a stay of proceedings against the debtor placed under the protection of the *CCAA*.[21]

40 Maintenance of the *status quo* involves an effort to balance the ultimate goal of the restructuring and the rights of the persons affected by the effect of the stay of proceedings. The general interests of the mass of creditors are what take priority in the exercise of balancing opposing interests. Rarely are specific interests considered, except if the result is a state of affairs that tends to prefer or penalize one creditor over the others. In such a case, the court has broad discretion to nuance the original order.

41 If the proposed plan of arrangement is necessary for the debtor to continue to exist, then the courts will be more inclined to restrain the interventions of discontented creditors, in spite of the prejudicial effects they may point out concerning their rights with regard to the debtor and its assets.

42 Consequently, the need for the arrangement may in itself justify certain negative effects on the interests of the creditors affected by the original order. But caution is required, because the object is not to reach an arrangement at any price.

43 In this context, the judge responsible for special case management must, in most cases, weigh the need for the arrangement against the rights of the parties affected.

44 To perform this weighing exercise, the judge seized of the matter may determine appropriate measures of accommodation or protection that will restore the balance between the opposing interests.

45 As a backdrop for the exercise, the court will first consider whether the plan of arrangement, and even the entire process set out by the *CCAA*,[22] has been well received by the creditors as a whole.

46 In its assessment, the court must characterize the prospect of success for a plan of arrangement. The qualifiers often used by the courts are as follows:

- not doomed to failure;
- apparently reasonable;
- strongly supported;
- diligently pursued;
- real prospect of success.

47 The court's assessment at various stages of the process may vary according to the specific circumstances of each case. Thus, the range of assessment of a plan of arrangement's prospect of success will have a decisive effect on the remedial measures sought by the creditor which considers itself injured by the process. The essential thing is not to hinder the plan of arrangement's prospect of success.

48 Frequently cited, Tysoe J. of the British Columbia Supreme Court identifies the three main objectives of the *CCAA*[23] in regard to maintenance of the status quo. He states:

> . . .
>
> It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:
>
> **1. <u>To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order</u> (which, in British Columbia, is normally the day on which the CCAA proceedings are commenced). This objective is intended to allow the insolvent company <u>an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor</u>.**
>
> **2. <u>To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process</u>. The litigation may be resolved <u>by way of</u> the reorganization.**
>
> **3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, <u>to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize</u>. This is the objective recognized by Quintette and Alberta-Pacific Terminals.**
>
> . . .[24]
>
> (Emphasis added.)

49 In the present case, the issue becomes clearer:

> **Does the relief sought by AXA constitute a financial burden detrimental to the prospect of success for the plan of arrangement**?

APPLICATION OF PRINCIPLES OF LAW TO THE FACTS OF THE CASE

• THE FINANCIAL STANDING OF THE INSURANCE COMPANY, AXA, IN RELATION TO THE PLAN OF ARRANGEMENT

50 Since the insurance premium was paid in full before the original order was issued, AXA is not actually a creditor of the debtors. Nonetheless, it is definitely a party whose rights were affected by the impact of the original order.

51 As was rigorously acknowledged by AXA's counsel, it is only if the plan of arrangement fails and the insolvent debtors are adjudged bankrupts that the insurer's exposure will be increased as opposed to the other creditors, whose debt was frozen in time on January 27, 2009, the date on which the original order was issued.

52 This would mean that here AXA can assert only a possible "exposure". If the forthcoming plan of arrangement goes forward and is accepted, normally the employees' wages, including the indemnity, will be paid.

53 In those circumstances, the odds of the success or failure of a possible plan of arrangement become a determining factor in the assessment of AXA's application for relief.

• ARE THE INDEMNITIES RELATING TO ANNUAL LEAVE DUE BY THE DEBTORS IN THEIR CAPACITY AS AN EMPLOYER?

54 In order to establish entitlement to an annual leave, the reference year is a period of twelve consecutive months during which an employee progressively acquires and accumulates entitlement to an annual leave.[25]

55 One year of uninterrupted service entitles an employee to an annual leave of two weeks.[26]

56 To understand the employer's obligation, it is useful to refer to s. 75 of the *Act respecting labour standards*[27] ("*ALS*"), which states the time when the indemnity must be paid to the employee. Section 75 *ALS* states:

> . . .
>
> **75. Subject to a provision of a collective agreement or decree, the indemnity pertaining to the annual leave of an employee must be paid to him <u>in a lump sum before the beginning of the leave</u>.**
>
> . . .
>
> (Emphasis added.)

57 The Court understands that during the reference year, an employee progressively acquires entitlement to an annual leave. However, the employer will pay the indemnity accumulated throughout the only at the beginning of the leave.

58 On January 28, 2009, namely, the day after the original order was issued, evidence was adduced that the debtors were indebted for a sum of $915,737 for indemnities to be paid to employees.[28] AXA is correct to argue that this sum has been growing since January 27, 2009. However, the amount accumulating during the stay of proceedings will only be paid to the employees when they will take their leave. It can be easily inferred that in general, the employees will want to take their leave in July and August. It is during this period of the year that the debtors will need to pay large amounts of money to the employees.

59 For the time being, the debtors are not legally required to pay the indemnities accumulated since January 28, 2009.

• DEBTORS' CASH FLOW

60 There is not much leeway in the cash flow projections if it is borne in mind that the debtors currently pay priority claims, suppliers, employees (excluding indemnities relating to leave), rent, utilities, equipment payments, etc.[29]

61 It must therefore be understood that the margins include the following financial reserves:

• *Priority claims*:

61 $588,000

• *Excess availability*:

61 $1,000,000

• *D&O Charge*:

61 $800,000

62 It would be true to say that by April 25, 2009, Royal Bank will be repaid in full for its advances, but that it would undoubtedly have been repaid as well in a bankruptcy scenario. Nonetheless, until April 25, 2009, Royal Bank will support the company in its process.

63 In the meantime, the debtors are barely surviving financially.

64 The Court is of the view that adding an additional financial provision would be detrimental to the cash flow that the debtors must have during the stay of proceedings. If they want their financial situation to be conducive to submitting a reasonable plan of arrangement to the creditors as a whole, some breathing space is required.

65 For the period from January 28, 2009 to May 2, 2009, the risk associated with the unpaid indemnities during this same period is estimated at $162,671. The Court does not find it grossly unfair to maintain the *status quo* with respect to AXA. In terms of the need relating to a plan of arrangement, the negative impact on AXA's interest does not seem out of proportion.

• **SUPPORT OF CREDITORS**

66 Until the present time, the creditors in general have backed the debtors' restructuring measures. Some clients are agreeing to accelerate the usual terms of payment. Others are paying in advance for the materials used as components for the manufacture and assembly of the products distributed by the debtors.

67 For the time being, the financial results obtained by the controller are much more than they hoped for. There seems to be a real desire in the debtors' business community to encourage the company's survival.

• **ABSENCE OF A PLAN OF ARRANGEMENT**

68 To date, no plan of arrangement has been proposed. But that is not fatal to the steps taken to succeed in formulating one. Serious efforts are being made, the controller is competent and seems, as he should, to have strict control over the situation. The confidence is there, and the parties are acting as diligently as required and in good faith.

69 The sketch of a possible plan of arrangement will result from the sale to third parties of all or part of the company's assets or a takeover within the context of a complete restructuring under the protection afforded by the *CCAA*.[30] A few buyers have already shown some interest.

70 Therefore, anything is possible. At this stage, the Court, asked to describe the prospect of success for a potential plan of arrangement, is of the opinion that there is a "real prospect of success". The market is reacting favourably to the restructuring measures initiated by the debtors.

• **THE IMPACT OF THE D&O CHARGE**

71 The original order clearly stipulates (paras. 24, 32 and 33) that the D&O charge only applies if the directors do not have valid insurance coverage. It is not itself additional insurance. The insurer remains the primary payor.

72 Consequently, apart from its impact on the margins, the existence of this charge has no effect on resolving the current dispute between AXA and the debtors.

• **CONCLUSION**

73 The financial restructuring process provided for in the *CCAA*[31] is an evolving relief mechanism. The financial picture could change as the restructuring measures are implemented.

74 In order to decide on AXA's application for relief, the Court must rely on the transitional and non-recurring conditions and not the conditions that AXA can foresee; namely, the possibility that the company, as an alternate solution, be declared bankrupt if the plan of arrangement fails.

75 Currently, financial conditions, although very tight and fragile, are still favourable to the execution of a plan of arrangement. The Court must therefore prioritize the reorganization of the company's business and adopt the appropriate protective measures required so that the debtors can propose an arrangement to their creditors.

76 Here, for the time being, the Court is of the view that the need for an arrangement exceeds the negative effects of the restructuring period on AXA's specific interests.

77 The Court is of the view that the prospects of success for a possible plan of arrangement largely offset the imbalance resulting from the higher risk that AXA could incur if the plan were to fail.

78 By and large, the Court believes that the relief sought by AXA, through its motion to vary the original order, would adversely affect the prospects of success for a potential plan of arrangement.

79 The debtors and the controller currently have the support of the main creditors, and they are acting diligently and in good faith. These factors militate in favour of appropriate protective measures and not an additional adverse financial burden.

80 The Court is of the opinion that the solution to the problem raised by AXA must be settled within the context of a possible plan of arrangement and not outside it. It is highly likely that a plan of arrangement will normally involve payment of the increasing indemnities. In such case, AXA will end up having been more frightened than hurt and will not suffer any prejudice.

81 In short, the Court considers that the specific and one-time circumstances of the case strike the right balance between opposing interests and that this balance should not be upset.

FOR THESE REASONS, THE COURT:

82 *DISMISSES* the motion brought by AXA Insurance Inc. to vary the original order as extended, or alternatively to obtain relief;

83 *WITH COSTS.*

APPENDIX

Date under advisement:

March 9, 2009

[TRANSLATION]

APPENDIX

APPENDIX

. . .

8. ORDERS, without restricting the foregoing, during the Stay of Proceedings, all the Persons who entered into agreements, contracts or arrangements, oral or written, with the Applicants or with respect to any of the Goods, for any object or purpose:

(a) to refrain from declaring the forfeiture of term thereof or of any rights of the Applicants or any other Person hereunder, and to not terminate, cancel, suspend or refuse to amend or extend the same on reasonable terms and conditions;

(b) to refrain from amending, suspending or otherwise hampering the provision of goods, services or other benefits by such Person or to such Person on the terms and conditions of these agreements, contracts or arrangements (notably Directors' and Officers' insurance, the use of a telephone number or any form whatsoever of telecommunications services, or provision of heating oil, gas, electricity or any other utilities); and

(c) to continue to execute and observe the conditions stipulated in these agreements, contracts or arrangements, as long as the Applicants pay the price of such goods and services received subsequent to the date of the Order or the related fees as and when they fall due in accordance with the law or according to what can be negotiated subsequent to the date hereof (except for instalments in the form of cash, letters of credit or letters of guarantee, commitment fees or similar payments that the Applicants shall not be required to pay or grant), barring the prior written consent of the Applicants and the Controller or the leave of the court.

. . .

23. ORDERS that, in addition to the existing indemnities, the Applicants shall indemnify and save harmless each of the Directors from and against the following (collectively, "**D&O Claims**"):

(a) all costs (notably the total defence fees), charges, expenses, claims, liability and obligations, of any nature whatsoever, arising subsequent to the Order (including any amounts paid to settle an action or satisfy a judgment in respect of a civil, criminal or administrative action or inquiries to which a Director may be a party), on the condition that any liability of this nature shall fall on him in his capacity as a director and provided that such Director (i) acted honestly and in good faith with a view to the interest of the Applicants, and (ii) that, in the case of a criminal or administrative action or proceeding where such Director would be liable to a fine, he has good reason to believe that his conduct was in compliance with the law, unless such Director actively failed to fulfil a fiduciary obligation or was negligent; and

(b) all costs, charges, expenses, claims, liability and obligations arising from the omission on the part of the Applicants to make payments or pay amounts as salaries, vacation pay, severance pay, retirement benefits or other benefits to which current or former employees are entitled or any other amount for services rendered subsequent to the Order and which these Directors incurred as a result of their association with the Applicants in their capacity as Directors, unless they actively failed to discharge a fiduciary obligation or were negligent.

However, the foregoing stipulations do not constitute an insurance contract, nor any other valid and recoverable insurance within the meaning given to this term in any existing insurance policy purchased for the benefit of the Applicants or any one of the Directors. Furthermore, to avoid any ambiguity, the stipulations in this paragraph shall apply only in respect of claims arising after this Order was issued for events occurring subsequent to the said Order.

24. DECLARES that, as a guarantee of the obligation of the Applicants to indemnify and save harmless the Directors pursuant to paragraph 23 hereof, a hypothec and security shall be constituted in favour of the Directors with regard to the Goods up to a total amount of $500,000 (**"D&O Charge"**) according to the priority established in paragraphs 32 and 33 hereof. Such D&O Charge shall not create a trust. Notwithstanding any stipulation to the contrary in any applicable insurance policy, such D&O Charge shall apply only if the Directors do not have Directors' and Officers' insurance coverage, which does not constitute insurance additional to the D&O Charge. In the event of a D&O Claim against one or more of the Directors (collectively, the **"Respondent Directors"**), if such Respondent Directors fail to receive within 21 days following the delivery of the notice of the D&O Claim to the insurer contemplated, a confirmation on the part of such insurer certifying that it will cover and indemnify the Respondent Directors, then, without prejudice to the subrogation rights mentioned below, the Applicants shall pay the amount of the D&O Claim at its expiry. Upon failure to make this payment, the Respondent Directors may assert the D&O Charge, provided that they reimburse the Applicants, if they receive the same thereafter, for the insurance indemnity for the D&O Claim paid by the Applicants, and provided furthermore that upon payment thereof by the Applicants, they shall be subrogated in the rights of the Respondent Directors to recover the payment from the insurer contemplated as if no payment of this type had been made.

. . .

Footnotes

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

2 A copy of paragraphs 8, 23 and 24 of the original order is appended.

3 Exhibit R-5.

4 R.S.Q., c. C-38.

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

6 Exhibit R-7.

7 Exhibit P-2 of the debtors' initial motion.

8 (1935) 16 C.B.R. 1 (S.C.C.), Duff J.

9 (1993) 17 C.B.R. 24 (Ont C.J.) at 31.

10 (1989) 72 C.B.R. (N.S.) 1 (Alta. Q.B.) Forsyth J. at 15.

11 (2000) 12 C.B.R. (4th) 94, (Alta. C.A.) at 110.

12 See in particular *Citibank Canada v. Chase Manhattan Bank of Canada*, (1991) 5 C.B.R. (3d) 165 (Ont. C.J.) at 188; *Hong Kong Bank v. Chef Ready Foods Ltd.*, (1990) 4 C.B.R. (3rd) 311 (B.C.C.A.) at 319; *Re: Lehndorff General Partner Ltd.*, *supra* note 9 at 31.

13 (2000) 12 C.B.R. (4th) 94 (Alta. C.A.) at 110.

14 (1989) 72 C.B.R. (N.S.) 1 (Alta. Q.B.), Forsyth J. at 15.

15 (2002) 35 C.B.R. (4th) 304 (Alta. Q.B.) at 311.

16 (1989) 72 C.B.R. (N.S.) 20 (Alta. Q.B.) at 28. See to this effect *Michaud v. Steinberg inc.*, [1993] R.J.Q. 1684 (C.A.) at 1690.

17 See in particular *Re: Westar Mining Ltd.*, (1992) 14 C.B.R. (3d) 88 (B.C.S.C.); *Re: Woodward's Ltd.*, (1993) 17 C.B.R. (3d) 236 (B.C.S.C.); *Re: Sharp-Rite Technologies*, (2000) BCSC 0122 (B.C.S.C.); *Re: United Used Auto & Truck Parts Ltd.*, (2000) 16 C.B.R. (4 th) 141 (B.C. C.A.) at 146; *Re: Hunters Trailer & Marine Ltd*., (2001) 27 C.B.R. (4 th) 236 (Alta. Q.B.).

18 See in particular *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, (1992) 8 C.B.R. (3d) 312 (Ont. C.J.); *Re: Armbro Enterprises Inc.*, [1993] O.J. No. 4482 (Ont. C.J.); *Dylex Ltd*., (1995) 31 C.B.R. (3d) 106 (Ont. C.J.); *Re: T. Eaton Co*., (1997) 46 C.B.R. (3d) 293 (Ont. C.J.).

19 See in particular *Re: Blue Range Resource Corp*., (1999) ABQB 1038 (Alta. Q.B.); leave to appeal refused in (1999) 12 C.B.R. (4 th) 186 (Alt. C.A.); *Re: T. Eaton Co*., (2000) 14 C.B.R. (4 th) 288 (Ont. C.J.).

20 (1993) 15 C.B.R. (3d) 265 (B.C.C.A.) at 271 and 272.

21 *Supra* note 1.

22 *Supra* note 1.

23 *Supra*, note 1.

24 *Re : Woodward's Ltd*. (1993), 100 D.L.R. (4 th), 133, 140 (B.C. S.C.).

25 *Act respecting labour standards*, R.S.Q., c. N-1.1, Division IV, s. 66.

26 *Ibid*., s. 68.

27 *Act respecting labour standards*, R.S.Q., c. N-1.1.

28 Exhibit R-7 filed in support of AXA.

29 Exhibit R-1 of the debtors' motion for an extension of the original order, Schedules 1 and 2.

30 *Supra* note 1.

31 *Supra* note 1.

TAB 15

2017 ONCA 99
Ontario Court of Appeal

U.S. Steel Canada Inc., Re

2017 CarswellOnt 1346, 2017 ONCA 99, 275 A.C.W.S. (3d) 249, 45 C.B.R. (6th) 41

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

And In the Matter of a proposed plan of compromise or arrangement with respect to U.S. Steel Canada Inc.

G.R. Strathy C.J.O., K.M. Weiler, M.L. Benotto JJ.A.

Judgment: February 8, 2017
Docket: CA M46908, M46916

Proceedings: Leave to appeal refused *U.S. Steel Canada Inc., Re* (2016), 2016 ONSC 5215, 2016 CarswellOnt 14647, 39 C.B.R. (6th) 227 (Ont. S.C.J.)

Counsel: Ken Rosenberg, Lily Harmer, Karen Jones, Robert Healey, for Moving Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Sharon L.C. White, for Moving Party, USW Local 1005
Andrew J. Hatnay, Barbara Walancik, Amy Tang, for Moving Party, non-union active employees and retirees of U.S. Steel Canada Inc.
James Gage, Paul Steep, for Responding party, U.S. Steel Canada Inc.
Robert Staley, Kevin Zych, William A. Bortolin, for Responding Party, Monitor, Ernst & Young Inc.

***Per curiam*:**

1 These motions for leave to appeal arise in the context of the ongoing proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, involving U.S. Steel Canada Inc. ("USSC").

2 In 2015, an order was made suspending the payment of certain benefits, referred to as "OPEBs" (other post-employment benefits, for example, prescription, dental and vision benefits) to retirees. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"), together with its local unions and representative counsel to the non-USW active and retired members, jointly brought a motion. They sought to have the payment of OPEBs reinstated on the basis that USSC's financial position had improved since the 2015 order was made.

3 The *CCAA* judge dismissed the motion on the condition that USSC make a one-time payment of $2.7 million towards the benefits. The moving parties now seek leave to appeal from that decision.

4 There is no dispute about the applicable test. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In assessing whether leave should be granted, the court must consider:

a. whether the proposed appeal is *prima facie* meritorious or frivolous;

b. whether the point on the proposed appeal is of significance to the practice;

c. whether the point on the proposed appeal is of significance to the action; and

d. whether the proposed appeal will unduly hinder the progress of the action.

See: *Nortel Networks Corp., Re*, 2016 ONCA 332, 36 C.B.R. (6th) 1 (Ont. C.A.), at para. 34; *SNMP Research International Inc. v. Nortel Networks Corp.*, 2016 ONCA 749 (Ont. C.A.), at para. 6; *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 24.

5 In this case, the *CCAA* judge had broad discretion under s. 11. The test governing the exercise of that discretion is whether the order furthers the remedial objectives of the statute, namely, to permit the debtor to carry on business and avoid the social and economic consequences of liquidation: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 70.

6 It is rare that this court will interfere with a discretionary decision of a *CCAA* judge. In our view, there is no *prima facie* merit to the moving parties' submission that this court should do so in this case. The *CCAA* judge, who has extensive familiarity with the circumstances of the debtor, considered the evidence before him, the submissions of the parties and their respective "with prejudice" settlement discussions. He carefully balanced competing considerations, including the goal of a successful reorganization, which would benefit all interested parties, including the moving parties. In the final analysis, while he refused to reinstate the payment of benefits to the end of 2016, he ordered that USSC make a one-time payment of $2.7 million towards benefits. We are not satisfied that an appeal from that order has any real prospect of success.

7 Given the fact-specific nature of the exercise of discretion in this case, the issue is not of significance to the insolvency practice.

8 In the circumstances, it is unnecessary to consider the other aspects of the leave test.

9 For these reasons, leave to appeal is denied. The motion is dismissed with costs to the respondent USSC, fixed at $2,500, inclusive of disbursements and all applicable taxes.

Motion dismissed.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. ET AL.

Applicants/Responding Parties

Court of Appeal File No.: M53250
Superior Court No.: CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT Toronto

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