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COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	2001-0216AC
TRIAL COURT FILE NUMBER:	2001-05630
REGISTRY OFFICE:	CALGARY
	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 DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.
APPLICANTS:	DIAVIK DIAMOND MINES (2012) INC.
STATUS ON APPEAL:	PROPOSED APPELLANT
STATUS ON APPLICATION:	APPLICANT
RESPONDENTS:	DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC, and DOMINION FINCO INC.
STATUS ON APPEAL:	PROPOSED RESPONDENTS
STATUS ON APPLICATION:	RESPONDENTS
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH, as AGENT to the FIRST LIEN LENDERS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**Osler, Hoskin & Harcourt LLP** 2500, 450 – 1 Street SW Calgary, AB T2P 5H1 Attn: Marc Wasserman / Michael De Lellis / Emily Paplawski Tel: 403.260.7000 Fax: 403.260.7024 Email: mwasserman@osler.com / mdelellis@osler.com / epaplawski@osler.com Matter: 1210529

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AND TO THE SERVICE LIST

PART I - OVERVIEW

1. Credit Suisse AG, Cayman Islands Branch, as agent (the "**Agent**") for the first secured lenders (the "**First Lien Lenders**") to Dominion Diamond Mines ULC ("**Dominion**") and various related parties (collectively, the "**Debtors**") opposes the application of Diavik Diamond Mines (2012) Inc. ("**DDMI**") for leave to appeal an order of the Honourable Justice K.M. Eidsvik granted November 4, 2020 ("**November Order**") in the Debtors' proceedings under the *Companies' Creditors Arrangement Act* (as amended, the "**CCAA**") commenced on April 22, 2020.

2. DDMI's proposed appeal is nothing more than a disguised attempt to invite this Court to second-guess two exercises of discretion by a CCAA Judge with respect to the application of a CCAA stay to DDMI's right to realize on its security interest against the property of the Debtors. The November Order, as well as the prior order that was granted in June 2020 in response to DDMI's request for a variation of the CCAA Stay (the "**Limited Waiver Order**"), are premised on factual findings based on the evidence before the CCAA Judge, and on her resulting judgment regarding the appropriate balancing of the interests of affected stakeholders, within the context of a complex and contested CCAA proceeding.

3. It is well-accepted that such exercises of CCAA Judge's discretion deserve the highest level of deference from this Court. Contrary to the submissions of DDMI, there is no issue of legal importance involving the rights of secured creditors generally arising from the November Order. The November Order simply affirms that there was no factual basis for varying the Limited Waiver Order (which DDMI did not appeal and which stakeholders in this proceeding have relied upon since June 2020). Apart from the limited exemptions from the Stay granted to DDMI in the Limited Waiver Order (as confirmed in the November Order), DDMI must remain in the same position as all other secured creditors, including the First Lien Lenders, who are stayed from enforcing their security while the Debtors seek to restructure. Leave to appeal should therefore be denied.

PART II - FACTS

4. On April 22, 2020, Dominion and various related companies obtained an Initial Order under the CCAA (the "**Initial Order**").[1] The Initial Order imposed a broad stay of proceedings (the "**Stay**") in order to provide the Debtors with the necessary breathing space to restructure.

5. DDMI is a joint interest partner of Dominion, and majority owner and operator of the Diavik Mine in the Northwest Territories (the "**Diavik Mine**"). Under a Joint Venture Agreement ("**JVA**"), both parties share in the operating expenses and both parties are entitled to share in the diamonds produced from the Diavik Mine (the "**Dominion Products**"), in proportion to their respective ownership interests.[2]

6. The JVA entitles DDMI to pay Dominion's share of operating expenses (referred to as the "**Cover Payments**") in the event Dominion is unable or unwilling to do so, and to take a security interest in the amount of the Cover Payments over Dominion's share of the Dominion Products.[3] In doing so, DDMI becomes a secured creditor of Dominion. Its rights to enforce its security are subject to the Stay.

7. At the hearing of Dominion's comeback application on May 1, 2020, DDMI sought: (a) a modification of the Stay to permit DDMI to make Cover Payments on behalf of Dominion; and (b) authorization to hold a portion of the Dominion Products to secure Dominion's obligations in respect of the Cover Payments, instead of delivering those Dominion Products to Dominion in the ordinary course. It was DDMI that proposed that the value of the Dominion Products retained to satisfy its security interest should be determined "based on royalty valuations performed from time to time at the PSF by the GNWT" ("**DICAN Valuation**").[4] DDMI thereafter abandoned this more

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[1] Affidavit of Alyssa Roy, sworn December 11, 2020 ("**Roy Affidavit**") at Exhibit A.

[2] Affidavit of Katie Doran, sworn November 10, 2020 ("**Doran Affidavit**") at Exhibit K, para 2.

[3] Doran Affidavit at Exhibit K, paras 18-20.

[4] Roy Affidavit at Exhibit B, Tab 1, section 19.

limited request and asked instead that it be entitled to retain 100% of the Dominion Products. Such expanded relief was opposed by, among others, the Monitor "[a]s a matter of principle".[5]

8. On June 19, 2020 – after 3 days of hearings and extensive oral argument – the CCAA Court recognized the "unusual situation" created by DDMI's obligations to make the Cover Payments and granted the Limited Waiver Order which, as initially requested by DDMI, amended section 16 of the Initial Order to provide for a "holdback" of the Dominion Products only to the extent required to secure the Cover Payments, as determined using the DICAN valuation.[6]

9. Section 16(e) of the Limited Waiver Order provided that upon the happening of certain defined occurrences, DDMI would be entitled to apply to the Court to seek an Order allowing it to exercise rights and remedies as against the Dominion Products.[7] Accordingly, on October 19, 2020, DDMI applied to the CCAA Court for such relief. However, in addition, DDMI asked the CCAA Judge to vary paragraph 16 of the Limited Waiver Order to grant it the expanded relief that it had previously sought – namely, the right to hold 100% of the Dominion Products. DDMI purported to rely on the "comeback clause" in the Limited Waiver Order to revisit and vary the otherwise final, non-appealable Limited Waiver Order.[8]

10. On November 4, 2020, the CCAA Court granted the November Order and Endorsement dismissing DDMI's request to revisit the Limited Waiver Order.

PART III - ISSUES

11. The sole issue before this Court is whether to grant leave to appeal the November Order.

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[5] Roy Affidavit at Exhibit D, p. 19.

[6] Doran Affidavit at Exhibit A, para 16, Exhibit I, p. 5:1-6, and Exhibit J, para 19.

[7] Doran Affidavit at Exhibit A, para 16.

[8] Doran Affidavit at Exhibit R, paras 14-15.

PART IV - LAW AND APPLICATION

12. Appeals of CCAA decisions can proceed only with leave of the CCAA court or a judge of the court to which the appeal lies.[9] Leave to appeal in CCAA proceedings is granted "sparingly". Courts have recognized a four-part test in deciding whether leave to appeal should be granted:

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

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

(c) whether the appeal is *prima facie* meritorious; and

(d) whether the appeal will unduly hinder the progress of the action.[10]

13. The Applicant must be able to demonstrate that "the CCAA Court erred in principle or exercised its discretion unreasonably."[11] The test for leave to appeal under the CCAA is particularly stringent when, as here, the order under appeal involves the exercise of a CCAA judge's discretion. As the Supreme Court of Canada recently noted, "[a]ppellate courts must be careful not to substitute their own discretion in place of the supervising judge's".[12]

14. DDMI seeks to have this Court revisit the exercise of the CCAA Judge's discretion on two separate occasions. In the first instance, the CCAA Judge exercised her discretion in granting the Limited Waiver Order. The result of the Limited Waiver Order was that, notwithstanding the CCAA Stay, and unlike any other secured creditor in this CCAA proceeding including the First Lien Lenders, DDMI obtained a limited entitlement to "hold back" a portion of the Debtors' assets against its security interest, together with an entitlement to return to court to enforce that security

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[9] *Companies' Creditors Arrangement Act*, RSC 1986, c C-36 at s. 13 ("CCAA"). **[TAB 1]**

[10] *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363 ("***Delphi Energy***") at para 10 **[TAB 2]**; *BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264 at paras 7-8 **[TAB 3]**; *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at para 16 **[TAB 4]**.

[11] *9354-9186 Quebec inc v Callidus Capital Corp*, 2020 SCC 10 ("*Callidus*") at paras 53-54. **[TAB 5]**

[12] *Callidus* at paras 53-54 **[TAB 5]**; *Delphi Energy* at paras 11-12 **[TAB 2].**

interest. In granting this relief, the CCAA Judge stated: "[t]his is a balance that I have attempted to achieve to allow for the Diavik Mine to remain operational and allow Dominion to continue to attempt to restructure."[13] DDMI did not appeal the Limited Waiver Order and the parties engaged in the restructuring of Dominion in reliance on the Limited Waiver Order.

15. DDMI then requested that the CCAA Court revisit the Limited Waiver Order on the basis of alleged "changing circumstances" to now grant DDMI the very relief previously denied – to retain 100% of the Dominion Products. The only "changing circumstance" that DDMI relied upon was the failure of the SISP to generate an executable transaction involving Dominion's interest in the Diavik Mine.[14] All other "changing circumstances" since the granting of the Limited Waiver Order were positive – the international diamond markets had reopened, market conditions and demand had improved, overall pricing was "higher than anticipated", and the market prices obtained on Dominion's initial diamond sales approximated their book value.[15]

16. Dismissing DDMI's request to revisit the Limited Waiver Order, the CCAA Judge noted that the "changing circumstances" alleged by DDMI were expressly contemplated in the granting of the Limited Waiver Order and that such circumstances were "one of the reasons" DDMI was granted an exception to the Stay in the Limited Waiver Order. The CCAA Judge noted that such circumstances "did not change the underlying reason to limit the *exception* to the general stay".[16]

17. In addition, the CCAA Judge found that, contrary to the submissions of DDMI, the additional information "about the recent value of diamonds is actually in favour of keeping the Order in place as it is, as opposed to an adverse change of circumstances that would require an

[13] Doran Affidavit at Exhibit I, p. 5:1-6, and Exhibit J, para 19.
[14] Doran Affidavit at Exhibit R, paras 14, 15, 22.
[15] Roy Affidavit at Exhibit E, paras 15-16, and Exhibit F, para 33; Doran Affidavit at Exhibit M, para 29.
[16] Doran Affidavit at Exhibit J, paras 23-24.

amendment."[17] Accordingly, the CCAA Judge held that there was no legal basis on which she could revisit the Limited Waiver Order and no basis on which she was prepared to exercise her discretion, balancing the interests of all stakeholders, to further improve the position of DDMI.

18. DDMI now seeks a "third kick at the can", allegedly on the basis of the effect of the November Order on secured creditor rights. No such rights are at stake. DDMI neglects to mention that both the Limited Waiver Order and the November Order were granted in response to its request to vary the Stay that otherwise precluded both it and all other secured creditors from enforcing their security. In the Limited Waiver Order, DDMI was already accorded a privileged position relative to all other secured creditors and, in the November Order, the CCAA Judge declined to exercise her discretion to give DDMI a further "leg up".

A. The Point on Appeal is not of Significance to the Practice

19. DDMI's proposed appeal is not of significance to the practice because the sole issue underlying the proposed appeal is well-settled law. As this Court recently noted, whether a proposed appeal is of significance to the practice thereby warranting "an appeal to this court depends on the extent to which there is no binding or guiding precedent on the point at issue."[18]

20. The November Order applied well-established case law regarding the circumstances in which the CCAA Court can vary a previous order in reliance on a so-called "come-back" clause. As Justice Topolinski recently noted, "[i]n supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems."[19] DDMI relied on this case law in seeking to establish "changing circumstances" since the Limited Waiver Order was granted.

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[17] Doran Affidavit at Exhibit J, para 23.

[18] *Repsol Canada Energy Partnership v Delphi Energy Corp*, 2020 ABCA 364 at para 10. **[TAB 6]**

[19] *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 at para 50 ("*Canada North*"), aff'd 2019 ABCA 314, leave to appeal granted 2020 CanLII 23629 (SCC). **[TAB 7]**

21. DDMI's complaint regarding the November Order is not that any uncertainty exists in the law with respect to comeback clauses which requires this Court's guidance. DDMI's complaint is that the CCAA Judge determined, on the basis of the evidence, that no changing circumstances existed that could justify the CCAA Court revisiting its own prior Limited Waiver Order. DDMI's disagreement with these findings does not convert this highly fact specific determination by the CCAA Judge into an issue of general application of significance to the practice.

22. DDMI did not appeal the Limited Waiver Order, and the CCAA Court found as a fact that no changing circumstances existed to justify its variation. The Limited Waiver Order has now been relied upon by stakeholders throughout the CCAA proceeding. The CCAA Judge's finding is deserving of the highest level of deference from this Court. Thus, even if broader legal implications from the CCAA Judge's orders exist with respect to DDMI's rights as a secured creditor (which is denied), those implications arise from the Limited Waiver Order, which DDMI did not appeal, and not the November Order.

23. In any event, the result remains the same even if the broader issue raised by DDMI under the Limited Waiver Order is considered. As expressly noted by the CCAA Judge, the issue before the Court when it granted the Limited Waiver Order was the extent to which the requested relief should be granted "with respect to DDMI" in light of the "unusual situation" in Dominion's CCAA proceedings.[20] Notwithstanding DDMI's current efforts to construe the issue as one "pertaining to the rights of secured creditors during an enforcement process", DDMI submitted to the CCAA Court in respect of the Limited Waiver Order that it was seeking "limited stay relief that is consistent with the JVA" and that "the limited stay modification sought by DDMI is appropriate".[21]

[20] Doran Affidavit at Exhibit J, para 19.

[21] Roy Affidavit at Exhibit C, paras 11-12. [Emphasis added]

24. The lifting of a stay is discretionary and falls squarely within the broad statutory powers granted to the CCAA Court under section 11 of the CCAA to "make any order that it considers appropriate in the circumstances".[22] In determining whether to lift the stay, the court must consider "whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action."[23]

25. The CCAA Court undertook this balancing of interests in her supervisory role in the CCAA proceedings in granting the Limited Waiver Order. In establishing this balance, the CCAA Judge considered the unique factual circumstances in the CCAA proceeding, including: (a) the additional security held by DDMI in the entirety of Dominion's 40% interest in the Diavik Mine, an interest which the CCAA Judge found had "some value"; (b) the realized value of diamond sales made by Dominion and DDMI during 2020 as compared to DICAN values; and (c) Dominion's "serious concerns about how DDMI is running the Diavik Mine" and complaints "about the Mine being over budget and mismanaged."[24]

26. The analysis undertaken by the CCAA Judge was inherently fact specific, "steeped in the intricacies of the CCAA proceeding"[25] and based on "the intimate knowledge acquired by the supervising judge in overseeing a CCAA proceeding".[26] It has no significance to the practice or the diamond industry. Any appeal by DDMI would only engage this Court in an exercise of second guessing the careful balance reached by the CCAA Judge in the Limited Waiver Order and the November Order. Such an exercise is not permissible.[27]

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[22] CCAA at s. 11; *Canwest Global Communications Corp*., 2011 ONSC 2215 at para 27 ("*Canwest*") **[TAB 8]**.

[23] *Canwest* at para 27 **[TAB 8]**; *Re Canadian Airlines Corp*, [2000] CarswellAlta 622 at para 20 (QB) **[TAB 9]**; *Timminco Limited (Re),* 2012 ONSC 2515 at para 17. **[TAB 10]**

[24] Doran Affidavit at Exhibit J, paras 18, 19, 21, and 23.

[25] *Callidus* at para 54. **[TAB 5]**

[26] *Calpine Canada Energy Ltd., Re*., 2007 ABCA 266 at para 14 **[TAB 11]**

[27] *Callidus* at paras 53, 54, 107, 108. **[TAB 5]**

B. The Point raised is not of Significance to the CCAA Proceeding

27. The proposed appeal is not of significance to the CCAA proceeding. The issue on the proposed appeal involves one creditor – DDMI – attempting to obtain a "leg up" relative to other creditors in a manner contrary to fundamental CCAA principles. As the Honourable Mr. Clement Gascon (as he then was) noted in *Boutiques San Francisco Inc.*, "maintaining the status quo involves balancing the interests of all affected parties and avoiding advantages to some over the others. Under the CCAA, the restructuring process and the general interest of all the creditors should always be preferred over the particular interests of individual ones."[28]

C. The Appeal is not Prima Facie Meritorious

28. DDMI's proposed appeal of the November Order is not *prima facie* meritorious for the reasons noted by Dominion in its Memorandum of Argument, which the Agent adopts.

29. In addition, the Agent submits that DDMI misstates the scope of the proposed appeal in two ways. First. DDMI's application states that the proposed appeal involves the requirement for "DDMI to release Diamonds prior to payment of the CP Indebtedness". This statement is not correct. Both the Limited Waiver Order and the November Order expressly permit DDMI to retain the Dominion Products required to satisfy the "CP Indebtedness", as valued on the basis of the DICAN Valuation. The CCAA Judge found as a fact that, based on "the recent value of diamonds" and the additional security held by DDMI in Dominion's 40% ownership interest in the Diavik Mine, DDMI is not prejudiced by the balance struck in the Limited Waiver Order and November Order. DDMI has presented no basis on which this Court could substitute its own findings for these findings of the CCAA Judge.

[28] *Boutiques San Francisco Inc., Re,* [2004] RJQ 986 (SC) at paras 21-23. [Emphasis added] **[TAB 12]**

30. Second, the November Order addressed only whether changing circumstances existed sufficient to justify revisiting the Limited Waiver Order pursuant to the comeback clause. The existence of such circumstances, or lack thereof, is the only proper ground of appeal. In seeking leave to appeal the November Order, DDMI is attempting to go behind the November Order to revisit the very substantive issues in the Limited Waiver Order which the CCAA Judge determined, in her discretion and based on her factual findings, could not be revisited.

D. Granting leave would unduly hinder Dominion's restructuring

31. Even where any or all criteria for leave to appeal are satisfied, a court may still deny leave to appeal an order if the appeal would unduly hinder the progress of the CCAA proceeding. The party seeking leave must establish, through affirmative evidence, that the proposed appeal will not do so.[29] DDMI has produced no such evidence. Nor can it do so, since granting leave to appeal would imperil Dominion's ongoing efforts to consummate a going-concern restructuring and constitute a continued drain on Dominion's limited resources.

32. On December 6, 2020, Dominion filed and served an application seeking, among other things, approval of a sale transaction contemplated by an Asset Purchase Agreement ("**APA**") which would see Dominion's assets conveyed to a third party purchaser, achieving a going concern outcome for Dominion's business.[30] The terms of Dominion's going concern restructuring in the APA were negotiated in reliance on the Limited Waiver Order and November Order. Granting DDMI leave to appeal would introduce significant uncertainty into Dominion's current efforts to achieve a going concern restructuring in accordance with the APA, not to mention requiring Dominion to incur the time and expense associated with such an appeal, while trying to consummate the transactions under the APA.

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[29] *Canadian Airlines Corp (Re)*, 2000 ABCA 149 at paras 41-45. **[TAB 13]**

[30] Roy Affidavit at Exhibit G.

PART V - RELIEF SOUGHT

33. The Agent respectfully submits that leave to appeal should be denied.

34. The Agent further submits that DDMI has failed to meet the criteria required for the granting of a stay of the November Order pending appeal for the reasons noted by Dominion in its Memorandum of Argument. The Agent respectfully requests that such relief also be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th day of December 2020

Marc Wasserman / Michael De Lellis /
Emily Paplawski
Osler, Hoskin & Harcourt LLP
Counsel for the Agent

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	*Companies' Creditors Arrangement Act*, RSC 1986, c C-36
2.	*Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363
3.	*BMO Nesbitt Burns Inc v Bellatrix Exploration Ltd*, 2020 ABCA 264
4.	*Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158
5.	*9354-9186 Quebec inc v Callidus Capital Corp*, 2020 SCC 10
6.	*Repsol Canada Energy Partnership v Delphi Energy Corp*, 2020 ABCA 364
7.	*Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550
8.	*Canwest Global Communications Corp*., 2011 ONSC 2215
9.	*Re Canadian Airlines Corp*, [2000] CarswellAlta 622
10.	*Timminco Limited (Re)*, 2012 ONSC 2515
11.	*Calpine Canada Energy Ltd., Re*., 2007 ABCA 266
12.	*Boutiques San Francisco Inc., Re*, [2004] RJQ 986 (SC)
13.	*Canadian Airlines Corp (Re)*, 2000 ABCA 149

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to November 17, 2020

Last amended on November 1, 2019

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

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

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

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

General power of court

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

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

Pouvoir général du tribunal

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

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

Relief reasonably necessary

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

2019, c. 29, s. 136.

Redressements normalement nécessaires

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

2019, ch. 29, art. 136.

Rights of suppliers

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

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

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

2005, c. 47, s. 128.

Droits des fournisseurs

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

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

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

2005, ch. 47, art. 128.

Stays, etc. — initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

Suspension : demande initiale

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

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

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest.

2019, c. 29, s. 139.

b) de la contrepartie payée pour l'obtention, notamment, de tout intérêt ou droit visés à l'alinéa a);

c) de tout autre intérêt ou droit prévus par règlement.

2019, ch. 29, art. 139.

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

Échéances

12 Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

Leave to appeal

13 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.

R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

Permission d'en appeler

13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

L.R. (1985), ch. C-36, art. 13; 2002, ch. 7, art. 134.

Court of appeal

14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Cour d'appel

14 (1) Cet appel doit être porté au tribunal de dernier ressort de la province où la procédure a pris naissance.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

Pratique

(2) Tous ces appels sont régis autant que possible par la pratique suivie dans d'autres causes devant le tribunal saisi de l'appel; toutefois, aucun appel n'est recevable à moins que, dans le délai de vingt et un jours après qu'a été rendue l'ordonnance ou la décision faisant l'objet de l'appel, ou dans le délai additionnel que peut accorder le tribunal dont il est interjeté appel ou, au Yukon, un juge de la Cour suprême du Canada, l'appelant n'y ait pris des procédures pour parfaire son appel, et à moins que, dans ce délai, il n'ait fait un dépôt ou fourni un cautionnement suffisant selon la pratique du tribunal saisi de l'appel pour garantir qu'il poursuivra dûment l'appel et payera les frais qui peuvent être adjugés à l'intimé et se conformera aux conditions relatives au cautionnement ou autres qu'impose le juge donnant la permission d'en appeler.

L.R. (1985), ch. C-36, art. 14; 2002, ch. 7, art. 135.

Appeals

15 (1) An appeal lies to the Supreme Court of Canada on leave therefor being granted by that Court from the

Appels

15 (1) Un appel peut être interjeté à la Cour suprême du Canada sur autorisation à cet effet accordée par ce tribunal, du plus haut tribunal de dernier ressort de la

TAB 2

2020 ABCA 363
Alberta Court of Appeal

Trican Well Service Ltd v. Delphi Energy Corp

2020 CarswellAlta 1843, 2020 ABCA 363

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

And in the Matter of a Plan of Compromise or Arrangement
of Delphi Energy Corp. and Delphi Energy (Alberta) Limited

Trican Well Service Ltd. and Ensign Drilling Inc. (Applicants) and Delphi Energy Corp. and Delphi Energy (Alberta) Limited (Respondents) and PricewaterhouseCoopers Inc. and Luminus Management LLC (Interested Parties)

Marina Paperny J.A.

Heard: October 7, 2020
Judgment: October 15, 2020
Docket: Calgary Appeal 2001-0183-AC

Counsel: H.A. Gorman, Q.C., M. Brockman, C. Onwuekwe, Q.C., S. Davies, for Applicants
R.S. Van de Mosseler, T. Sandler, for Respondents
J.G.A. Kruger, Q.C., for PricewaterhouseCoopers Inc.
J.L. Oliver, J.W. Hocher, J.J. Bellissimo, for Luminus Management LLC

Subject: Insolvency
Headnote
Bankruptcy and insolvency
Table of Authorities
Cases considered by *Marina Paperny J.A.*:

Allen-Vanguard Corp., Re (2011), 2011 ONSC 5017, 2011 CarswellOnt 8984, 81 C.B.R. (5th) 270 (Ont. S.C.J. [Commercial List]) — referred to

Bellatrix Exploration Ltd v. BP Canada Energy Group ULC (2020), 2020 ABCA 178, 2020 CarswellAlta 807, 79 C.B.R. (6th) 205 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 623, 19 C.B.R. (4th) 12 (Alta. Q.B.) — considered

Connacher Oil and Gas Ltd., Re (July 16, 2019), Doc. Calgary 1601-06131 (Alta. Q.B.) — referred to

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — considered

SemCanada Crude Co., Re (2009), 2009 ABQB 490, 2009 CarswellAlta 1269, 57 C.B.R. (5th) 205, 479 A.R. 318 (Alta. Q.B.) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 7041, 2012 CarswellOnt 15919, 99 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — referred to

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 6 — considered

s. 13 — considered

s. 22 — considered

s. 22(2) — referred to

***Marina Paperny J.A.*:**

Introduction

1 The applicants, Trican Well Services Ltd. (Trican) and Ensign Drilling Inc (Ensign), seek leave to appeal an order sanctioning a plan of arrangement put forward by the respondents Delphi Energy Corp and Delphi Energy (Alberta) Limited (collectively, Delphi) under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. The applicants are trade creditors who filed builders' liens against Delphi's properties for goods and services.

2 Delphi is a junior energy producer. In 2019, it implemented a recapitalization transaction from which it drew down funds to drill three new wells in 2020. In March 2020, the combination of an oil price collapse and COVID-19 put Delphi in financial peril. Ultimately, Delphi's cash flow was restricted by senior lenders. On April 14, 2020, Delphi filed for *CCAA* protection.

3 A plan of arrangement (the Plan) was put forward and approved by the requisite double majorities of creditors, and the Sanction Order was granted on September 11, 2020. Two classes of affected creditors voted on the Plan: secured creditors, comprising Delphi's Second Lien Noteholders in respect of the secured portion of their claims, and "general unsecured creditors". The unsecured creditors included trade creditors, which category included the applicants, the Second Lien Noteholders in respect of their unsecured deficiency claims, and a convenience class of unsecured creditors with claims of less than $5,000. All unsecured creditors had the option to join the convenience class and accept a $5,000 payout on their claims; they were then deemed to have voted in favour of the Plan.

4 The applicants provided goods and services in the erection of Delphi's three new wells and are owed approximately $7.5 million. At the sanction hearing, they submitted that their builders' lien rights were improperly subordinated to the interests of supplemental debenture holders, Delphi's first lien lenders and second lien noteholders, resulting in the applicants and other prospective lien holders becoming general unsecured creditors. They take issue with the manner in which the voting classes of creditors were established, which they say resulted in the voting power of the trade creditors being overwhelmed.

5 The applicants seek leave to appeal the Sanction Order, submitting it was neither fair nor reasonable, and was not in compliance with the statutory requirements for a sanction order under the *CCAA*. Specifically, the applicants seek leave to appeal on the following grounds:

a) the chambers judge misapplied or misapprehended the commonality of interest test for classification of voters, essentially denying trade creditors voting power; and

b) the chambers judge ought not to have sanctioned a plan that breached the statutory requirement under s 5.1(2) of the *CCAA* because it purports to compromise statutorily protected claims against directors.

6 In oral argument on the leave application the applicants submitted that, while they did not appeal the original classification order, their classification for the purpose of voting and the fairness of the Plan were important considerations at the sanction hearing, and these circumstances were improperly disregarded by the supervising judge in granting the Sanction Order.

7 In her reasons for sanctioning the plan the supervising judge noted that the overall indebtedness of Delphi was insurmountable, with total secured claims of $142.3 million and unsecured claims of another $27 million, for a total indebtedness of $170 million. If the Plan is approved, the 104 small creditors comprising the Convenience Class will each receive $5,000; approximately 100 parties will share *pari passu* in an unsecured claims pool of $3 million dollars, or about 2.4% on the dollar recovery. All the secured debt, less the deficiency claim amount, will be converted to equity. The supervising judge stated, "but for some trailing obligations, Delphi, if the plan is sanctioned and closes, will emerge debt free with 38 employees and will continue operating as an energy company headquartered in Alberta".

8 In concluding that the Plan was fair and reasonable, the supervising judge considered the alternative of liquidation, wherein all unsecured parties would lose and the company would cease to operate. She found that "upon close examination, the unsecured claim class is properly constituted, even if the convenience class are excluded, the vote in favour would still have carried the plan". In concluding there was sufficient commonality of interest among the class, she noted that the balancing of creditors' interests also discloses that the shareholders are compromising substantial claims, the plan sponsor being by far the largest loser.

Considering an application for leave to appeal under the CCAA

9 The test for leave to appeal is set out in s 13 of the *CCAA*:

> 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 When considering whether to grant leave to appeal the discretionary decision of a supervising judge under the *CCAA*, appellate courts are instructed to consider several factors: whether the point on appeal is of significance to the practice; whether the point raised is of significance to the proceeding itself; whether the appeal is *prima facie* meritorious; and whether the appeal will unduly hinder the progress of the action: *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.) at paras 15-16, (2003), 44 C.B.R. (4th) 96 (Alta. C.A.); *Bellatrix Exploration Ltd v. BP Canada Energy Group ULC*, 2020 ABCA 178 (Alta. C.A.) at para 16.

11 The standard of review applied to the discretionary decision of a supervising judge is highly deferential, absent an error in law or principle or an exercise of discretion that is clearly unreasonable. As stated by Fruman JA in *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3, (1999), 244 A.R. 93 (Alta. C.A.):

> [T]his 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.

12 The Supreme Court of Canada recently reiterated the need for caution in the review of a supervising judge's discretionary decisions, noting that "[a]ppellate courts must be careful not to substitute their own discretion in place of the supervising judge's": *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para 53.

13 Whether a plan is fair and reasonable is a question of mixed law and fact, and as such is entitled to deference. The very nature of a *CCAA* proceeding requires the balancing of a multiplicity of divergent interests and stakeholders with a view to a fair and reasonable compromise in aid of a successful restructuring, if possible. Ascertaining how that can be accomplished with as little pain as possible is a delicate task, requiring a clear understanding of all the interests at stake, the effect of the plan on

all stakeholders and, equally importantly, the effect of the alternative to restructuring on those same stakeholders. An appellate court should not lightly intervene in this balancing exercise.

First proposed ground of appeal: The classification of creditors

14 In assessing whether a plan is fair and reasonable, as required by s 6 of the *CCAA*, the supervising judge must consider the composition of the voting class of unsecured creditors. Section 22 of the *CCAA* empowers the company to divide its creditors into classes for the purpose of a compromise or arrangement. Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest", taking into account the following factors (s 22(2)):

> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in above.

15 The key considerations in determining if a proposed class has the requisite commonality of interest are set forth in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.) at para 31:

> 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 C.C.A.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.A.A., 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 *as creditors* before or after the plan in a similar manner.
>
> [emphasis in original]

16 Excessive fragmentation, which is counterproductive to facilitating a reorganization, should be avoided. Fragmentation is not just about the number of classes, but the effect that fragmentation of classes might have on the ability to achieve the legislative goal of a viable reorganization: see *SemCanada Crude Co., Re*, 2009 ABQB 490 (Alta. Q.B.) at para 21. What is required is some "community of interest and rights which are not so dissimilar as to make it impossible for the creditors in the class to consult with a view toward a common interest": *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at para 14. Another important consideration is avoidance of tyranny of the minority: "it would be improper to create a special class simply for the benefit of the opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power": *Sklar-Peppler* at para 14.

17 In this case, the applicants submit that the trade creditors were unfairly classified and, had they their own separate class, they would have defeated the Plan. They submit that the supervising judge failed to properly characterize the commonality of interest test. Put simply, the applicants say they have no commonality of interest with the other members of the class. The trade creditors will receive a negligible amount, whereas the convenience class will receive what amounts to full recovery, and the second lien noteholders with deficiencies will see the conversion of their secured debt to equity.

18 It is worth nothing that the trade creditors could have opted into the convenience class had they so chosen. Moreover, the second lien noteholders will see the secured portion of their claims converted from debt to equity, but their deficiencies are subject to the same 2.4 cents on the dollar that the trade creditors will receive under the Plan.

19 A review of the transcript makes clear that the supervising judge understood the situation of the various creditors. She was alive to the fact that, if the trade creditors were given their own class, they could veto the Plan. She understood that if the convenience class was removed, the vote would have passed regardless.

20 The matter of classification is discretionary, as was the supervising judge's determination that the overall Plan was fair and reasonable in the circumstances. The proposed issue on appeal is clearly of importance to the applicants, as if they were successful on appeal they would be in a position to veto the Plan. However, given the degree of deference that would be paid to the decision of the supervising judge on issues of classification, I am not persuaded that this ground of appeal has a likelihood of success.

Second proposed ground of appeal: Failure to meet the statutory requirements under s. 5.1(2)

21 The applicants accept that a plan may compromise some claims against directors by capping them to proceeds under insurance policies. However, they submit that statutorily protected claims against directors must be exempted from any compromise in light of s 5.1(2), which excludes claims based on allegations of misrepresentation or wrongful or oppressive conduct. The applicants submit the Sanction Order irrevocably limits such protected claims to the unspecified proceeds of insurance policies which, they say, is statutorily prohibited. The applicants also submit that Delphi failed to put the insurance policies into evidence before the supervising judge.

22 Delphi submits that the Plan does not compromise the claims against directors, but merely channels financial recovery to available insurance proceeds, and that this is consistent with the practice of *CCAA* courts across Canada, including in Alberta [1] .

23 There is clear authority for Delphi's proposition, although I was not directed to any appellate authority considering the issue. In my view, the merit of this proposed ground of appeal depends on whether Delphi's position, that the claim in this case is not being compromised, withstands scrutiny. A careful review of the Plan and the Sanction Order makes clear that the applicants' claim against the directors is not being compromised within the meaning of the *CCAA*. Rather, recovery on that claim is limited to the amount of directors' and officers' insurance in place. That amount is $40 million. The total builders' lien claims, were they to be completely successful, amount to approximately $20 million. I note as an aside that the bad faith argument upon which this potential claim is premised was found for the purpose of the sanction hearing to be without evidentiary foundation. In all these circumstances, there is no merit to the argument that the claim is being impermissibly compromised.

Conclusion

24 In my view, in light of the standard of review applicable to a decision on fairness, and in light of the applicable law, neither proposed ground of appeal is of sufficient merit to warrant an appeal.

25 I am also mindful of the last consideration, that is the undue hinderance of the restructuring if leave to appeal is granted. The applicants concede that some delay would be occasioned by an appeal, although they propose the appeal be heard on an expedited basis. However, the record suggests that the prospect of a going-concern restructuring will be seriously imperiled if the plan sponsors choose not to fund the Plan beyond the agreed plan outside date. If the Plan is not consummated, Delphi will undoubtedly be faced with liquidation, the only other alternative put forward. The economic consequences of liquidation would be considerably worse for all stakeholders, including the applicants.

26 In my view, this is not a case where leave to appeal ought to be granted. The issues raised to impugn the exercise of discretion that the Plan is not fair and reasonable have been thoroughly considered by appellate courts across the country and the principles are well known. The exercise of discretion by the supervising judge was not the product of legal error or

misapprehension of the evidence. She appears to have had a very solid understanding of the financial circumstances of Delphi and all the objecting creditors when she concluded the plan was fair and reasonable.

27 The application for leave to appeal is, accordingly, dismissed.

Footnotes

1 *Connacher Oil and Gas Ltd., Re* [(July 16, 2019), Doc. Calgary 1601-06131 (Alta. Q.B.)], 2019 Plan Sanction Order of Justice Dario (16 July 2019) Calgary 1601-06131 at para 31; *Sino-Forest Corp., Re* [2012 CarswellOnt 15919 (Ont. S.C.J. [Commercial List])], Plan Sanction Order of Justice Morawetz (10 December 2012) Toronto CV-12-9667-00CL at para 37; *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List]) at paras 26-27 and 78.

End of Document

TAB 3

2020 ABCA 264
Alberta Court of Appeal

BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd.

2020 CarswellAlta 1262, 2020 ABCA 264, [2020] A.W.L.D. 2721, 320 A.C.W.S. (3d) 540, 81 C.B.R. (6th) 161

In the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c.C-36, as amended And in the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

BMO Nesbitt Burns Inc., operating as BMO Capital Markets (Applicant) and Bellatrix Exploration Ltd. (Respondent) and National Bank of Canada, as agent (Respondent) and Borden Ladner Gervais LLP (Interested Party / Monitor)

Jo'Anne Strekaf J.A.

Heard: June 23, 2020
Judgment: July 13, 2020
Docket: Calgary Appeal 2001-0115-AC

Counsel: C.C.J. Feasby, Q.C., E.E. Paplawski, for Applicant
R.J. Chadwick, C. Defcours, for Respondent, Bellatrix Exploration Ltd.
E.W. Halt, Q.C., K.J. Bourassa, J. Reid, J. Jang, for Respondent, National Bank of Canada

Subject: Civil Practice and Procedure; Insolvency

Headnote

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

Company entered protection under Companies' Creditors Arrangement Act — Sale was arranged by sale advisor, however, price ultimately was considerably less than had been initially anticipated and was insufficient to pay out first lien creditors — First lien creditors objected to payment of advisor's fee from cash on hand — Order blocking payment to sale advisor being made in priority to amounts owing to first creditors pursuant to priority scheme in initial order was granted — Security for completion fee for sale was found to rank behind that of first lien lenders — Sale advisor brought application for leave to appeal — Application dismissed — Appeal was not prima facie meritorious — Trial judge properly interpreted terms of initial order — Matter did not raise important legal issue that was of significance to practice generally.

Table of Authorities

Cases considered by *Jo'Anne Strekaf J.A.*:

Bellatrix Exploration Ltd (Re) (2020), 2020 ABQB 348, 2020 CarswellAlta 1018 (Alta. Q.B.) — considered

Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — considered

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — followed

Mudrick Capital Management LP v. Lightstream Resources Ltd. (2016), 2016 ABCA 401, 2016 CarswellAlta 2416, 43 C.B.R. (6th) 175 (Alta. C.A.) — considered

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Statutes considered:

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

Generally — referred to

APPLICATION by sale advisor for leave to appeal order regarding payment of fees.

***Jo'Anne Strekaf J.A.*:**

Introduction

1 BMO Nesbitt Burns Inc (the Sale Advisor) seeks leave to appeal a decision denying payment to it of a Completion Fee in a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

Background

2 The Sale Advisor was retained by Bellatrix Exploration Ltd (Bellatrix), an oil and gas company, to provide financial advisory services with respect to the sale of Bellatrix's assets pursuant to a written engagement letter and fee schedule dated September 9, 2019 (Engagement Letter). The Engagement Letter identified a "Work Fee" of up to $100,000 to be paid monthly, as well as a "Completion Fee", a lump sum of $2.75 million plus a percentage of the value of the transaction above a specified threshold to be paid if a sales transaction was completed.

3 Bellatrix sought protection under the *CCAA*. The Initial Order, granted in the *CCAA* proceedings on October 2, 2019, did the following:

- approved the Sale Advisor on the terms set out in the Engagement Letter (para 27);

- directed that the Monitor, counsel to the Monitor, counsel to Bellatrix and the Sales Advisor "shall be paid their reasonable fees and disbursements . . . in each case at their standard rates and charges, subject to the terms set forth in their respective engagement letters with (Bellatrix), as applicable, as part of the costs of these proceedings" (para 33);

- provided the Monitor, counsel to the Monitor, counsel to Bellatrix and the Sale Advisor with an "Administration Charge", not exceeding $500,000, "as security for the professional fees and disbursements incurred . . . (other than the Completion Fee (as defined in the Sale Advisor Engagement Letter)) at the standard rates and charges of the Monitor, such counsel and the Sale Advisor, subject to the terms set forth in their respective engagement letters" and provided the Sale Advisor with a "Sale Advisor Transaction Fee Charge" as security for the Completion Fee (para 35);

- directed that the priorities of the various charges would be as follows (para 42):

  (a) First Administration Charge (to the maximum amount of $500,000);

  (b) Second — Interim Lenders' Charge;

  (c) Third — Director's Charge (to the maximum amount of $1.5 million);

  (d) Fourth — Credit Card Charge (to the maximum amount of $250,000);

  (e) Fifth — the Encumbrances existing as of the date hereof in favor of the First Lien Agent securing obligations owing under the First Lien Credit Agreement;

  (f) Sixth — KERP Charge (to the maximum amount of $2.7 million); and

  (g) Seventh — Sale Advisor Transaction Fee Charge.

4 The Sale Advisor found a purchaser and a Sale and Vesting Order approving the sale of substantially all of Bellatrix's assets was granted on May 8, 2020 (the Transaction). The price, however, was considerably less than had been initially anticipated and was insufficient to pay out the First Lien Creditors. When the First Lien Creditors became aware that Bellatrix intended to pay

the Completion Fee of $2.75 million to the Sale Advisor by paying that amount from cash on hand into escrow five days prior to the closing of the Transaction (as contemplated in the Engagement Letter), they applied for an order blocking the payment being made in priority to the amounts owing to them pursuant to the priority scheme set out in paragraph 42 of the Initial Order.

5 The application judge determined that the security for the Completion Fee ranked behind that of the First Lien Lenders and, accordingly, Bellatrix could not pay the Completion Fee to the Sale Advisor before the First Lien Lenders were fully paid.

6 The application judge rejected the Sale Advisor's argument that the distinction between the "Work Fee" and "Completion Fee" was intended to provide extra protection for payment of the Completion Fee and, because Bellatrix had cash on hand to pay the fee, there was no need to resort to the priority scheme in paragraph 42 of the Initial Order.

Test for Leave to Appeal

7 The test for leave to appeal in *CCAA* proceedings requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering the following four factors (*Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta. C.A.) at paras 15-16):

> (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.

8 "An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in *CCAA* proceedings": *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para 3. Decisions of a supervising chambers judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras 28-29.

Analysis

9 The Sale Advisor seeks leave to appeal on the question of whether the Sale Advisor or the First Lien Lenders (both of whom are key participants in the *CCAA* proceedings) are entitled to the $2.75 million held in trust by the Monitor. That is a question of significance in the ongoing *CCAA* proceedings, and the resolution of that question, should leave be granted, would not unduly delay those proceedings. I am, therefore, satisfied that the second and fourth factors in the test for leave to appeal are met in this case.

10 The key considerations on this application are the first and third factors of the test.

11 The Sale Advisor submits first, that the appeal is meritorious, and second, that it is of significance to the practice generally because the Initial Order is based on the template order that is used for all *CCAA* proceedings in Alberta.

12 With respect to the merit of the appeal, the Sale Advisor argues that the application judge's interpretation of the Initial Order conflated the obligation to make ongoing payments and the charges granted to secure such payment obligations, and that this is an error of law, reviewable on the correctness standard. The Sale Advisor further submits that the decision introduces uncertainty with respect to the payment of other professional fees protected by the Initial Order, including those of the Monitor. If the payment of other professional fees is subject to the priority scheme in paragraph 42, then they would be subject to the $500,000 cap in Administration Charges set out in paragraph 42. The Sale Advisor points out that the cash flow forecasts in support of the Initial Order projected over $7 million in professional fees in the first 16 weeks of the CCAA process and over $1.5 million was paid by Bellatrix during the week of June 6, 2020 alone. Finally, the Sale Advisor says that a payment made

under the Key Employee Retention Plan ("KERP"), which also ranks junior to the First Lien Lenders in the priority scheme in paragraph 42, was allowed to proceed, and this payment is not addressed by the application judge.

13 With respect to the third factor, the Sale Advisor says the proposed appeal involves an important question to *CCAA* practice generally, as it relates to the interpretation of clauses in the Initial Order that are based on the template order and will therefore have precedential significance. As well, the structure of agreements between financial advisors and debtor companies is designed to facilitate the restructuring process by deferring a vast majority of the payments until the end of the process. The application judge's decision could result in the restructuring of how professionals may require their fees to be addressed in future *CCAA* proceedings.

14 To satisfy the first aspect of the test for permission to appeal, the applicant must demonstrate that the appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401 (Alta. C.A.) at para 51.

15 The Sale Advisor submits that the application judge erred in law in her interpretation of the Initial Order. It says the application judge failed to recognize that Bellatrix was permitted by paragraph 6(b), and required by paragraph 33, to pay the Completion Fee from cash on hand, and that she erroneously imported security concepts such as priority into a Court-approved payment arrangement.

16 The question is whether this argument is *prima facie* meritorious. The essence of the application judge's decision was that the Engagement Letter and the Initial Order drew a distinction between the monthly Work Fee and the Completion Fee, which distinction was "made purposefully and clearly, not just by the Court but by the parties who painstakingly negotiated their own agreement to much of the Initial Order." (para 17).

17 The distinction is perhaps most clearly set out in her oral decision (Transcript page 2):

> In deciding between the two competing interpretations of the initial order and how it intended to deal with (the Sale Advisor's) completion or success fee, I am persuaded that the interpretation of the first lien lenders is correct. The completion or success fee was consistently delineated from (the Sale Advisor's) work fee. In my view, the latter was secured to some extent by the $500,000 admin charge but was also payable by Bellatrix from cash as an ongoing expense for the costs of these proceedings. It is this ---it is this work fee and not the completion fee that Bellatrix could pay as it went, subject to available cash.

18 In addition, the application judge made the following statement in her written decision (*Bellatrix Exploration Ltd (Re)*, 2020 ABQB 348 (Alta. Q.B.)) at paras 16 — 17:

> [16] BMO argues that the separation of the Completion Fee/Sale Advisor Transaction Fee from its monthly Work Fee and its priority charge in paragraph 42 of the Initial Order was done only as "extra" protection for payment of the former. Because Bellatrix has sufficient cash, BMO says it simply does not need to resort to this priority scheme in order to be paid.
>
> [17] I cannot accept that argument. To do so would render completely meaningless the separate definitions and treatment of the Work Fee and the Completion Fee, first in the Engagement Letter itself and more obviously in the Initial Order. This was a distinction made purposefully and clearly, not just by the Court but by the parties who painstakingly negotiated their own agreement to much of the Initial Order.

19 The Sale Advisor submits that the application judge erred in law by concluding that the Initial Order distinguished between the Work Fee and the Completion Fee for the purposes of determining which fees were payable by Bellatrix on an ongoing basis. I am not satisfied that the applicant has met its burden of establishing there is sufficient merit to this argument to justify an appeal.

20 Section 6(b) (which was mentioned by the application judge) provides that Bellatrix "shall be entitled but not required to make the following advances or payments . . . (b) the fees and disbursements of any Assistants (which includes the Sale Advisor) retained or employed by (Bellatrix) *at their standard rates and charges* . . . " (emphasis added).

21 Section 33 was not specifically mentioned by the application judge, but it contains similar language. It states that that the Monitor, counsel to the Monitor, counsel to Bellatrix, and the Sales Advisor "shall be paid their reasonable fees and disbursements . . . in each case *at their standard rates and charges*, subject to the terms set forth in their respective engagement letters with (Bellatrix), as applicable, as part of the costs of these proceedings" (emphasis added).

22 Paragraph 35 of the Initial Order, which was reproduced in its entirety by the application judge in her written reasons, provides:

> The Monitor, counsel to the Monitor, counsel to the Applicant and the Sale Advisor shall be entitled to the benefits of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for the professional fees and disbursements incurred both before and after the granting of this Order *(other than the Completion Fee (as defined in the Sale Advisor Engagement Letter))* at the standard rates and charges of the Monitor, such counsel and the Sale Advisor, subject to the terms set forth in their respective engagement letters, as applicable, and *the Sale Advisor shall be entitled to the benefits of and is hereby granted a charge (the "Sale Advisor Transaction Fee Charge") on the Property, as security for the Completion Fee (as defined in the Sale Advisor Engagement Letter). The Administration Charge and the Sale Advisor Transaction Fee Charge shall each have the priority set out in paragraphs 42 and 44 of this Order.*
>
> [emphasis by the application judge]

23 An examination of these clauses (along with paragraphs 42 and 44 of the Initial Order) supports the application judge's recognition that the Work Fee and the Completion Fee were treated differently throughout the Initial Order.

24 The Initial Order contemplated that Bellatrix was *permitted* to pay certain fees on an ongoing basis, pursuant to para 6(b): "the fees and disbursement of (the Sale Advisor) . . . *at their standard rates and charges* . . . " (emphasis added). Bellatrix was *required* to pay other fees on an ongoing basis, described as the Sale Advisor's "reasonable fees and disbursement . . . *at their standard rates and charges*, subject to the terms set forth in their respective engagements letters . . . " (emphasis added) The Completion Fee ($2.75 million plus a percentage of the price of the Transaction) is different from the Work Fee, in that the former does not qualify as an amount payable at the Sale Advisor's "standard rates and charges". This key distinction between the nature of the Work Fee and the Completion Fee is reflected in the different treatment that these fees received, both as to whether they could be paid on an ongoing basis and as to their ultimate priority.

25 The last sentence of para 33, which authorizes and directs Bellatrix "to pay the accounts of the foregoing parties in accordance with the payment terms agreed between [Bellatrix] and such parties" does not have the effect of overriding the earlier requirements in the paragraph that the fees and disbursements payable pursuant to this paragraph be "reasonable" and at "standard rates and charges".

26 The suggestion made by the Sale Advisor that the decision creates uncertainty with respect to the ability of Bellatrix to pay the fees of the Monitor or counsel in excess of the Administration Fee charge $500,000 is unfounded. So long as such fees of the Monitor and counsel (or the Sale Advisor's Work Fee) meet the requirements in para 33, they can be paid on an ongoing basis. Such payments are not restricted by the amount of the Administration Fee charge.

27 The Sale Advisor noted that the application judge did not address para 27 of the Initial Order, which approved the Engagement Letter "including, without limitation, the payment of the fees and expenses contemplated thereby, and (Bellatrix) is authorized to continue the engagement of the Sale Advisor on the terms set out in the Sale Advisor Engagement Letter". When this paragraph is read in context, together with all of the other paragraphs in the Initial Order, its approval of the

Engagement Letter does not override the more specific provisions that distinguish between when payments of the Work Fee and the Completion Fee can be made.

28 With respect to the Sale Advisor's submission that payments made under the KERP provision support its interpretation of the Initial Order, the First Lien Lenders note that those payments were made without their knowledge and at the time they understood that they would be paid out in full. There is no merit to the suggestion that the application judge's failure to address this submission would constitute a reviewable error.

29 While the Initial Order was based upon the draft template order, the question raised on the proposed appeal, whether the Completion Fee can be paid to the Sale Advisor out of cash on hand, is largely dependent upon the interpretation of modifications that were made to the language in the draft template order. As a result, the point on appeal would be of limited interest to the practice generally.

30 For all of the foregoing reasons, I have concluded that the appeal is not *prima facie* meritorious, nor does it raise an important legal issue that is of significance to the practice generally.

Conclusion

31 Having considered all of the factors collectively, I am not satisfied that it would be appropriate to grant leave to appeal. The application is dismissed.

Application dismissed.

TAB 4

2003 ABCA 158
Alberta Court of Appeal

Liberty Oil & Gas Ltd., Re

2003 CarswellAlta 684, 2003 ABCA 158, [2003] A.J. No. 615, 122 A.C.W.S. (3d) 976, 44 C.B.R. (4th) 96

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

AND IN THE MATTER OF LIBERTY OIL & GAS LTD.

LEXXOR ENERGY INC. and LIBERTY OIL & GAS LTD. (Appellants) and RICHTER, ALLAN & TAYLOR INC., MONITOR OF LIBERTY OIL & GAS LTD. (Respondents)

Witmann J.A.

Heard: April 23, 2003
Judgment: May 14, 2003
Docket: Calgary Appeal 0301-0038-AC

Counsel: G. Brian Davison for Various Unsecured Creditors
Larry B. Robinson for Appellants, Lexxor Energy Inc.. Liberty Oil & Gas Ltd.
Geoffrey D. Baker for Rick Martin
Frank R. Dearlove for Respondents, Richter, Allan & Taylor Inc., Monitor of Liberty Oil & Gas Ltd
Peter S. Jull, Q.C. for Various Unsecured Creditors

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Purchaser acquired oil and gas company after its plan of arrangement under Companies Creditors' Arrangement Act was accepted by creditors — As was customary in industry company did not receive payment for previous month's production until following month — Dispute arose between unsecured creditors and purchaser as to amounts attributable to post-petition period between February 25, 2002 and July 23, 2002 — Purchaser took position that matching principle of accounting was inapplicable and that plan indicated that only cash received during post-petition period would be used to pay excluded claims — Monitor took position that revenues and expenses during period should be matched, which would result in post-petition trade creditors being paid in full and unsecured creditors receiving greater percentage of cash proceeds — Chambers judge approved monitor's position — Purchaser brought application for leave to appeal — Application dismissed — Decision of supervising chambers judge contained no demonstrable or arguable error — Chambers judge adopted monitor's interpretation of fundamental accounting concept for purposes of revenue recognition during post-petition period — Recognition in terms of revenue is specialized term pursuant to Canadian Institute of Chartered Accountants Handbook, where it is defined as "process of including item in financial statements of entity" — Recognition has particular application to revenue in terms of timing of it — Chambers judge did not err in ordering application of fundamental accounting concept to revenue recognition and measurement as recommended in detail by monitor.

Table of Authorities

Cases considered by *Witmann J.A.*:

Blue Range Resource Corp., Re, 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re, 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to
CIBC World Markets Inc. v. Blue Range Resources Corp., 2001 ABCA 86, 2001 CarswellAlta 461, 281 A.R. 172, 248 W.A.C. 172 (Alta. C.A.) — referred to
Multitech Warehouse Direct Inc., Re, 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) — referred to
Royal Bank v. Fracmaster Ltd., 1999 CarswellAlta 539, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — referred to
Smoky River Coal Ltd., Re, 1999 CarswellAlta 128, *(*sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, *(*sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

Statutes considered:

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

Generally — considered

s. 13 — considered

s. 14(1) — considered

APPLICATION by purchaser of business for leave to appeal judgment approving monitor's interpretation of accounting concept for purposes of revenue recognition.

***Witmann J.A.*:**

Introduction

1 Lexxor Energy Inc. ("Lexxor") acquired Liberty Oil & Gas Ltd. ("Liberty") after Liberty's plan of arrangement ("the Plan") pursuant to the *Companies Creditors' Arrangement Act* ("*CCAA*") R.S.C. 1985 c. C-36 was accepted by its creditors. The transaction closed July 23, 2002.

2 Hart, J. at all material times was the supervising judge pursuant to the *CCAA* and Richter, Allan & Taylor Inc. acted as the court-appointed Monitor. The business of Liberty included the production of oil and gas. As is customary in the industry, payment for the previous month's production was not received until the following month. In the case of Liberty, on or about the 25th of each month. A dispute arose between the unsecured creditors and Lexxor as to the amounts available attributable to the post-petition interval between February 25, 2002, the petition date, and July 23, 2002 ("the *CCAA* Period").

3 At the core of the dispute was whether revenue accruing during the *CCAA* Period was available to pay excluded claims, a defined term under the Plan. Lexxor took the position before Hart, J. that the matching principle of accounting was inapplicable, that the Plan indicated that only cash received during the *CCAA* Period would be used to pay excluded claims and that therefore the cash proceeds ("the basket") were available to pay any unsecured creditor deficiency arising. The impact on the unsecured creditors if Lexxor's position were adopted is significant. It markedly decreases their recovery.

Facts

4 The relevant provisions of the Plan voted upon by the unsecured creditors and affirmed by court order dated June 29, 2002 are as follows:

2.1 — Purpose

. . . Liberty's Unsecured Creditors are to be paid their first $1,500.00 of Proven Claims in cash and receive their *pro rata* share of a pool of cash and Lexxor Shares estimated to enable them to recover $0.75 per dollar of Proven Claim. . . .

2.2 — Claims Not affected - Excluded Claims

This Plan does not compromise the following Claims and rights that arise in the following capacities (the "Excluded Claims"):

. . .

(b) All Claims arising or accruing for either or both of the provision of goods and performance of services to Liberty from and after the date of the Initial Order;

. . .

4.1 — Overview

. . . it is expected that this Plan will enable Liberty to go forward as a viable business entity. It is expected that this Plan will result in:

(a) repayment of 100% of all Excluded Claims from the Cash Proceeds with the exception of the National Bank Debt which will be dealt with . . .

(b) a distribution to Unsecured Creditors of approximately $0.75 per dollar, consisting of the balance of Cash Proceeds and Lexxor Shares;

. . .

4.2 — Details of the Plan

. . .

(d) Payment of Excluded Claims and Distributions to Secured Creditors, and Unsecured Creditors:

(i) *Excluded Claims*: If Excluded Claims which are to be repaid in accordance with the provisions of the Plan have not been paid by the Plan Implementation Date, then Liberty shall pay such Excluded Claims from the Cash Proceeds as soon as practicable following the Plan Implementation Date . . .

(ii) *Cash Distributions to Unsecured Creditors*: The Monitor shall distribute the portion of Cash Proceeds due to Unsecured Creditors with Proven Claim after payment of or allowance for all Excluded Claims . . .

"*Cash Proceeds*"means a cash payment of $6,811,425.00 which will be available to Liberty and the Monitor which will permit Liberty or the Monitor, as applicable, to make the payments to Creditors contemplated by this Plan.

The Monitor's Fifth Report to the Court

5 In that part of the Fifth Report of the Monitor to the Court dealing with "Lexxor's Interpretation of the Plan", the Monitor stated at p.2:

At the closing date of July 23, 2002, the Liberty had $1,362,484 in liabilities relating to post-petition trade creditors that had not yet been paid by Liberty. These creditors are to be satisfied in full as the amounts owed to them arose subsequent to the Initial Order [FEB. 25, 2002]. Lexxor is of the view that the $1,362,484 is to be paid from the Cash Proceeds as Lexxor acquired no debt. Interpreting the Plan in this fashion has the effect of reducing the cash recovery to Liberty's unsecured creditors from 45 cents on the dollar to 27.5 cents on the dollar.

6 He continued at pp.2-3:

. . . The Plan, however, does not address revenues earned by Liberty during the post-petition period. Those revenues which Lexxor believes they are entitled to, are required to pay Liberty's post-petition creditors.

> When Liberty's Plan was advanced to creditors to vote upon, unsecured creditors expected a recovery of 75 cents on the dollar, 45 cents in cash, and 35 cents in Lexxor shares. Paying post-petition trade creditors from the Cash Proceeds advanced by Lexxor was not contemplated. It is the Monitor's view that if the Plan is interpreted in this way the resulting removal of $1,362,484 from funds available to unsecured creditors may have significantly affected their vote on the Plan. Moreover, there were alternatives available other than Lexxor's proposal which both Liberty and the unsecured creditors may have considered differently if those parties were aware that the cash component of their recovery would only be 27.5 cents not 45 cents as a result of post-petition trade creditors sharing in the cash proceeds.
>
> As well, given Lexxor's interpretation of the Plan, it appears that the quantum of post-petition trade creditors left in Liberty is arbitrary based on the closing date. If Lexxor had acquired Liberty on July 26, 2002, not July 23, 2002, the revenues for June 2002 production would have been received by Liberty and would have been used to pay a portion of Liberty's post-petition trade creditors. Consequently, the date of closing has a substantial impact on the recovery to Liberty's unsecured creditors. The gross revenues received by Liberty for June and July 2002 total approximately $1.55 million net of royalties. It seems consistent to the Monitor that these funds should be available to satisfy Liberty's post-petition trade creditor debt, not the Cash Proceeds.

7 There were other issues put forward by Lexxor that are not subject to this leave application but which were dealt with by Hart, J. on January 24, 2003.

Monitor's Sixth Report to the Court

8 This report was part of the material before Hart, J. on January 24, 2003. It is dated January 21, 2003. It is short. It repeats the issue as set out in the Monitor's Fifth Report in terms of the position of Lexxor and the payment of post-petition trade creditors. It also indicates that the Monitor had requested a summary of receipts and disbursements for the period February 25 to February 28, 2003 from Lexxor but that that information had not been provided. It goes on to reference Exhibit 1 which the Monitor at p.3 stated:

> . . . reflects Liberty's receipts for July and August, 2002 as well as the disbursements made by Liberty in July 2002, the majority of which were made after the July 23, 2002 closing date. Based on the information available to the Monitor, it appears that during the *CCAA* Period Liberty had positive cash flow. Consequently, if the revenues and expenses (receipts and disbursements) were matched, it appears that the post-petition trade creditors would have been paid in full and the unsecured creditors of Liberty would receive a greater percentage of the Cash Proceeds.
>
> Lexxor's interpretation of the Plan may be contrary to a fundamental accounting concept. The concept is known as matching whereby expenses that are linked to a revenue generating activity are matched with the revenues in the period the revenue is recognized. Liberty would have prepared its statements on an accrual basis and therefore would have recognized or recorded the revenue in the period it occurred as well as when the expenses were incurred. Lexxor's interpretation would only reflect Liberty's expenses and not its revenues. The treatment of revenues in Liberty's Plan is not addressed and it is the Monitor's view that in the absence of clear language fundamental accounting principles should be applied.

The Decision of the Supervising Chambers Judge — January 24, 2003

9 The transcript of the reasons includes the following:

> . . . looking at the plan as a whole and considering the process as a whole and included in that, of course, are the monitor's ongoing reports reporting on positive cashflow, that data coming from the operating company, looking at the various clauses in the plan itself, I am satisfied that the matching principle, as set out by the monitor in its reports, most notable the sixth report, and as contained in the briefs of - at least as contended for - in the briefs of Mr. Davison and Mr. Jull, is the proper principle and that the plan should be and was intended to be interpreted accordingly.

> There is no clear language to rebut a proper application of generally accepted accounting principles and it is clear that the unsecured creditors, at least, were given very strong representations that they could expect, on the basis of ongoing operations between the petition date and the closing date, that they could expect something in the order of $.75 on the dollar. There were other expenses that were not contemplated at the time that drives that figure down. But implicit in that representation I am satisfied was the notion that the matching principle would be applied between those dates and that earnings would be taken into account.
>
> Now that is the advice and direction that I give to the monitor.

10 The application for leave to appeal to this Court was filed February 10, 2003. During the period from January 24, 2003 to March 3, 2003, the parties could not agree on the form of order to be taken out pursuant to Hart, J. reasons. On March 3, 2003, another hearing before Hart, J. was held to settle the minutes of his January 24, 2003 order.

The Decision of the Supervising Judge on March 3, 2003

11 At this hearing, counsel for Lexxor and Liberty shifted gears, perhaps in an attempt to grasp too much of a good thing. Two alternate forms of order were put forward to Hart, J. on March 3, 2003. So far as this leave application is concerned, the relevant clauses are, as put forward by Lexxor:

> 2. The Court approves and adopts the matching principle as set out by the Monitor in its Reports, most notably the Sixth Report, and, in particular:
>
> > (a) the application of the matching principle is to be applied in accordance with generally accepted accounting principles for the period between February 25, 2002 and July 23, 2002.

12 The second form of order put forward by the remainder of the parties, including the Monitor and the unsecured creditors, stated:

> 2. The Court approves and adopts the concept of "matching" as applied in the Monitor's Sixth Report, and, in particular, Exhibit "1" to that Report.

13 At the hearing before Hart, J., Lexxor's counsel repeatedly advocated that the words "generally accepted accounting principles" be used in the form of the order because Hart, J. had mentioned that terminology in his decision on January 24, 2003 and wanted to make sure it applied to the entire *CCAA* period. Extensive argument occurred before Hart, J. as to the difference in impact on the unsecured creditors if Lexxor's version of the order were adopted or if the remainder, i.e. the majority of the parties' version were adopted. Hart, J. stated at p.42-43 of his March 3, 2003 decision as follows:

> The purpose of this hearing today on - this aspect of the hearing at least is to fix the terms of the order that I granted on January 24th on the monitor's application.
>
> I have heard all counsel who have spoken on this settlement of terms hearing and I am satisfied that the version that - as between the two versions of the order, the one that accords with the actual order that I granted on the 24th is the order acceptable to the majority of the parties.
>
> I was at pains in January to make it clear that the matching principle that I wanted to see applied and which formed a basis for the rationale of the order I gave at that time was the matching principle as discussed by the monitor in his sixth report. And that was clear then, it remains clear and, in my belief, the order sponsored by the monitor and the majority of the parties reflects that position. I am not satisfied that the order proposed by Mr. Robinson on behalf of his client [Lexxor] does that.
>
> Indeed, in my view, his order distorts the matching principle and could well result in a clawback or a diversion of funds from the unsecured creditor or the estate back to Lexxor contrary to the spirit and intent of my order of January the 24th and, indeed, as I see it, contrary to the proper meaning of the plan of arrangement itself.

So I order and direct that the form of order to be used in the circumstances is the form of order agreed to by the majority of the parties.

The Test for Leave to Appeal

14 Leave to appeal is available under the *CCAA* by virtue of s. 13. Sections 13 and 14(1) state 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.

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

15 The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties: *Canadian Airlines Corp., Re* (2000), 261 A.R. 120, 2000 ABCA 149 (Alta. C.A. [In Chambers]), ("*Resurgence #1*") at para 6; *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22; *Canadian Airlines Corp., Re* (2000), 266 A.R. 131, 2000 ABCA 238 (Alta. C.A. [In Chambers]) ("*Resurgence #2*") at para. 19; *Multitech Warehouse Direct Inc., Re*, [1995] A.J. No. 663 (Alta. C.A.) at para. 3; (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.), at 63.

16 The four factors subsumed in an assessment whether the criterion is present are:

(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: *Resurgence #1* at para. 7; *Resurgence #2* at para. 19.

17 The first factor may be influenced by whether there is appellate authority on the question proposed to be considered on appeal: *Resurgence #1* at para. 33. It is also interpreted broadly to include not only in the insolvency practice but the industry involving the claimant: *CIBC World Markets Inc. v. Blue Range Resources Corp.* (2001), 281 A.R. 172 (Alta. C.A.) at para. 1. It was argued by the unsecured creditors that the point on appeal had no significance to the insolvency practice because it involved an interpretation of the terms of a specific plan of arrangement. Therefore, it was not a point of significance in the sense used. Perhaps. But the timing of payment for oil and gas production in relation to the *CCAA* period may be of significance to the practice.

18 The second factor - whether the point raised is of significance to the action itself - is conceded. In argument before me, Lexxor asserted that the proper application of the matching principle would result in a clawback of over a million dollars but Lexxor proposed to cap the clawback at a million dollars in any event of the result. The unsecured creditors indicated that the broader import of the matching principle as put forward by Lexxor would indeed have that result. So it is of significance to the parties.

19 The third factor involves a consideration as to whether there appears to be an error in principle of law or a palpable and overriding error of fact or that the exercise of discretion by a supervising *CCAA* judge has been exercised improperly, such as by taking into consideration irrelevant factors or failing to consider relevant factors: *Resurgence #1* at para. 41-42. Lexxor's counsel argued strenuously that the alleged misstatement of the matching principle was an error of law, subject to the standard of review of correctness. The other parties submitted that there was no error of law or principle, that the interpretation of the Plan and the adoption of the Monitor's proposal was at most an error of mixed law and fact or the exercise of discretion by the supervising judge. I agree.

20 The standard of review that would govern the appeal is to be considered: *Resurgence #2* at para. 42; *Resurgence #1* at para. 28-29. Ancillary to these considerations are indications that a supervising chambers judge under the *CCAA* should be accorded considerable deference. Their decisions will be interfered with only in the event of unreasonable acts, errors in principle or manifest errors: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3. It has also been stated that an appellate court scrutinizing leave applications under the *CCAA* should exercise its powers sparingly, that a supervising *CCAA* judge has an ongoing management process similar to that of a judge making orders during a trial: *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para. 3; *Smoky River Coal Ltd., Re* at para. 62. Finally, the four factors are to be assessed in the context of determining whether the criterion has been met by ascribing appropriate weight to each of the elements of the general criterion: *Resurgence #1* at para. 46.

Application in this Case

21 Central to the issue proposed for appeal is the impact of the application of the matching principle either as propounded by Lexxor or as propounded by the Monitor. The issue is not whether the matching principle is to be applied in accordance with generally accepted accounting principles. It is whether Hart, J. erred in law in approving the Monitor's proposed application of the matching principle in his Sixth Report. In my view, he did not. No details were articulated as to what the error complained of was. Only that the words "generally accepted accounting principles" were absent from the formal order actually settled on when they were, in fact, included in the reasons. It is clear from the quotation from the Monitor's Sixth Report what Hart, J. had in mind. He said what he had in mind when he settled the minutes of the order. He, in effect, approved the Monitor's version of the matching principle, i.e. the recognition of revenue during the *CCAA* period and its availability to satisfy excluded claims. Neither the Monitor nor Hart, J. intended to extend "the matching principle" beyond revenue recognition. In other words, there was no intent to derive a new accounting from February 25 to July 23 on a full accrual basis according to the version put forward by Lexxor.

22 Whether the appeal would unduly hinder the progress of the action was not strenuously argued. Apparently, an interim distribution can be made and there must be some delay because there is another contingent claim brought by one Martin which remains outstanding and which will delay a final distribution in any event. I am prepared to proceed on the basis that this factor would not and does not influence the decision to grant leave.

Conclusion

23 What is fatal to the applicant's position here is the absence of any demonstrable or, with respect, arguable error in the decision of the supervising chambers judge. He did not pronounce on the matching principle as if he were writing a chapter of the *Canadian Institute of Chartered Accountants* ("*CICA Handbook*") in setting out generally accepted accounting principles. What he did do was adopt the Monitor's interpretation of fundamental accounting concepts for the purposes of revenue recognition during the *CCAA* period. Recognition in terms of revenue is a specialized term pursuant to the *CICA Handbook* at 1000.41 where it is indicated that "recognition is the process of including an item in the financial statements of an entity". It has a particular application to revenue in terms of the timing of it: See s. 3400 revenue .06, .07 of the *CICA Handbook*.

24 Generally accepted accounting principles are defined at paragraph 1000 .59, .60, .61 of the *CICA Handbook* including departure and applicability. That terminology would not be helpful in a general sense to the resolution of the dispute between the parties here. The particular application of a fundamental accounting concept in terms of revenue recognition and measurement, as recommended in detail by the Monitor, is what is relevant, and that is what Hart, J. ordered.

25 The application for leave to appeal is denied.

Application dismissed.

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

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

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, 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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Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Headnote

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

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

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

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

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

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA,

the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

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

Held: The appeal was allowed.

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

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

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

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise

de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

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

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

Arrêt: Le pourvoi a été accueilli.

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

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les

créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

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

Table of Authorities

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

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

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

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

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

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

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

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

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

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

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

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — considered

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, *(*sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — referred to

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 BCSC 1563, 2010 CarswellBC 2962, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]) — referred to

Hayes v. Saint John (City) (2016), 2016 NBBR 125, 2016 NBQB 125, 2016 CarswellNB 253, 2016 CarswellNB 254 (N.B. Q.B.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, *(*sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Langtry v. Dumoulin (1885), 7 O.R. 644 (Ont. Div. Ct.) — referred to

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, *(*sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, *(*sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Marcotte c. Banque de Montréal (2015), 2015 QCCS 1915, 2015 CarswellQue 4055 (C.S. Que.) — referred to

McIntyre Estate v. Ontario (Attorney General) (2002), 2002 CarswellOnt 2880, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, *(*sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, *(*sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

Pole Lite ltée c. Banque Nationale du Canada (2006), 2006 CarswellQue 3438, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re)* 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 3(1) — referred to

s. 4 — referred to

s. 5 — referred to

s. 6 — referred to

s. 6(1) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

s. 11.8 [en. 1997, c. 12, s. 124] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 22(1) — referred to

s. 22(2) — referred to

s. 22(3) — considered

s. 23(1)(d) — referred to

s. 23(1)(i) — referred to

ss. 23-25 — referred to

s. 36 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

s. 6(1) — referred to

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

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

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

I. Overview

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

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

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

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., 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, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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).

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TAB 6

2020 ABCA 364
Alberta Court of Appeal

Repsol Canada Energy Partnership v. Delphi Energy Corp

2020 CarswellAlta 1855, 2020 ABCA 364, [2020] A.W.L.D. 3229, [2020] A.W.L.D. 3292, 324 A.C.W.S. (3d) 134

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

And In the Matter of a Plan of Compromise or Arrangement
of Delphi Energy Corp. and Delphi Energy (Alberta) Limited

Repsol Canada Energy Partnership and Repsol Oil & Gas Canada Inc. (Applicants)
and Delphi Energy Corp. and Delphi Energy (Alberta) Limited (Respondents) and
PricewaterhouseCoopers Inc. and Luminus Management LLC (Interested Parties)

Marina Paperny J.A.

Heard: October 7, 2020
Judgment: October 15, 2020
Docket: Calgary Appeal 2001-0193-AC

Counsel: J.W. Reid, for Applicants
R.S. Van de Mosseler, T. Sandler, for Respondents
J.G.A. Kruger, Q.C., for PricewaterhouseCoopers Inc.
J.L. Oliver, J.W. Hocher, J.J. Bellissimo, for Luminus Management LLC

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

Headnote

Natural resources --- Oil and gas — Practice and procedure — Leave to appeal

R Inc. and D Inc. were both oil and gas producers and held certain petroleum and natural gas rights jointly — D Inc. was operator pursuant to joint operating agreement and between December 2019 and March 2020, D Inc. undertook independent operations to drill three wells on joint lands, with respect to which R Inc. elected not to participate — In April 2020, D Inc. filed for and received order for protection pursuant to Companies' Creditors Arrangement Act (CCAA) and numerous builders' liens were filed against joint lands respecting work on D Inc.'s independent operations completed before filing date — R Inc. served materials opposing paragraph 33(i) of sanction order, arguing that it improperly impacted post-filing rights of R Inc.'s unaffected claims under plan — Supervising judge determined that indemnity claim against D Inc. arising from builders' liens was pre-filing claim and therefore affected claim — R Inc. brought application for leave to appeal sanction order — Application dismissed — Specific provisions of s. 19 of CCAA defined pre-filing claims and were designed to capture claims that were broader than crystallized causes of action — Those claims included present and future liabilities to ensure that all stakeholders understood contingent or unliquidated claims that might arise so they could determine their position on plan and, in particular, whether plan was fair and reasonable having regard to all circumstances — Not least of those circumstances was viability of company post-arrangement — In light of plain language of s. 19 of CCAA, and authorities interpreting provision and conducting similar analysis under Bankruptcy and Insolvency Act, it was not found satisfactory that issue raised was sufficiently meritorious to warrant appeal.

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

R Inc. and D Inc. were both oil and gas producers and held certain petroleum and natural gas rights jointly — D Inc. was operator pursuant to joint operating agreement and between December 2019 and March 2020, D Inc. undertook independent operations to drill three wells on joint lands, with respect to which R Inc. elected not to participate — In April 2020, D Inc.

filed for and received order for protection pursuant to Companies' Creditors Arrangement Act (CCAA) and numerous builders' liens were filed against joint lands respecting work on D Inc.'s independent operations completed before filing date — R Inc. served materials opposing paragraph 33(i) of sanction order, arguing that it improperly impacted post-filing rights of R Inc.'s unaffected claims under plan — Supervising judge determined that indemnity claim against D Inc. arising from builders' liens was pre-filing claim and therefore affected claim — R Inc. brought application for leave to appeal sanction order — Application dismissed — Specific provisions of s. 19 of CCAA defined pre-filing claims and were designed to capture claims that were broader than crystallized causes of action — Those claims included present and future liabilities to ensure that all stakeholders understood contingent or unliquidated claims that might arise so they could determine their position on plan and, in particular, whether plan was fair and reasonable having regard to all circumstances — Not least of those circumstances was viability of company post-arrangement — In light of plain language of s. 19 of CCAA, and authorities interpreting provision and conducting similar analysis under Bankruptcy and Insolvency Act, it was not found satisfactory that issue raised was sufficiently meritorious to warrant appeal.

Table of Authorities

Cases considered by *Marina Paperny J.A.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — referred to

Arrangement relatif à Métaux Kitco inc. (2017), 2017 QCCA 268, 2017 CarswellQue 791, 46 C.B.R. (6th) 173, 2017 CarswellQue 4198, [2017] G.S.T.C. 11 (C.A. Que.) — considered

Bellatrix Exploration Ltd v. BP Canada Energy Group ULC (2020), 2020 ABCA 178, 2020 CarswellAlta 807, 79 C.B.R. (6th) 205 (Alta. C.A.) — referred to

Condominium Plan No. 9512180 v. Prairie Land Corp. (2008), 2008 ABQB 269, 2008 CarswellAlta 585, 73 C.L.R. (3d) 176, 62 C.P.C. (6th) 90, (sub nom. *Owners-Condominium Plan 9512180 v. Prairie Land Corp.)* 445 A.R. 138 (Alta. Q.B.) — considered

Dean v. Kociniak (2001), 2001 ABQB 412, 2001 CarswellAlta 709, 92 Alta. L.R. (3d) 92, 289 A.R. 201 (Alta. Q.B.) — considered

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — considered

Peters v. Remington (2004), 2004 ABCA 5, 2004 CarswellAlta 20, 20 Alta. L.R. (4th) 1, [2004] 3 W.W.R. 614, 339 A.R. 326, 312 W.A.C. 326, 49 C.B.R. (4th) 273 (Alta. C.A.) — considered

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

SemCanada Crude Co., Re (2012), 2012 ABQB 489, 2012 CarswellAlta 1399, 93 C.B.R. (5th) 188, 546 A.R. 203 (Alta. Q.B.) — referred to

SemCanada Crude Co., Re (2012), 2012 ABCA 313, 2012 CarswellAlta 1829, 536 A.R. 396, 559 W.A.C. 396 (Alta. C.A.) — referred to

Trican Well Service Ltd v. Delphi Energy Corp (2020), 2020 ABCA 363, 2020 CarswellAlta 1843 (Alta. C.A.) — considered

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 121(1) — considered

s. 121(2) — considered

Builders' Lien Act, R.S.A. 2000, c. B-7
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 19 — considered

s. 19(1) — considered
Limitations Act, R.S.A. 2000, c. L-12
Generally — referred to

APPLICATION by R Inc. for leave to appeal sanction order.

***Marina Paperny J.A.*:**

1 The applicants, Repsol Canada Energy Partnership and Repsol Oil & Gas Inc. (collectively, Repsol), seek leave to appeal certain provisions of a Sanction Order granted by the supervising judge under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

2 The Sanction Order relates to a plan of compromise and arrangement under the *CCAA* (the Plan) of the respondents, Delphi Energy (Alberta) Limited and Delphi Energy Partnership (collectively, Delphi). The background of the Plan is more thoroughly dealt with in the companion decision of *Trican Well Service Ltd v. Delphi Energy Corp*, 2020 ABCA 363 (Alta. C.A.), and is briefly summarized below.

3 Delphi and Repsol are both oil and gas producers and hold certain petroleum and natural gas rights jointly. Delphi is the operator pursuant to the Joint Operating Agreement, which is governed by the CAPL operating procedure. Between December 2019 and March 2020, Delphi undertook independent operations to drill three wells on the joint lands, with respect to which Repsol elected not to participate.

4 The combination of the collapse of oil prices and the COVID-19 pandemic led to Delphi's financial wherewithal becoming seriously imperiled. As a result, on April 14, 2020, Delphi filed for and received an order for protection pursuant to the *CCAA* (the Filing Date). Shortly thereafter, numerous builders' liens were filed against the joint lands respecting work on Delphi's independent operations completed before the Filing Date.

5 The Plan provides for a compromise and release of all "Affected Claims" as against Delphi, and was approved by the requisite majorities on September 9, 2020. On September 10, the day before the hearing to sanction the Plan, Repsol served materials opposing paragraph 33(i) of the Sanction Order, arguing it "improperly impacts the post-filing rights of Repsol's Unaffected Claims" under the Plan. The issue was whether Repsol's potential indemnity claim against Delphi arising from the builders' liens, and under the Joint Operating Agreement and CAPL operating procedures, is a pre-filing claim for purposes of the *CCAA*. If the potential indemnity claim is a pre-filing claim as defined in s.19 of the *CCAA*, then it is an "Affected Claim" under the Plan.

6 The supervising judge determined the indemnity claim against Delphi arising from the builders' liens was a pre-filing claim and therefore an Affected Claim.

7 Repsol seeks leave to appeal the Sanction Order. It submits that the paragraph of the Sanction Order that extinguishes the claims of joint interest owners arising from the builders' lien claims renders useless the indemnity provisions in the CAPL operating procedures. At the very least, the decision of the supervising judge creates uncertainty for the ability of joint interest owners to rely on the provisions in their Joint Operating Agreement.

8 The test for leave to appeal is well known. It requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering four factors (see *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158 (Alta.

C.A.) at paras 15-16, (2003), 44 C.B.R. (4th) 96 (Alta. C.A.); *Bellatrix Exploration Ltd v. BP Canada Energy Group ULC*, 2020 ABCA 178 (Alta. C.A.) at para 16):

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 an appeal will unduly hinder the progress of the action.

9 In considering whether to grant leave to appeal, appellate courts must appreciate that decisions of a supervising judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3, (1999), 244 A.R. 93 (Alta. C.A.); *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) at para 53.

10 The first aspect of the test for leave requires consideration of whether the issue is of importance to the practice, or in this case the industry, which here includes insolvency practitioners and those in the oil and gas business. The question raised on this appeal is important, but, as is discussed further below, whether it warrants an appeal to this court depends on the extent to which there is no binding or guiding precedent on the point at issue.

11 The second factor concerns whether the point is significant to the action. In a *CCAA* context, the answer to this question is generally "yes", as issues raised on appeal often will have important consequences to the *CCAA* plan in question and to all stakeholders involved. In this case, whether the claim to indemnity is a pre- or post-filing claim impacts the entirety of the Plan.

12 The third inquiry, whether the appeal is *prima facie* meritorious, is in this case directly related to the first factor. The third factor involves consideration of whether there appears to be an error in principle of law, or a palpable and overriding error of fact, or an improper exercise of discretion, for example by taking into consideration irrelevant factors or failing to consider relevant factors: *Liberty Oil & Gas* at para 19. The key point in this case is whether the issue is one of settled or unsettled law.

13 Repsol submits that the determination of when its claim for indemnity arises ought to be guided by the terms of the indemnity agreement, and not by when a claim arises under the *Builders' Lien Act*, RSA 2000, c B-7. Repsol relies on *Dean v. Kociniak*, 2001 ABQB 412 (Alta. Q.B.) and *Condominium Plan No. 9512180 v. Prairie Land Corp.*, 2008 ABQB 269 (Alta. Q.B.), decisions from the Court of Queen's Bench that deal with when a contractual claim for contribution and indemnity arises for purposes of the *Limitations Act*, RSA 2000, c L-12.

14 With respect, I cannot agree. Section 19(1) of the CCAA defines pre-filing claims as:

> 19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims *that relate to debts or liabilities, present or future, to which the company is subject* on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and
>
> (b) claims that relate to debts or liabilities, *present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to* in subparagraphs (a)(i) and (ii).
>
> [emphasis added]

15 Delphi submits, and I agree, that the section provides that any claim that relates to a debt or liability to which a company may become subject by reason of an obligation incurred by the company prior to the *CCAA* filing date is a pre-filing claim, regardless of when the damage was suffered or the claim itself arose. The section is clear and is directed at facilitating a plan of arrangement.

16 In determining whether something is a pre-filing claim under the *CCAA*, regard must be had to the wording of the *CCAA* itself. Analysis of the issue in the context of the *Limitations Act* of a particular jurisdiction, while interesting, cannot provide guidance if it is directly in contradiction to what the *CCAA* provides. The specific provisions of s 19 were designed to capture claims that are broader than crystallized causes of action. Those claims include present and future liabilities to ensure that all stakeholders understand the contingent or unliquidated claims that might arise so they can determine their position on the plan and, in particular, whether the plan is fair and reasonable having regard to all the circumstances. Not the least of those circumstances is the viability of the company post-arrangement.

17 This purposive interpretation accords with the analysis of Romaine J in *SemCanada Crude Co., Re*, 2012 ABQB 489 (Alta. Q.B.), leave to appeal denied 2012 ABCA 313 (Alta. C.A.), where she held at para 24:

> This interpretation of Section 19(1) ignores the words "that relate to liabilities, present or future" that modify the term "claims". It is clear that SemCAMS was subject to the possibility of liability under the IGPA before the CCAA proceedings commenced. The claims for suspension damages are claims that relate to the IGPA and to the suspension of the IGPA that occurred as a result of the CCAA proceedings. Section 19(1) does not limit the claims that may be dealt with by a Plan under the CCAA to presently existing liabilities. This is made clear by the addition of the word "future" in both Section 19(1)(a) and Section 19(1)(b).

18 As was noted by Romaine J at para 25 of *SemCanada*, a "claim" for the purpose of the *CCAA* includes any "indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3". Section 121(1) of the BIA defines "provable claims" as "all debts and liabilities, present and future, to which the bankrupt is subject . . . , or to which the bankrupt may become subject... by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt..."; s 121(2) of the BIA makes clear that this includes contingent or unliquidated claims: *SemCanada* at paras 25-26.

19 The Supreme Court of Canada has confirmed that a claim may be provable in bankruptcy even if it is a contingent claim: see *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.) at para 28; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (S.C.C.) at para 36. "A 'contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'"": *Orphan Well Association*, citing *Peters v. Remington*, 2004 ABCA 5 (Alta. C.A.) at para 23.

20 More recently, the Quebec Court of Appeal commented that "post-debts are only those incurred after and also resulting from an obligation originating after Determination", and that "an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision 'deems it provable'": *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268 (C.A. Que.) at para 77-78 [unofficial English translation].

21 In light of the plain language of s 19, and the authorities interpreting that provision and conducting a similar analysis under the *Bankruptcy and Insolvency Act*, I am not satisfied that the issue raised is sufficiently meritorious to warrant an appeal. Accordingly, the application for leave to appeal is dismissed.

Application dismissed.

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TAB 7

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Canada v. Canada North Group Inc. | 2017 ABCA 363, 2017 CarswellAlta 2213, 284 A.C.W.S. (3d) 461, 54 C.B.R. (6th) 5, [2017] A.W.L.D. 6130, [2017] A.W.L.D. 6301 | (Alta. C.A., Nov 3, 2017)

2017 ABQB 550
Alberta Court of Queen's Bench

Canada North Group Inc (Companies' Creditors Arrangement Act)

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

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

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

J.E. Topolniski J.

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

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

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

Headnote

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

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory

scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Miscellaneous

Debtors' restructuring plan became plea for Companies' Credit Arrangement Act (CCAA) — Debtors' motion and cross-motion to appoint receiver of three of debtor companies by debtor's primary lender, CWB, proceeded — Debtors served CRA with initial order by mailing to CRA office permissible form of service under Alberta' Rules of Court — When interim financer, BDC, advanced $900,000 of priority $1,000,000 facility, debtors sought to extend stay of proceedings — Debtors subsequently served CRA with application to increase interim financing — Stay of proceedings was extended, and interim financing was increased to $2,500,000 — CRA's counsel noted risk to BDC for additional advances subject to Crown's charges — CRA brought motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National or CRA for unremitted source deductions — Ruling was made — Court's order set our priority of charges at issue — Relevant CCAA sections allowed court, where appropriate, to grant priority only to those charges necessary for restructuring — Purpose of deemed trust in fiscal statutes was still met, as deemed trusts maintained their priority status over all other security interests, but those ordered under ss. 11.2, 11.51, and 11.52 of CCAA — Debtors effected service, albeit short notice service, on CRA, which Court deemed to be good and sufficient — Despite glaring failure of CRA's mail management system and although CRA was effectively and technically served June 28, purpose of service was not fulfilled until July 6 when CRA became aware of initial order — CRA's interest was security interest, not proprietary interest — Impact and interplay of "notwithstanding" language in Income Tax Act s. 227(4.1) did not change this conclusion — CRA's position disregarded rather obvious, that successful corporate restructurings resulted in continued jobs to fuel and fund its source deduction tax based — It was logical to infer that Parliament intended to create co-existing statutory scheme that accomplished goals of both fiscal statues and CCAA — CCAA gave Court ability to rank priority charges ahead of CRA' security interest arising out of deemed trusts.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

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

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List]) — considered

Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — referred to

Christiansen v. Paramount Developments Corp. (1998), 1998 CarswellAlta 1093, 234 A.R. 149, 8 C.B.R. (4th) 220, 1998 ABQB 1005 (Alta. Q.B.) — referred to

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — referred to

Concrete Equities Inc., Re (2012), 2012 ABCA 266, 2012 CarswellAlta 1572, 96 C.B.R. (5th) 139, 354 D.L.R. (4th) 683, (sub nom. *Sandhu v. MEG Place LP Investment Corp.)* 542 A.R. 12, (sub nom. *Sandhu v. MEG Place LP Investment Corp.)* 566 W.A.C. 12 (Alta. C.A.) — referred to

Elias v. Hutchison (1980), 12 Alta. L.R. (2d) 241, 35 C.B.R. (N.S.) 30, (sub nom. *Catalina Exploration & Development Ltd. v. Hutchison)* 27 A.R. 13, 1980 CarswellAlta 169 (Alta. Q.B.) — referred to

Elias v. Hutchison (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 1981 ABCA 31 (Alta. C.A.) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12, 1991 CarswellNS 35 (N.S. T.D.) — referred to

First Vancouver Finance v. Minister of National Revenue (2002), 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance)* 2002 D.T.C. 7007 (Fr.), [2002] 3 C.T.C. 285, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, 288 N.R. 347, [2003] 1 W.W.R. 1, [2002] 2 S.C.R. 720, 45 C.B.R. (4th) 213 (S.C.C.) — considered

Fitch v. Official Receiver (1995), [1996] 1 W.L.R. 242, [1996] B.C.C. 328, [1996] B.P.I.R. 152 (Eng. C.A.) — referred to

General Chemical Canada Ltd., Re (2005), 2005 CarswellOnt 210, 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Lyall, Re (1991), 8 C.B.R. (3d) 82, 1991 CarswellBC 493 (B.C. S.C.) — referred to

Minister of National Revenue v. Temple City Housing Inc. (2008), 2008 ABCA 1, 2008 CarswellAlta 2, [2008] 2 C.T.C. 67, (sub nom. *R. v. Temple City Housing Inc.)* 2008 G.T.C. 1128 (Eng.), [2008] G.S.T.C. 2, (sub nom. *Temple City Housing Inc., Re)* 422 A.R. 4, (sub nom. *Temple City Housing Inc., Re)* 415 W.A.C. 4, 43 C.B.R. (5th) 35 (Alta. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 264, 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — followed

Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re) (2017), 2017 NSSC 160, 2017 CarswellNS 449, (sub nom. *In Re: Rosedale Farms)* 2017 D.T.C. 5079, [2018] 1 C.T.C. 132 (N.S. S.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 193 A.R. 321, 135 W.A.C. 321, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank)* 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — considered

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — considered

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — followed

Temple City Housing Inc., Re (2007), 2007 ABQB 786, 2007 CarswellAlta 1806, [2008] 2 C.T.C. 61, [2007] G.S.T.C. 188, 42 C.B.R. (5th) 274 (Alta. Q.B.) — followed

Thibodeau c. Air Canada (2014), 2014 SCC 67, 2014 CSC 67, 2014 CarswellNat 4124, 2014 CarswellNat 4125, 74 Admin. L.R. (5th) 1, 377 D.L.R. (4th) 193, (sub nom. *Thibodeau v. Air Canada)* 463 N.R. 231, [2014] 3 S.C.R. 340 (S.C.C.) — considered

Statutes considered:

Bank Act, S.C. 1991, c. 46

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

s. 187(5) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — considered

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

Generally — referred to

s. 2(1) "secured creditor" — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(2) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(2) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

s. 34(11) — referred to

s. 37 — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — considered

s. 86(2.1) [en. 1998, c. 19, s. 266] — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 224(1.3) "secured creditor" — considered

s. 224(1.3) "secured interest" — considered

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.)

Generally — referred to

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 3.9 — considered

R. 9.15(1) — considered

R. 9.15(4) — considered

R. 11.14(1)(b) — considered

R. 11.14(2)(b) — considered

Treaties considered:

Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, ICAO Doc. No. 9740

Generally — referred to

RULING on Canada Revenue Agency's motion to determine whether Court ordered "super-priority" security interests granted in proceeding could take priority over statutory deemed trusts in favour of Minister of National for unremitted source deductions.

***J.E. Topolniski J.*:**

Introduction

1 This case is about whether Court ordered "super-priority" security interests granted in a *Companies' Creditor Arrangement Act* [1] (*CCAA*) proceeding can take priority over statutory deemed trusts in favour of Her Majesty the Queen in Right of Canada, as represented by the Minister of National Revenue (CRA) for unremitted source deductions.

2 Acknowledging that its success on this motion would cause a chill on commercial restructuring, CRA relies on the comeback provision in an initial *CCAA* Order made July 5, 2017 (Initial Order) to vary "super-priority" charges made in favour of an interim financier, the directors of the debtor companies, and the Monitor and its counsel (Priority Charges), which subordinate its deemed trust claims arising under the *Income Tax Act (ITA)* [2], *Canada Pension Plan Act* [3] *(CPP Act)*, and *Employment Insurance Act* [4] *(EI Act)* (collectively, the Fiscal Statutes) [5].

3 CRA's view is that the deemed trusts give it a proprietary, rather than a secured interest in the Debtors' assets that cannot be subordinated. Alternatively, if it is a secured creditor, its first place position under the Fiscal Statutes cannot be undermined by the Priority Charges. Canada North Group Inc, Canada North Camps Inc, Camcorp Structures Ltd, DJ Catering Ltd, 816956 Alberta Ltd, 1371047 Alberta Ltd and 1919209 Alberta Inc (the Debtors), the Monitor, and the interim financer, Business Development Bank of Canada (BDC), strenuously oppose the motion.

4 In addition to the priority issue, there are a number of interconnected, subsidiary issues including: Whether the subject is proper for variance, the onus on a comeback motion, technical service versus actual notice, and delay prejudice.

5 For the reasons that follow, CRA's interest arising under the Fiscal Statutes is properly subordinated by the Priority Charges. Concerning the subsidiary issues, I have (obviously given the foregoing) found that the question is appropriate for a comeback hearing. I have also found that CRA bears the onus and that, even if CRA had prevailed, it would have been inappropriate to disturb the Priority Charges for the period between the Initial Order and this hearing on August 11, 2017, because of the delay prejudice.

The Factual Landscape

6 No surprise given the nature of the proceedings, matters have unfolded quickly.

7 The Debtor's restructuring plan began with s 50.4(1) *Bankruptcy and Insolvency Act* (*BIA*) [6] notice of intention to make a proposal to creditors that very quickly changed to a plea for *CCAA* relief.

8 The originating *CCAA* materials were served on CRA via courier at its Edmonton office (CRA Office) on June 28. The service package included:

a. The originating application returnable July 5, 2017 seeking a stay of proceedings and basket of other relief, including the Priority Charges;

b. A draft form of initial order that set out the sought after charges: Interim financier charge of $1,000,000, administrative charge of $1,000,000, and the director's indemnity charge of $50,000,000; and

c. An affidavit of a director of the Debtors attesting to a $1,140,000 debt to CRA for source deductions and GST (the evidence does not breakdown what is owed for source deductions, which is the only remittance in issue).

9 On July 5, the Debtors' motion and a cross-motion to appoint a receiver of three of the debtor companies by the Debtor's primary lender, Canadian Western Bank (CWB), proceeded. CRA did not appear (more will be said about this later). The Court refused CWB's receivership application and granted the Initial Order, which included typical service provisions and a comeback clause (Comeback Provision). The Priority Charges track the draft form of Order with one change - a (consensual) $500,000 reduction to the administrative charge.

10 On July 6, the Debtors served CRA with the Initial Order by mailing it to the CRA Office, a permissible form of service under Alberta's *Rules of Court*. Also on this day, the CRA employee responsible for *CCAA* filings in western Canada (CRA Representative) received the Initial Order. The curious routing was via a Department of Justice Canada (DOJ) lawyer who was given it by a party that noted CRA's manifest absence at the initial hearing.

11 On July 12, the Monitor published notice of the proceedings in one local and one national newspaper and created a proceeding-specific website.

12 By July 13, the Debtor's service package had wended its way from the CRA Office to the CRA Representative's hands.

13 Next, on July 20, when BDC had advanced $900,000 of the Priority $1,000,000 facility, the Debtors served a motion to extend the stay of proceedings (made in the Initial Order) returnable July 27 (Extension Motion). Again, service was on the CRA Offices.

14 Then, on July 21, CWB served another motion to appoint a receiver also returnable on July 27. CWB served CRA by sending the documents to a DOJ lawyer.

15 On July 25, the Debtors served CRA with an application to increase interim financing returnable July 27 on the ground that they had a new contract to supply camps for firefighters battling the wildfires then ravaging British Columbia (Enhanced Financing Motion).

16 Late on the afternoon of July 26, CRA's counsel emailed an unfiled version of this motion and a draft form of the order to be sought to the Monitor's and Debtors' counsel, who passed the information to BDC's counsel.

17 On July 27, all three motions proceeded. CRA appeared, taking no position. In the result, the stay of proceedings was extended until September 26, and the interim financing was increased to $2,500,000 (written reasons were later filed: 2017 ABQB 508 (Alta. Q.B.)). After the Court delivered its oral reasons for decision, CRA's counsel rose to advise that his client would be filing this motion, noting the risk to BDC for "additional advances subject to the Crown's charges." In response, BDC's counsel indicated that his client had earlier learned of CRA's intentions and was still prepared to advance under the facility.

The Legal Landscape

The CCAA and Judicial Decision Making

18 The *CCAA*'s purpose is to allow financially distressed businesses with more than $5,000,000 debt to keep operating and, where possible, avoid the social and economic costs of liquidation.

19 The *CCAA* process "creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all." [7]

20 When enacting the *CCAA*, Parliament understood that liquidation of insolvent businesses is harmful to creditors and employees and the optimal outcome is their survival. [8] This notion would not have been lost on Parliament when the *CCAA* was substantially amended in 2009 (2009 amendments). Indeed, in a post-2009 amendment case, *Sun Indalex Finance, LLC v. United Steelworkers*, [9] Cromwell J, concurring in result and writing for McLachlin CJ and Rothstein J, spoke of the *CCAA's* purpose saying:

> [It] is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. [10]

21 The Court's function during the *CCAA* stay period is to supervise and move the process to the point where the creditors approve a compromise or it becomes evident that the attempt is doomed to fail. [11] Typically, this requires balancing multiple interests.

22 *CCAA* s 11 cloaks the Court with broad discretionary power to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the *Act*. However, as the Supreme Court of Canada observed in *Century Services*, there are limits on the exercise of inherent judicial authority in a *CCAA* restructuring. [12]

23 The Supreme Court also provides this overarching direction for exercising *CCAA* judicial authority in *Century Services*:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit [13].

24 In interpreting and applying the *CCAA*, the Court is to employ a hierarchical approach, and consider and, if necessary, resolve the underlying policies at play. [14]

A Brief History of Deemed Trust Litigation

25 While there are other priority cases involving disputes between CRA and insolvent entities, this discussion necessarily begins with *Royal Bank of Canada v. Sparrow Electric Corp*. [15]

26 The contest in *Sparrow Electric* was between CRA's deemed trust claim for unremitted source deductions under the *ITA* and security interests under the *Bank Act* [16] and the Alberta *Personal Property Security Act*. [17] CRA lost the priority battle since the security interests were fixed charges attaching to the secured property when the debtor acquired it. Consequently,

CRA's deemed trust had no property to attach to when it later arose. In response to *Sparrow Electric*, Parliament amended the *ITA* by expanding s 227 (4) and adding s 227(4.1) (detailed below).

27 The next noteworthy case is *First Vancouver Finance v. MNR*, [18] which concerned a priority dispute between CRA's deemed tax trusts and the interest of a third party purchaser of assets bought in an insolvency proceeding sale. The interpretation of *ITA* s 227(4.1) was at the fore.

28 The Supreme Court found in favour of the third party purchaser. Writing for the majority, Iacobucci J noted:

a. In principle, the deemed trust is similar to a floating charge over all the debtor's assets in favour of the Crown (at para 40);

b. The deemed trust operates "in a continuous manner, attaching to any property which comes into the hands of the debtor as long as the debtor continues to be in default, and extending back in time to the moment of the initial deduction" (at para 33);

c. Property subject to the deemed trust can be alienated by the debtor, after which the deemed trust applies to the proceeds (at para 42); and

d. The deemed trust is not a "true trust," nor is it governed by common law requirements under ordinary principles of trust law, but the effect of s227(4.1) is to revitalize the trust whose subject matter has lost all identity (citing Gonthier J in *Sparrow Electric*) (at para 27-28).

29 The Supreme Court concluded that Parliament intended s 227(4) and (4.1):

. . . to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. (at para 28).

30 *First Vancouver* was considered in the 2007 decision, *Temple City Housing Inc (Companies' Creditors Arrangement Act)*, [19] and again in June 2017 in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*. [20]

31 In *Temple City*, CRA opposed a Priority charge in favour of an interim financier (then termed a debtor in possession, or DIP, financier) on the basis that it had a proprietary interest in the debtor's assets under its (tax) deemed trusts. Unlike this case, it was decided before the 2009 amendments.

32 Like others before her with no statutory authority to grant the super priority charges, Romaine J assessed the merits and relied on the Court's inherent jurisdiction to grant the charge.

33 The Alberta Court of Appeal denied leave to appeal, finding the issue unimportant to the practice because amendments allowing such charges were on the horizon and future cases would engage statutory interpretation (the Court of Appeal's forecast of looming amendments was sidelined by Parliamentary inaction, and the amendments were eventually proclaimed in force on September 18, 2009). The Court also found the issue unimportant to the case itself for two distinct reasons. First, the proceeding had taken on a momentum that would make it virtually impossible to "unscramble the egg." Second, an appeal would hinder the restructuring as the DIP lender would not advance without being in a priority position.

34 Next is the seminal decision in *Century Services*, which considered the deemed trust for GST arising under the *Excise Tax Act* (ETA). [21] Despite the different deemed trust at issue, *Century Services* is important for many reasons including, general interpretation of the *CCAA*, policy considerations, the Court's function, and the parameters for exercising inherent jurisdiction.

35 *Rosedale Farms* concerned deemed tax trusts and a super-priority interim financing charge in a *BIA* proposal scenario. The reasons disagree quite strongly with the logic of *Temple City*. The Court also found that because CRA did not have the requisite notice, it could not be bound by the interim financing Order.

36 I will return to the conflicting views expressed in *Temple City* and *Rosedale Farms* in the context of the priority analysis.

The Statutory Provisions

37 The relevant statutory provisions are set out below. All emphasis is mine.

38 *CCAA* s 2(1) defines the term, "secured creditor" as including:

> **a holder of . . . a trust** in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada... .

39 *ITA* s 224(1.3) defines "secured creditor" as "a person who has a security interest in the property of another person." It defines "security interest" as:

> **any interest in**, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, **created by or arising out of a** debenture, mortgage, hypothec, lien, pledge, charge, **deemed or actual trust,** assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.

40 The *EI Act* and *CPP Act* cross-reference these definitions.

41 The relevant portions of *CCAA* ss 11.2, 11.51, and 11.52 read:

> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**
>
> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> **(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.**

42 *CCAA* s 37, previously s 18.2, reads:

> 37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") . . . .

43 *ITA* ss 227(4) and (4.1) read:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada,** any enactment of a province or any other law, **where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid** to Her Majesty in the manner and at the time provided under this Act, **property of the person and property held by any secured creditor** (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust **is deemed**
>
> > (a) *to be held*, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, *in trust for Her Majesty whether or not the property is subject to such a security interest*, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> **and is property beneficially owned by Her Majesty** notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

44 *EI Act* s 86(2.1) and *CPP Act* s 23(3) are identical to *ITA* s 227(4.1).

45 With that legal backdrop, I turn now to address whether I can and, if so should, entertain CRA's motion, or whether it is properly the subject of an appeal to the Court of Appeal.

Jurisdiction to Entertain CRA's Motion

46 The language of the Comeback Provision is typical in initial *CCAA* Orders made in this province and elsewhere. It reads:

> 58 Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

47 The answer to whether I have jurisdiction to entertain CRA's motion or whether it is properly a subject of appeal to the Court of Appeal rests on the answers to: for whom and when is the Comeback Provision is available.

Who can rely on the Comeback Provision?

48 The Comeback Provision is available to any interested party. It is only logical that an interested party that was not given notice of a *CCAA* initial hearing can rely on the comeback clause. [22] Similarly, and depending upon the circumstances, an interested party given notice may also access the comeback clause.

49 CRA is an interested party that received notice of the motion for the Initial Order. While the Initial Order deemed that service to be good and sufficient, CRA's actual knowledge came the day after it occurred.

When can the Comeback Provision be used?

50 Recourse through the comeback clause is available when circumstances change. As explained in *Pacific National Lease Holding Corp., Re*:

> [I]n supervising a proceeding under the C.C.A.A. **orders are made, and orders are varied as changing circumstances require**. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. [23] [emphasis added]

51 Likewise, in *Re Royal Oak Mines Inc*, Blair J (as he then was) observed that the comeback clause is a means of sorting out issues as they arise during the course of the restructuring. [24]

52 Logically, non-disclosure of material information in an *ex parte* initial application also supports recourse via the comeback clause. [25]

53 An analogous form of statutory recourse is found in *BIA* s 187(5). A sparingly used tool, variance under this provision is a practical means of determining if an order should continue in the face of changed circumstances or fresh evidence. [26]

54 Equally, under r 9.15(1) of the Alberta *Rules of Court* the Court can set aside, vary, or discharge an entered judgment or order (interlocutory or final) if it was made without notice to an affected person, or to correct an accident or mistake if the person did not have adequate notice of the trial. In a similar vein, r 9.15(4) allows the Court to set aside, vary, or discharge an interlocutory order by agreement of the parties, or because of fresh evidence, or other grounds that the Court considers just.

55 Likely because many, if not most, *CCAA* authorities deal with variance of *ex parte* initial orders, little is written about recourse by appeal versus comeback. One example is the rather unusual case of *Re Algoma Steel Inc*, [27] where creditors filed a simultaneous comeback motion and appeal of the initial *ex parte* order. The appeal was heard first. The Court of Appeal found that the appeal was premature (because the order was a "lights on" order) and said that variance should have been pursued.

56 Comeback motions must be made *post haste* because of delay prejudice and the mounting prejudice caused by the momentum of proceeding itself - which Rowbothom JA described as the virtual impossibility of unscrambling the egg in *Temple City*. [28]

57 Next, I will discuss service and timing concerns.

Service

58 It is trite that the point of service is that a party must get notice of the proceeding and that a party serving documents on a proper address for service must be able to do so with confidence. [29]

59 As previously noted, CRA was served on June 28 at the CRA Office by courier delivery.

60 Rule 11.14(1)(b) provides that service is effected on statutory entities and other entities by "being sent by recorded mail, addressed to the entity, to the entity's principal place of business or activity in Alberta." Recorded mail includes mail by courier and the date of effective service is "on the date acknowledgement of receipt is signed": r 11.14(2)(b).

61 Rule 3.9 requires that an originating application and supporting affidavits be served at least 10 days before the return date. To comply, the Debtors had to serve by June 25, but because this date fell on a weekend, technically compliant service mandated delivery of the service package on June 23.

62 CRA points to the Office of the Superintendent of Bankruptcy's (OSB) website in defence of the position that service was lacking. In part, it reads:

> To make sure insolvency documents are processed quickly and effectively, you should send them to the appropriate area of the CRA.

The webpage also identifies "key processing areas for insolvency documents", which in this case is the office where the CRA Representative is located in Surrey, British Columbia.

63 The OSB website does not assist CRA. While companies seeking relief under the *CCAA* may retain insolvency professionals in advance of their filing, imposing an expectation that debtors heed the OSB's 'unofficial advice' is simply asking too much. More importantly, to require compliance is contrary to the Alberta *Rules of Court*.

64 Properly, CRA does not cast blame on the Debtors for the fact that its own challenges routing mail caused the delay in getting the service package into the right hands. What CRA does say is that despite this, it should have the opportunity to address its significant challenge to the Priority Charges because if the service package was delivered to the regional office responsible for *CCAA* matters by June 25, it was "very likely that CRA would have been represented at the July 5th application."

65 The Debtors effected service, albeit short notice service, on CRA, which the Court deemed to be good and sufficient. Short notice in insolvency proceedings is not a new concept and CRA is not new to insolvency proceedings. Indeed, it is a seasoned and sophisticated player in the *CCAA* arena with access to the might of the federal government's resources.

66 These observations aside, the *CCAA* is not all about technicalities and technical compliance. It is about ensuring maintenance of the *status quo* in the sorting-out period, balancing interests, and, in that vein, hearing from all affected voices whenever it is practicable to do so.

67 In the result, despite the glaring failure of CRA's mail management system and although CRA was effectively and technically served on June 28, the purpose of service was not fulfilled until July 6 when CRA became aware of the Initial Order. On this basis, I am satisfied that I have jurisdiction to hear the variance motion. In finding as I do, I am mindful that CRA is asking whether the Priority Charges ought to have been granted in the first instance, which could well be the subject of appeal. However, *Algoma Steel* supports the notion that variance may be the preferred route where a party did not have actual notice of an order made early in the proceeding.

Timing

68 While comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question." [30]

69 Armed with knowledge of the Initial Order the day after it was made and well-knowing that the beneficiaries of the Priority Charges would rely upon them, CRA waited twenty days to informally announce its intentions. Then, CRA chose to attend and take no position at the Extension and Enhanced Financing Motions. It also chose to defer advising the Court of this intended motion until after the Court delivered its decision on those motions.

70 CRA's dawdling put BDC, the Monitor, and perhaps the directors at risk of significant prejudice, and it is unfair for it to now ask that the priority be reversed before it gave meaningful notice to all affected parties.

71 The options for fixing the appropriate date of meaningful notice are the date of informal notice, the hearing date, and the release of these Reasons. In my view, the most appropriate date is the hearing of this motion because experience shows that not all informally announced motions actually proceed.

72 Accordingly, irrespective of whether CRA prevails at the end of the day, all of the Priority Charges should be unaffected until August 11, 2017.

73 I turn next to who bears the onus.

The Onus

74 The authorities disagree on who bears the onus where the party seeking to vary under a comeback clause was served. Indeed, Blair J (as he then was) observed that there may be no formal onus, but there "may well be a practical one if the relief sought goes against the established momentum of the proceeding." [31]

75 In *General Chemical Canada Ltd., Re*, [32] Farley J stated that "[I]n any comeback situation, the onus rests solely and squarely with the [initial] applicant to demonstrate why the original or initial order should stand."

76 In contrast, in *Re Target Canada Co*, Morowetz J directed a comeback hearing that was to be a "true" comeback hearing in which the applying party did "not have to overcome any onus of demonstrating that the order should be set aside or varied." [33] There, the initial order went beyond a usual "first day" order. While service was not addressed, it is evident that many, if not most, of the stakeholders were not represented at the hearing.

77 Considering the practicalities of *CCAA* matters, my view is that barring unforeseen circumstances, the onus on a variation application should be this:

- When the initial application is made *without notice* or with insufficient notice, the initial applicant bears the onus of satisfying the court that the terms of the initial order are appropriate.
- When the initial application is made *with notice*, the onus is on the party seeking the variation to show why it is appropriate and that the relief sought does not prejudice others who relied on the order in good faith.

78 I now turn to the substantive priority issue.

Who has priority?

79 It is beyond debate that *ITA* s227 (4) and the mirrored provisions in *EI Act* (s 86(2) and *CPP Act* (s 23(3)) create deemed trusts, and that *CCAA* s 37(2) explicitly preserves their operation. The debate is simply about whether CRA's interest arising from the deemed trusts can be subordinated by the Priority Charges.

80 Two principal questions arise:

i. What is the nature of CRA's interest?

ii. Does CRA's statutorily secured status elevate it above a Priority Charge?

What is the nature of CRA's interest?

81 CRA relies on the extension of trust provisions in the Fiscal Statutes to support the notion that it holds a proprietary rather than secured interest in the Debtors' property. Key to its position is the effect of the concluding phrase in s 227(4.1):

> Notwithstanding any other provision of this Act . . . property held by any secured creditor... is deemed...and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [emphasis added]

82 CRA asserts that these words take it beyond a mere secured creditor because they do not just *deem* the Crown to be the owner of the interest, but rather, says that it *is* the owner.

83 This is the same position CRA advocated in *Temple City*, where Romaine J distilled these features of tax deemed trusts from *First Vancouver* :

> • The "deemed trust" is not in "truth a real one as the subject matter of the trust cannot be identified from the date of creation of the trust;" and
>
> • In principle, the deemed trust is similar to a floating charge over all the assets of the tax debtor in that the tax debtor is free to alienate its property, and when it does, the trust releases the disposed-of property and attaches to the proceeds of sale. To find otherwise would freeze the tax debtor's assets and prevent it from carrying on business, which was clearly not a result intended by Parliament.

84 Justice Romaine determined that despite the concluding words of s 227(4.1) these features were inconsistent with a property interest, noting that the definition of a "security interest" in the *ITA* included a "deemed or actual trust", which supports the interest being capable of having the same treatment as a security interest under the *CCAA*. [34]

85 Moir J in *Rosedale Farms* disagreed finding instead that:

> • The analogy of the deemed trust to a floating charge in *First Vancouver* was not about creating security, but rather, sales made in the ordinary course of business. Iacobucci J's statement that the question of priority of secured creditors did not arise is noted. [35]
>
> • The "notwithstanding" language of *ITA* s 227(4.1) expressly overrides the *BIA* and all other enactments thereby giving priority to the deemed trust. [36]
>
> • Reliance on the *ITA* definition of "secured interest" is misguided. [37]

86 Moir J correctly notes Justice Iacobucci's observation that the creation of secured creditor priority did not arise in *First Vancouver* . However, as I read *Temple City*, the analysis did not rest on the floating charge analogy. Rather, like the *ITA* definition of "secured creditor," it was but one of several features supporting the result. That said the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings.

87 *Rosedale Farms* is distinguishable in that it concerned a *BIA* scenario. Nevertheless, even if it were otherwise, like Romaine J, I accept that the definitions of secured creditor and security interest in the *CCAA* and Fiscal Statutes support finding that the interests arising from the deemed trusts are security interests, not property interests. In particular, I note that s 224(1.3) defines a security interest as "any interest in property that secures payment . . . and includes a ... deemed or actual trust ... ."

88 Indeed, it would seem inconsistent to interpret the interest they create in a way contrary to their enabling statutes.

89 For these reasons, I conclude that CRA's interest is a security interest, not a proprietary interest. The impact and interplay of the "notwithstanding" language in *ITA* s 227(4.1), the discussion of which follows, does not change my conclusion.

Does CRA's statutorily secured status elevate it above the Priority Charges?

90 It may appear that *CCAA* ss 11.2, 11.51, or 11.52 conflict with the deemed trust sections in the Fiscal Statutes, and that a strict "black letter" reading of only ss 227(4) and (4.1) may support CRA's interpretation. However, one must not read

these provisions in a vacuum. The Fiscal Statutes, the *BIA*, and the *CCAA* are part of complex legislative schemes that operate concurrently and must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [38] Each references the other, expressly or impliedly, and it would be an error to focus on only one section in one piece of the entire scheme.

91 *ITA* s 227(4.1) opens with these words:

> **Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law**, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty notwithstanding any security interest in such property . . . . [emphasis added] (Notwithstanding Provision)

92 CRA points to the *obiter dicta* of Fish J (in his separate concurring reasons) in *Century Services* (at para 104) finding that Parliament intended deemed trusts to prevail in insolvency proceedings as a complete answer. The other members of the Court did not adopt his reasoning. For that reason, I cannot find his *obiter dicta* to be "the answer."

93 While the *CCAA* preserves the operation of the Fiscal Statutes deemed trusts, it also authorizes the reorganization of priorities through Court ordered priming.

94 CRA urges that the Fiscal Statutes and the *CCAA* can be 'stitched together' to read:

> Notwithstanding [sections 11, 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangements Act*,] property of [the Applicants] equal in value to the [unremitted source deductions] . . . is beneficially owned by Her Majesty notwithstanding any security interest in such property [including security interests granted pursuant to ss. 11.2, 11.51, or 11.52 of the *CCAA*] and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

95 The problem with "stitching" in this way is that incorporating these sections into the Notwithstanding Provision implies that they are somehow in conflict with it. The Supreme Court of Canada has taken a restrictive view of what constitutes a conflict between statutory provisions of the same legislature.

96 In *Thibodeau v Air Canada*, [39] the Court addressed whether there was a conflict between the *Official Languages Act* and the *Convention for the Unification of Certain Rules for International Carriage by Air*, concluding that there is a conflict between two provisions of the same legislature "*only* when the existence of the conflict, in the restrictive sense of the word, *cannot be avoided by interpretation*" [40] [emphasis added]. Nothing in these *CCAA* sections directly conflict with s 227(4.1) and thus, one must attempt to interpret these provisions without conflict.

97 Further, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [41] the Supreme Court of Canada, dealing with another complex legislative scheme, said:

> The provisions at issue are found in statutes which are themselves components of a larger statutory scheme **which cannot be ignored**:
>
> > As the product of a rational and logical legislature, the statute is considered to form a system. **Every component contributes to the meaning as a whole**, and the whole gives meaning to its parts: "each legal provision should be considered in relation to other provisions, as parts of a whole" . . . .
> >
> > (P. -A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p 308)
> >
> > As in any statutory interpretation exercise . . . courts need to examine **the context that colours the words and the legislative scheme**. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute **while preserving the harmony, coherence and consistency of the legislative sch**eme (***Bell ExpressVu***, at

para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": ***Bristol-Myers Squibb Co***., at para. 102. [emphasis added]

98 Deschamps J observed in *Century Services*, at para. 15:

> . . . the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

99 She also quoted with approval the reasons of Doherty JA in *Elan Corp v Comiskey*[42] (Doherty JA was dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

100 In a survey of *CCAA* cases, Dr. Janis Sarra found that 75% of the restructurings required the aid of interim lenders.[43]

101 In *Indalex*, the Supreme Court of Canada observed the phenomenon, citing Sarra, and said:

> . . . case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries.[44]

102 The interim financiers' charge provides both an incentive and guarantee to the lender that funds advanced in the course of the restructuring will be recovered. Without this charge such financing would simply end, and with that, so too would end the hope of positive *CCAA* outcomes. Here, I digress to note the increasing prevalence of interim financiers having no prior relationship to the debtor. It does not take a stretch of imagination to forecast that this practice will diminish if not end altogether without the comfort of super-priority charges.

103 Similarly, the charge in favour of directors is important. The charge is intended to keep the captains aboard the sinking ship. Without the benefit of this charge, directors will be inclined to abandon the ship, and it would be remarkably difficult, if not impossible, to recruit replacements.

104 Likewise, the priority charge for administrative fees is critical to a successful restructuring. Indeed, it is the only protection the Monitor has to ensure that its bills are paid. While the debtor's counsel has the option of resigning if its accounts go unpaid, the Monitor does not have that luxury. As a Court officer, the Monitor's job is to see the proceeding through to completion or failure and would need Court approval to be relieved of that duty. Finally, insolvency practitioners well know that they typically do not have to look to the administrative charge for their initial work — where it has the most significance is at the end.

105 Further, the 2009 amendments codifying and elaborating on priority charges that had previously been granted under the Court's residual, inherent jurisdiction, shows Parliament's intention that secured creditors' interests could be eroded if the Court was satisfied of the need.

106 Had Parliament wanted to limit the Court's ability to give priority to these charges, it could have drafted s 11.52(2) (and the mirror provisions) to expressly provide:

> . . . priority over the claim of any secured creditor **except the claim of Her Majesty over deemed trusts under s. 227(4) and (4.1) of the Income Tax Act**.

107 CRA's interpretation recognizes the obvious, underlying policy reason favouring the collection of unremitted source deductions, which is described as being "at the heart" of income tax collection in Canada": *First Vancouver* at para 22. However, it fails to reconcile that objective with the Canadian insolvency restructuring regime and Parliament's continued commitment

(as evidenced by the 2009 amendments) to facilitating complex corporate *CCAA* restructurings, even if erosion of security is required.

108 The *CCAA*'s aim is to facilitate business survival and avoid the multiple traumas occasioned by business failure. Interim financiers are an integral part of the restructuring process. Without them, most *CCAA* restructurings could not get off the ground. Likewise, directors and insolvency professionals are essential to the process, and they too need the comfort of primed charges to fully engage in the process. Surely, Parliament knew all of these things when it passed the 2009 amendments authorizing primed charges.

109 CRA's position, which it acknowledges will cause a chill on complex restructurings, undermines the *CCAA*'s purpose for the sake of tax collection. It disregards the rather obvious, that successful corporate restructurings result in continued jobs to fuel and fund its source deduction tax base. Notably, its interpretation fails to reconcile these purposes.

110 The Fiscal Statutes and the *CCAA* should, if possible, be interpreted harmoniously to ensure that Parliament's intention in the entire scheme is fulfilled.

111 It is logical to infer that Parliament intended to create a co-existing statutory scheme that accomplished the goals of both the Fiscal Statues and the *CCAA*. In my view, it is possible to construe these legislative provisions in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme.

112 I conclude that it is the Court's order that sets the priority of the charges at issue. The relevant *CCAA* sections allow the Court, where appropriate, to grant priority *only* to those charges necessary for restructuring. The purpose of the deemed trusts in the Fiscal Statutes is still met as deemed trusts maintain their priority status over *all other* security interests, but those ordered under ss 11.2, 11.51, and 11.52.

113 A harmonious interpretation respecting both sets of statutory goals is one that preserves the deemed priority status over all security interests, subject to a Court order under *CCAA* ss 11.2, 11.51, and 11.52 granting a "super priority' to those charges.

114 For these reasons, I find that the *CCAA* gives the Court the ability to rank the Priority Charges ahead of CRA's security interest arising out of the deemed trusts.

Order accordingly.

Footnotes

1 RSC 1985, c C-36 as amended, ss 11.2, 11.4, 11.51 11.52.

2 RSC, 1985, c 1 (5th Supp) 6.

3 RSC 1985, c C-8.

4 SC 1996, c 23.

5 Para 44 of the Initial Order provides that the Priority Charges constitute a charge on all of the debtors' property which, subject to s 34(11) of the *CCAA*, rank in priority to all other security interests, including trusts, liens, and encumbrances, statutory or otherwise.

6 RSC 1985, c B-3.

7 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 77, [2010] 3 S.C.R. 379 (S.C.C.).

8 *Century Services* at paras 15, 17.

9 *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205, [2013] 1 S.C.R. 271 (S.C.C.).

10 ***Indalex*** at para 105.

11 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.) at 140, (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.).

12 *Century Services* at paras 64-66.

13 ***Century Services*** at para 70.

14 *Century Services* at paras 65 and 70.

15 *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) .

16 *SC 1991, c 46.*

17 SA 1988, c P-4.05.

18 *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720 (S.C.C.).

19 *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274 (Alta. Q.B.), leave to appeal denied *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 43 C.B.R. (5th) 35 (Alta. C.A.).

20 *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.).

21 *RSC 1985, c E15.*

22 *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para 5; *Comstock Canada Ltd., Re*, 2013 ONSC 4756, 4 C.B.R. (6th) 47 (Ont. S.C.J.) at para 49; *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.); *CanaSea PetroGas Group Holdings Ltd., Re* (2014), 18 C.B.R. (6th) 283 (Ont. S.C.J.) at paras 13-14.

23 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265, 72 B.C.L.R. (2d) 368 (B.C. C.A. [In Chambers]) at para 30.

24 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at para 28.

25 *Re CanaSea PetroGas Group Holdings Ltd*.

26 *Elias v. Hutchison* (1980), 12 Alta. L.R. (2d) 241 (Alta. Q.B.) (at para 6), (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.), aff'd (1981), 121 D.L.R. (3d) 95, 37 C.B.R. (N.S.) 149 (Alta. C.A.); *Christiansen v. Paramount Developments Corp.*, 1998 ABQB 1005 (Alta. Q.B.) (at para 24), (1998), 8 C.B.R. (4th) 220 (Alta. Q.B.); *Fitch v. Official Receiver* (1995), [1996] 1 W.L.R. 242 (Eng. C.A.); *Lyall, Re* (1991), 8 C.B.R. (3d) 82 (B.C. S.C.).

27 *Algoma Steel Inc., Re*, [2001] O.J. No. 1994 (Ont. S.C.J. [Commercial List]), leave to appeal refused, (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 (Ont. C.A.).

28 At para 14.

29 *Concrete Equities Inc., Re*, 2012 ABCA 266 (Alta. C.A.) at paras 19, 24.

30 *Muscletech*, at para 5.

31 *Royal Oak*, at para 28.

32 *General Chemical Canada Ltd., Re* (2005), 7 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) at para 2.

33 *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.) at para 82.

34 *Temple City*, at para 13.

35 *Rosedale Farms*, at para 39.

36 *Ibid*, para 35.

37 *Ibid*, para 29.

38 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21.

39 *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.).

40 *Thibodeau* at para 92.

41 *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.).

42 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.) at para 57.

43 Janis P Sarra, *Rescue!: Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199.

44 ***Indalex*** at para 59.

TAB 8

2011 ONSC 2215
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2011 CarswellOnt 2392, 2011 ONSC 2215, [2011] O.J. No. 1590, 200 A.C.W.S. (3d) 1023, 75 C.B.R. (5th) 156

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

And In the Matter of a Plan of Compromise or Arrangement of
Canwest Global Communications Corp. and Other Applicants

Pepall J.

Judgment: April 7, 2011
Docket: CV-09-8396-00CL

Counsel: Douglas J. Wray, Jesse B. Kugler for Applicant, Communications, Energy and Paperworkers Union of Canada
David Byers, Maria Konyukhova for Monitor

Subject: Insolvency; Labour; Public

Headnote

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

C Entities obtained initial order under Companies' Creditors Arrangement Act (CCAA) staying all proceedings against them — As part of CCAA proceedings, claims procedure order was granted which established procedure for identification and quantification of claims against C Entities — B was dismissed after having been employed by division of one of C Entities for 20 years — Union filed claims pursuant to claims procedure order in respect of certain outstanding grievances — Claim with respect to B's grievances was not resolved — Plan was implemented, at which time all operating assets of C Entities were transferred and C Entities ceased operations — Stay with respect to employer was terminated — Stay with respect to remaining C Entities was extended — Union brought motion for order lifting stay of proceedings in respect of B's grievances and directing that they be adjudicated in accordance with collective agreement — Motion granted — Generally speaking, grievances should be adjudicated along with other claims pursuant to provisions of claims procedure order within context of CCAA proceedings — Present case was unique — Employer emerged from CCAA protection and was currently operating under different name — B was 20 year employee — Given stage of CCAA proceedings, fact that stay relating to employer had been lifted, and B's employment tenure, B ought to be given opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by claims officer if so ordered — No meaningful prejudice would ensue to any stakeholder — Balance of convenience and interests of justice favoured lifting stay to permit grievances to proceed through arbitration rather than before claims procedure officer.

Table of Authorities

Cases considered by *Pepall J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7882, 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]) — followed

Canwest Global Communications Corp., Re (2010), 321 D.L.R. (4th) 561, 2010 ONSC 1746, 2010 CarswellOnt 3948, 82 C.C.E.L. (3d) 180 (Ont. S.C.J. [Commercial List]) — considered

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 C.L.L.C. 220-035, 363 N.R. 226, 400 W.A.C. 1, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 242 B.C.A.C. 1, 164 L.A.C. (4th) 1, 157 C.R.R. 21, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, [2007] 2 S.C.R. 391 (S.C.C.) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, *(*sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, *(*sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 14255, [2010] R.J.Q. 1518, [2010] R.J.D.T. 887, 2010 CarswellQue 6229, 2010 QCCS 2590, D.T.E. 2010T-443, 65 C.B.R. (5th) 186, 82 C.C.P.B. 192 (C.S. Que.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 33 [en. 2005, c. 47, s. 131] — referred to

s. 33(1) [en. 2005, c. 47, s. 131] — referred to

s. 33(8) [en. 2005, c. 47, s. 131] — referred to

MOTION by union for order lifting stay of proceedings in respect of certain grievances and ordering adjudication pursuant to collective agreement.

***Pepall J.*:**

Introduction

1 The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

2 On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**
>
> 15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended

pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

3 On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, "Claim" is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date [1] (a "Prefiling Claim") and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a "Restructuring Claim"). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

4 On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

5 On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

6 John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA] [2] . The Union reserves its right to make further submissions in this regard.

7 In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

8 The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept, settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

9 The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

10 CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

11 For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

12 Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

13 Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

14 The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

15 Both parties agree that the following two issues are to be considered:

> (a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?
>
> (b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

16 In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

17 Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

18 The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

19 The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

20 As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* [3], the claims procedure order does not interfere with freedom of association.

21 Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

22 The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Ltd., Re* [4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

23 The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding Up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an *Act* referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

24 As the Court of Appeal noted in *Nortel Networks Corp., Re* [5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Ltd.* [6].

25 Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lehndorff General Partner Ltd.* [7]:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

26 In *Canwest Global Communications Corp., Re* [8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Canadian Airlines Corp., Re.* [9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*" [10]. They included where:

a) a plan is likely to fail;

b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

c) the applicant shows necessity for payment;

d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;

g) there is a real risk that a creditor's loan will become unsecured during the stay period;

h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

i) it is in the interests of justice to do so.

27 The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp., Re*[11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

28 There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Smoky River Coal Ltd., Re*[12], the issue was whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[13]

29 I do recognize that the *Smoky River* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

30 In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

31 The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

32 Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA*

proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

33 The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

34 That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

35 As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

36 In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

37 Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

38 Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Co., Re* [14] . He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." [15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process. [16]

39 In *Canwest Global Communications Corp., Re*. [17] , I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status." [18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly. [19]

40 I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

41 Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

42 CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* [20] , the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process. [21]

43 In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

44 Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

Motion granted.

Footnotes

1 The Filing Date was October 6, 2009, the date of the initial order.

2 The words in brackets were omitted but presumably this was the intention.

3 (S.C.C.).

4 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 6.

5 (Ont. C.A.) at para. 33.

6 *Supra*, note 4 at para. 10.

7 *Ibid*, at para. 6.

8 (Ont. S.C.J. [Commercial List]).

9 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)

10 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

11 *Supra*, note 8 at para. 32.

12 (Alta. C.A.)

13 *Ibid*, at para. 33.

14 2010 QCCS 2590 (C.S. Que.)

15 *Ibid*, at para. 31.

16 *Ibid*, at para. 35.

17 (Ont. S.C.J. [Commercial List])

18 *Ibid*, at para. 32.

19 *Ibid*, at para. 33.

20 *Supra*, note 3.

21 *Ibid*, at at paras. 19 and 29.

TAB 9

2000 CarswellAlta 622
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 622, [2000] A.W.L.D. 666, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1

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

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.
S. Dunphy, for Air Canada and 853350 Alberta Ltd.
R. Anderson, Q.C., for Loyalty Group.
H. Gorman, for ABN AMRO Bank N.V.
P. McCarthy, for Monitor - Price Waterhouse Cooper.
D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.
C.J. Shaw, for Airline Pilots Association International.
G. Wells, for NavCanada.
D. Hardy, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Headnote

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

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral — Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

2000 CarswellAlta 622, [2000] A.W.L.D. 666, [2000] A.J. No. 1692, 19 C.B.R. (4th) 1

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Table of Authorities

Cases considered by *Paperny J.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) — considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) — referred to

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

Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 15 C.B.R. (3d) 57 (note), 143 N.R. 286 (note), 70 B.C.L.R. (2d) xxxiii (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note) (S.C.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — considered

s. 11 — considered

s. 11(4) — considered

APPLICATION by holders of senior secured notes in corporation for order lifting stay of proceedings against them in *Companies' Creditors Arrangement Act* proceeding to allow for appointment of receiver and manager over assets and property

charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Paperny J. **(orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and

2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> 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 problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

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

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

> 1. When the plan is likely to fail;
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
>
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
>
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
>
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

End of Document

TAB 10

2012 ONSC 2515
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 5390, 2012 ONSC 2515, 216 A.C.W.S. (3d) 286

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
Timminco Limited and Bécancour Silicon Inc., Applicants

Morawetz J.

Heard: March 26, 2012
Judgment: April 27, 2012
Docket: CV-12-9539-00CL

Counsel: James C. Orr, N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, Penneyfeather v. Timminco Limited et al
P. O'Kelly, A. Taylor, for Applicants
P. LeVay, for Photon Defendants
A. Lockhart, for Wacker Chemie AG
K.D. Kraft, for Chubb Insurance Company of Canada
D.J. Bell, for John P. Walsh
A. Hatnay, James Harnum, for Mercer Canada, Administrator of the Timminco Haley Plan
S. Weisz, for Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Plaintiff sought to bring class proceedings regarding insurance proceeds against company that was protected under Companies' Creditors Arrangement Act — Stay under Act was lifted for purposes of bringing leave to appeal regarding limitation period — Hearing was held regarding lifting stay generally — Stay not lifted — Stay was put in place for restructuring and sale — If plaintiff's proceedings were to continue, executive team would have to devote considerable time to proceedings — Time sensitivity was largely alleviated by lifting stay with regards to leave proceedings — Insurance proceeds were not available to other creditors.

Table of Authorities

Cases considered by *Morawetz J.*:

Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Canwest Global Communications Corp., Re (2011), 2011 ONSC 2215, 2011 CarswellOnt 2392, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) — referred to

Carey Canada Inc., Re (2006), 29 C.B.R. (5th) 81, 2006 CarswellOnt 7748 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton (2001), *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R.

(3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 12 — referred to

s. 28 — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

s. 138.14 [en. 2002, c. 22, s. 185] — referred to

HEARING regarding lifting stay of proceedings imposed under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

2 The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;

(b) a motion to substitute the Representative Plaintiff;

(c) a motion to force disclosure of insurance policies;

(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

(e) settlement discussions;

(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;

(g) a motion for particulars; and

(h) a motion served but not heard to strike portions of the Statement of Claim.

3 On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

4 The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

5 On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

6 Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

7 Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

8 Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

9 Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank*, [1992] O.J. No. 889 (Ont. C.A.) at paras. 13-15 and *Carey Canada Inc., Re*, [2006] O.J. No. 4905 (Ont. S.C.J. [Commercial List]) at paras. 7, 16-17.)

10 In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

11 The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

12 Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

13 Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

14 It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

15 The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order

to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Stelco Inc., Re*, [2005] O.J. No. 1171 (Ont. C.A.) at para. 36.

16 Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp., Re*, [2011] O.J. No. 1590 (Ont. S.C.J. [Commercial List]) at para. 27.

17 Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re)*, *supra*, at para. 27.

18 Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

19 I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

20 It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

21 In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

22 Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

23 With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order

would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

24 I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

25 In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

Order accordingly.

End of Document

TAB 11

2007 ABCA 266
Alberta Court of Appeal (In Chambers)

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 1097, 2007 ABCA 266, [2007] A.W.L.D. 3481, [2007] A.J. No. 917, 161 A.C.W.S. (3d) 370, 33 B.L.R. (4th) 94, 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 80 Alta. L.R. (4th) 60

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

And In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited and 3094479 Nova Scotia Company (the "CCAA Applicants")

Calpine Power L.P. (Appellant / Applicant (Creditor)) and The CCAA Applicants and Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership (Respondents / Applicants)

Calpine Canada Natural Gas Partnership (Respondent / Applicant / CCAA Party) and Calpine Energy Services Canada Partnership and Lisa Winslow, Trustee of Calpine Greenfield Commercial Trust (Respondents / (CCAA Applicant and Interested Parties)) and Calpine Power L.P. (Appellant / Applicant / (Creditor in CCAA Proceedings))

C. O'Brien J.A.

Heard: August 15, 2007
Judgment: August 17, 2007
Docket: Calgary Appeal 0701-0222-AC, 0701-0223-AC

Proceedings: refusing leave to appeal *Calpine Canada Energy Ltd., Re* (2007), 2007 CarswellAlta 1050, 2007 ABQB 504 (Alta. Q.B.)

Counsel: P.T. Linder, Q.C., R. Van Dorp for Applicant, CPL
L.B. Robinson, Q.C., S.F. Collins, J.A. Carfagnini for CCAA Applicants and the CCAA Parties (Respondents)
H.A. Gorman for Ad Hoc ULCI Noteholders Committee
P.H. Griffin, U. Sheikh for Calpine Corporation and other US Debtors
F.R. Dearlove for HSBC
P. McCarthy, Q.C., J. Kruger for Ernst & Young Inc., the Monitor
N.S. Rabinovitch for Lien Debtholders
R. De Waal for Unsecured Creditors Committee

Subject: Insolvency
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Applicants obtained order granting them protection from their creditors under Companies' Creditors Arrangement Act ("CCAA") — Order appointed monitor and provided for stay of proceedings against applicants and against CESC Partnership, CCNG Partnership, and CCS Limited Partnership — Applicants and these three parties were together referred to as CCAA debtors — Parties negotiated terms of global settlement agreement ("GSA") — Monitor noted that GSA resolved all material

issues that existed between applicants and US debtors — Monitor concluded that GSA was beneficial to CCAA debtors and their creditors and unequivocally endorsed GSA — Application for approval of settlement was granted and GSA was approved — Supervising judge found that GSA was not linked to or subject to plan of arrangement and did not compromise rights of creditors that were not parties to it or did not consent to it, and did not have effect of unilaterally depriving creditors of contractual rights without their participation in GSA — Applicants were granted order approving terms of GSA and directing various parties to execute such documents and implement transactions necessary to give effect to GSA, order permitting CCR Co. and its holdings of CCEF ULC Notes to take necessary steps to sell Notes, and extension of stay contemplated by initial order to December 20, 2007 — Creditor brought application for stay pending appeal and leave to appeal three orders on basis that supervising judge erred in concluding that GSA was not compromise or plan of arrangement — Application dismissed — Supervising judge did not make any palpable or overriding error — Supervising judge had discretion to approve GSA — Creditor failed to establish serious and arguable grounds for granting leave — Creditor did not demonstrate that appeal for leave was sought was prima facie meritorious — There was no compromise of debt if indebtedness was paid in full which was likely result as found by supervising judge — Fact that GSA impacted upon assets of debtor companies was common feature of any settlement agreement and did not automatically result in vote by creditors — GSA did not usurp right of creditors to vote on plan of arrangement if it became necessary to propose such plan to creditors — Settlement between CCAA debtors and US debtors unlocked Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided mechanisms for resolving remaining issues and significant creditor claims, and clarification of priorities.

Table of Authorities

Cases considered by *C. O'Brien J.A.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

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

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — followed

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — referred to

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — considered

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288, 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11(4) — referred to

APPLICATION by creditor for stay pending appeal and leave to appeal from judgment reported at *Calpine Canada Energy Ltd., Re* (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 33 B.L.R. (4th) 68 (Alta. Q.B.), granting application for approval of settlement.

***C. O'Brien J.A.*:**

Introduction

1 Calpine Power L.P. (CLP) applies for a stay pending appeal and leave to appeal three orders granted on July 24, 2007 in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (CCAA). At the request of counsel, the applications have been dealt with on an expedited basis. Oral submissions were heard on August 15, at the close of which I undertook to deliver judgment by the end of the week. I do so now.

Background facts

2 In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the CCAA. At the same time, the parties referred to as the US Debtors sought and obtained similar protection under Chapter 11 of the U. S. Bankruptcy Code.

3 A monitor, Ernst & Young Inc., was appointed under the CCAA proceedings and a stay of proceedings was ordered against the CCAA Applicants and against Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership. The latter three parties collectively are referred to as the CCAA Parties and those parties together with the CCAA Applicants as the CCAA Debtors.

4 This insolvency is extremely complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets has been made more difficult by a number of cross-border issues.

5 As described in the Monitor's 23rd Report, dated June 28, 2007, the CCAA Debtors and the US Debtors concluded that the most appropriate way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the material cross-border issues between them. The parties negotiated a global settlement agreement (GSA) subject to the approval of both Canadian and U. S. courts, execution of the GSA and the sale by Calpine Canada Resources Company of its holdings of Calpine Canada Energy Finance ULC (ULC1) Notes in the face amount of US$359,770,000 (the CCRC ULC1 Notes). Counsel at the oral hearing informed me that the Notes were sold on August 14, 2007, yielding a net amount of approximately US $403 million, an amount exceeding the face amount.

6 On July 24, 2007, the CCAA Applicants sought and obtained three orders. First, an order approving the terms of the GSA and directing the various parties to execute such documents and implement the transactions necessary to give effect to the GSA. Second, an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, an extension of the stay contemplated by the initial CCAA order to December 20, 2007. No objection was taken to the latter two orders and both were granted. The supervising judge also, in brief oral reasons, approved the GSA with written reasons to follow. Written Reasons for Judgment were subsequently filed on July 31, 2007: *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 (Alta. Q.B.). The reasons are careful and detailed. They fully set out the relevant facts and canvas the applicable law and as I see no need to repeat the facts and authorities, the reasons should be read in conjunction with these relatively short reasons dealing with the applications arising therefrom.

7 The applications to the supervising judge were made concurrently with applications by the US Debtors to the US Bankruptcy Court in New York state, the applications proceeding simultaneously by video conference. The applications to the US Court, including an application for approval of the GSA, were also granted.

8 The applicant, CLP, the Calpine Canada Energy Finance II ULC (ULC2) Indenture Trustee and a group referring to itself as the "Ad Hoc Committee of Creditors of Calpine Canada Resources Company" opposed the approval of the GSA. CPL is the only party seeking leave to appeal.

9 CLP submits that the supervising judge erred in concluding that the GSA was not a compromise or plan of arrangement and therefore, sections 4 and 5 of the CCAA did not apply and no vote by creditors was necessary.

10 Sections 4 and 5 of the CCAA provide:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

11 CLP further submits that the jurisdiction of the supervising judge to approve the GSA is governed by section 6 of the CCAA. Section 6 provides:

> 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 bankruptcy 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.

12 The supervising judge found that the GSA is not linked to or subject to a plan of arrangement and does not compromise the rights of creditors that are not parties to it or have not consented to it, and it does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. She concluded that the GSA was not a compromise or arrangement for the purposes of section 4 of the CCAA. In the course of her reasons she cites a number of cases for support that the court has jurisdiction to review and approve transactions and settlement agreements during the stay period of a CCAA proceedings if an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

Test for leave to appeal

13 This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (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.

14 In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the proceedings

which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Analysis

15 The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was "not a plan of compromise or arrangement with creditors" (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

16 The statute itself contains no definition of a compromise or arrangement. Moreover, it does not appear that a compromise or an arrangement has been *proposed* between a debtor company and either its unsecured or secured creditors, or any class of them within the scope of sections 4 or 5 of the CCAA. Neither the company, a creditor, nor anyone made application to convene a meeting under those sections.

17 Rather, the GSA settles certain intercorporate claims between certain Canadian Calpine entities and certain US Calpine entities subject to certain conditions, including the approvals both of the Court of Queen's Bench of Alberta and of the US Bankruptcy Court.

18 This is not to minimize the magnitude, significance and complexity of the issues dealt with in the intercorporate settlement which, by definition, was not between arm's length companies. The material cross-border issues are identified in the 23 rd Report of the monitor and listed by the supervising judge (Reasons, para. 5).

19 It is implicit in her reasons, if not express, that the supervising judge accepted the analysis of the monitor, and found that the GSA would likely ultimately result in payment in full of all Canadian creditors, including CLP. CLP does not challenge this finding, but points out that payment is not assured, and rightly relies upon its status as a creditor to challenge the approval in the meantime until such time as it has been paid.

20 The supervising judge further found that the GSA "does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA" (Reasons, para. 51). CPL challenges this finding. In order to succeed in its proposed appeal, CPL must also demonstrate palpable and overriding error in these further findings of the supervising judge which once again, involve findings of fact or of mixed law and fact.

Application in this case

21 CPL submits that the "fundamental problem" with the approval granted by the supervising judge is that the GSA is in reality a plan of arrangement because it settles virtually all matters in dispute in the Canadian CCAA estate and therefore, entitles the applicant to a vote. CPL argues that the GSA must be an arrangement or compromise within the meaning of sections 4, 5 and 6 of the CCAA because, in its view, the GSA requires non party creditors to make concessions, re-orders the priorities of creditors and distributes assets of the estate.

22 The supervising judge acknowledged at the outset of her analysis that if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary (Reasons, para. 41). However, she was satisfied that the GSA did not constitute a plan of arrangement with creditors.

23 The applicant conceded that a CCAA supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors. This concession was proper having regard to case authority recognizing such jurisdiction and cited in the reasons of the supervising judge, including *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]), *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-*

Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) and *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.).

24 The power to approve such transactions during the stay is not spelled out in the CCAA. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of the debtor until it can present a plan: *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) at para. 8.

25 Hunt, J.A. in delivering the judgment of this Court in *Smoky River Coal*considered the history of the legislation and its objectives in allowing the company to take steps to promote a successful eventual arrangement. She concluded at para. 53:

> These statements about the goals and operation of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

and further at para. 60:

> To summarize, the language of s. 11(4) is very broad. The CCAA must be interpreted in a remedial fashion.

26 In my view, there is no serious issue as to the jurisdiction of a supervising judge to approve a settlement agreement between consenting parties prior to consideration of a plan of arrangement pursuant to section 6 of the CCAA. The fact that the GSA is not a simple agreement between two parties, but rather resolves a number of complex issues between a number of parties, does not affect the jurisdiction of the court to approve the agreement if it is for the general benefit of all parties and otherwise meets the tests identified in the reasons of the supervising judge.

27 CPL urges that the legal issue for determination by this Court is where the line is to be drawn to say when a settlement becomes a compromise or arrangement, thus requiring a vote under section 6 before the court can grant approval. It suggests that it would be useful to this practice area for the court to set out the criteria to be considered in this regard.

28 An element of compromise is inherent in a settlement as there is invariably some give and take by the parties in reaching their agreement. The parties to the GSA made concessions for the purpose of gaining benefits. It is obvious that something more than compromise between consenting parties within a settlement agreement is required to constitute an arrangement or compromise for purposes of the CCAA as if that were not so, no settlement agreement could be approved without a vote of the creditors. As noted, that is contrary to case authority accepted by all parties to these applications.

29 The CCAA deals with compromises or arrangements sought to be imposed upon creditors generally, or classes of creditors, and a vote is a necessary mechanism to determine whether the appropriate majority of the creditors proposed to be affected support the proposed compromise or arrangement.

30 As pointed out by the supervising judge, a settlement will almost always have an impact on the financial circumstances of a debtor. A settlement will invariably have an effect on the size of the estate available for other claimants (Reasons, para. 62).

31 Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the CCAA, and that the settlement merited approval. She recognized the peculiar circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

32 At the time of granting her approval, the supervising judge had been overseeing the conduct of these CCAA proceedings since their inception — some 18 months earlier. She had the benefit of the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

33 CPL submits that the GSA compromises its rights and claims, and thus, challenges the express finding of the supervising judge that the settlement neither compromises the rights of creditors before it, nor deprives them of their existing contractual rights. The applicant relies upon the following effects of the GSA in making this submission:

> (i) a priority payment of $75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;
>
> (ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;
>
> (iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and
>
> (iv) the dismissal of the Greenfield Action brought by another CCAA Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

34 For purposes of the CCAA proceedings, the applicant is a creditor of Calpine Energy Services Canada Ltd., Calpine Canada Power Ltd. and perhaps, also, Calpine Canada Resources Company. The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.

35 In my view, the submission of the applicant does not show any palpable and overriding error in the findings of the supervising judge that the right of creditors not parties to the GSA have not been compromised or taken away. Firstly, there is no compromise of debt if such indebtedness, as ultimately found due to the applicant, is paid in full, which is the likely result as found by the supervising judge, albeit she acknowledged that this result was not guaranteed (Reasons, para. 81). Secondly, and in any event, the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

36 The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge, the settlement between the CCAA Debtors and the US Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

37 It is correct, of course, that if the claims of CPL are paid in full in the course of the CCAA proceedings, it will never be necessary for it to vote on a plan of arrangement. The applicant should have no complaint with that result. On the other hand, if the claims are not satisfied, it seems likely a plan of arrangement will ultimately be proposed to the applicant, who will then have its right to vote on any such plan.

38 CPL argues that the supervising judge was not entitled to assess the merits of the GSA *vis-à-vis* the creditors as this was a matter for the exclusive business judgment of the creditors and to be exercised by their vote. As became apparent during the course of its submissions, if a vote were required, from the perspective of the CPL, this would give it veto power over the

GSA. Unless clearly mandated by the statute, this is a result to be avoided. While it is understandable that an individual creditor seeks to obtain as much leverage as possible in order to enhance its negotiating position, the objectives and purposes of the CCAA could easily be frustrated in such circumstances by the self interest of a single creditor. Court approval requires, as a primary consideration, the determination that an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. As the supervising judge noted, court approval of settlements and major transaction can and often is given over the objections of one or more parties because the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation.

39 I am not persuaded that the applicant has demonstrated any reasonably arguable error of law in the reasons of the supervising judge or any palpable and overriding errors in her findings of fact or findings of mixed fact and law. In the absence of any such error, it follows that she had discretion to approve the GSA, which she exercised based upon her assessment of the merits and reasonableness of the settlement, and other factors in accordance with the principles set out in the authorities, cited in her reasons, governing the approval of transactions, including settlements, during the stay period prior to a plan of arrangement being submitted to the creditors.

Conclusion

40 CPL has failed to establish serious and arguable grounds for granting leave. In particular, two of the factors used to assess whether this criterion is present have not been met. It has not been demonstrated that the point on appeal is of significance to the parties having regard to the fact dependent nature of whether a plan of arrangement has been proposed to creditors. More importantly, having regard to the standard of review and the findings of the supervising judge, the applicant has not demonstrated that the appeal for which leave is sought is *prima facie* meritorious.

41 The application for leave is dismissed. It follows that the application for a stay likewise fails and is dismissed.

42 Finally, I would be remiss if I did not acknowledge the excellent quality of the submissions, both written and oral, of counsel on these applications. The submissions were of great assistance in permitting the application to be dealt with in an abbreviated time frame.

Application dismissed.

TAB 12

2004 CarswellQue 300
Quebec Superior Court

Boutiques San Francisco Inc., Re

2004 CarswellQue 300, [2004] R.J.Q. 986, [2004] Q.J. No. 2886, 5 C.B.R. (5th) 174, J.E. 2004-620, REJB 2004-54298

Les Boutiques San Francisco Incorporées, Les Ailes de la Mode Incorporées and Les Éditions San Francisco Incorporées (Debtors) and Ritchter & Associés Inc. (Monitor) and L'Oréal Canada inc. and Make Up For Ever S.A. (Petitioners)

Gascon J.S.C.

Heard: January 29, 2004
Judgment: February 10, 2004
Docket: C.S. Montréal 500-11-022070-037

Counsel: Me Serge Guérette, Me Stéphanie Lapierre for Debtors
Me Philippe Buist for Monitor
Me Nicolas Plourde for L'Oréal Canada inc., Make Up For Ever S.A.

Subject: Insolvency; Contracts; Corporate and Commercial; Property

Headnote

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

Composed of three retail chains, B Group obtained protection of Companies' Creditors Arrangement Act — Initial order stayed proceedings against B Group — On day of initial order, two cosmetics suppliers of B group were owed sums of money for goods delivered to B Group within 30 days preceding date of initial order — Suppliers each filed motion for stay to be lifted and declared inapplicable to them or for deposit of proceeds of sale of goods in separate trust — Motions dismissed — CCAA is flexible tool seeking to allow debtor corporation to stay in business while attempting to solve financial difficulties and to restructure — Key element of achieving CCAA objectives is maintaining status quo for time necessary to obtain creditors' approval of arrangement — Stay of proceedings is basic component of maintenance of status quo — Suppliers' motions went directly against CCAA objectives and maintenance of status quo during restructuring and would put suppliers in preferred position — Contemplated arrangement appeared reasonable and was supported by many creditors — Granting motions would provoke avalanche of similar motions by other creditors — No precedents existed in Quebec or elsewhere in Canada to support motions — Possible situations justifying lifting stay did not exist in case at bar and application of CCAA did not of itself constitute sufficiently serious and distinct prejudice to justify lifting stay — Even if art. 1605 C.C.Q. did apply, suppliers' contracts were not resiliated as B Group was not in default, either by suppliers in writing or by operation of law — Prejudice claimed by suppliers was not serious in overall picture of restructuring B Group — As B Group's core business included cosmetics and perfumes, suppliers were within focus of restructuring and would benefit from successful restructuring — B Group did not act in bad faith towards suppliers — Neither lift of stay nor deposit was warranted.

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

Composed of three retail chains, B Group obtained protection of Companies' Creditors Arrangement Act — Initial order stayed proceedings against B Group — On day of initial order, two cosmetics suppliers of B group were owed sums of money for

goods delivered to B Group within 30 days preceding date of initial order — Suppliers each filed motion for stay to be lifted in respect of suppliers' claims — Supplier L inc. also demanded return of display units provided to B Group — Motions dismissed — Agreement between supplier L inc. and B Group provided that parties would equally share cost of creating, constructing and installing display units and that L inc. would remain owner of units — Agreement was not traditional lease but did have several characteristics usually found in contract of lease — Situation was quite analogous to use of leased property provided after initial order was made — Since B Group was still using displays to sell L inc. products, nothing justified different treatment than that provided by s. 11.3 of CCAA — If B Group intended to continue using display units, B Group had to abide by terms of obligation agreed to, including payment of $28,000 within 90 days of delivery of units as well as $28,000 allowance as "coop-advertising" for 2003-2004 period.

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Effet de l'ararrangement — Suspension des procédures

Groupe B, qui était composé de trois chaînes de magasins, a obtenu la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a suspendu les procédures contre le Groupe B — En date de l'ordonnance initiale, le Groupe B devait de l'argent à deux de ses fournisseurs en cosmétiques pour des biens qu'ils lui avaient livrés dans les 30 jours précédant l'ordonnance initiale — Fournisseurs ont chacun présenté une requête afin que la suspension soit levée et déclarée inapplicable à eux ou afin que le produit de la vente des biens soit déposé dans un compte distinct — Requêtes rejetées — LACC est un outil flexible ayant pour but de permettre à une compagnie débitrice de demeurer en affaires pendant qu'elle tente de régler ses problèmes financiers et de se restructurer — Maintien du statu quo durant le temps nécessaire pour faire approuver l'arrangement par les créanciers constitue un élément clé de la réussite des objectifs de la LACC — Suspension est un élément fondamental du maintien du statu quo — En plus de les privilégier, les requêtes des fournisseurs allaient directement à l'encontre des objectifs de la LACC et du maintien du statu quo pendant la restructuration — Arrangement envisagé semblait raisonnable et était appuyé par plusieurs créanciers — Accueil des requêtes provoquerait une avalanche de requêtes similaires par d'autres créanciers — Aucun précédent appuyant les requêtes n'existait au Québec ou ailleurs au Canada — Aucune des situations possibles justifiant la levée de la suspension n'étaient présentes en l'espèce, et l'application de la LACC ne constituait pas en soi un préjudice suffisamment grave et distinct justifiant de lever la suspension — Même si l'art. 1605 s'était appliqué, les contrats des fournisseurs n'étaient pas résiliés puisque le Groupe B n'était pas en défaut, que ce soit par écrit par les fournisseurs ou par l'opération de la loi — Préjudice allégué par les fournisseurs n'était pas grave dans le cadre de l'ensemble de la restructuration du Groupe B — Puisque le coeur des affaires du Groupe B incluait les cosmétiques et les parfums, les fournisseurs étaient visés par la restructuration et en profiteraient si elle réussissait — Groupe B n'a agi avec aucune mauvaise foi envers les fournisseurs — Rien ne justifiait la levée de la suspension ou un dépôt.

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Questions diverses

Groupe B, qui était composé de trois chaînes de magasins, a obtenu la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a suspendu les procédures contre le Groupe B — En date de l'ordonnance initiale, le Groupe B devait de l'argent à deux de ses fournisseurs en cosmétiques pour des biens qu'ils lui avaient livrés dans les 30 jours précédant l'ordonnance initiale — Fournisseurs ont chacun présenté une requête afin d'obtenir la levée de la suspension à l'égard de leur réclamation — Fournisseur L inc. a aussi demandé la remise des présentoirs fournis au Groupe B — Requêtes rejetées — Selon l'entente entre L inc. et le Groupe B, les parties devaient se partager également les coûts de la création, de la construction et de l'installation des présentoirs, et L inc. conserverait la propriété de ceux-ci — Entente ne constituait pas un bail traditionnel, mais comportait plusieurs des caractéristiques se trouvant généralement dans un contrat de location — Situation était très similaire à celle de l'usage d'un bien loué qui a été fourni après le prononcé de l'ordonnance initiale — Puisque le Groupe B utilisait toujours les présentoirs pour vendre des produits de L inc., rien ne justifiait un traitement différent de celui prévu par l'art. 11.3 LACC — Si le Groupe B voulait continuer à utiliser les présentoirs, il devait respecter les termes de l'obligation contractée, y compris faire le paiement de 28 000 $ dans les 90 jours de la livraison des présentoirs en plus du paiement de l'allocation de 28 000 $ à titre de « publicité à frais partagés » pour la période 2003-2004.

Table of Authorities

Cases considered by *Gascon J.S.C.*:

Agro Pacific Industries Ltd., Re (2000), 2000 BCSC 837, 2000 CarswellBC 1143, 76 B.C.L.R. (3d) 364, 5 B.L.R. (3d) 203 (B.C. S.C.) — considered

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 1996 CarswellOnt 5053, 22 O.T.C. 247 (Ont. Gen. Div.) — considered
Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 622, 19 C.B.R. (4th) 1 (Alta. Q.B.) — considered
Century Industries Inc. v. Enterprises Union Électrique Ltée (1992), 1992 CarswellQue 1869 (C.S. Que.) — distinguished
Détaillants Shirmax Ltée/Shirmax Retail Ltd. c. 170974 Canada Inc. (1994), 28 C.B.R. (3d) 177, 1994 CarswellQue 18 (C.S. Que.) — considered
Henry Birks & Sons Ltd., Re (1993), 22 C.B.R. (3d) 235, 1993 CarswellQue 38 (C.S. Que.) — considered
Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, *(sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — considered
International Wallcoverings Ltd., Re (1999), 1999 CarswellOnt 4933, 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]) — referred to
Meridian Development Inc. v. Toronto Dominion Bank (1984), [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576, 1984 CarswellAlta 259 (Alta. Q.B.) — referred to
Mine Jeffrey inc., Re (2003), 2003 CarswellQue 90, 35 C.C.P.B. 71, [2003] R.J.D.T. 23, 40 C.B.R. (4th) 95, *(sub nom. Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (C.A. Que.) — considered
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 1988 CarswellAlta 319 (Alta. Q.B.) — considered
Olympia & York Developments Ltd., Re (March 14, 1994), Doc. B125/92 (Ont. Gen. Div. [Commercial List]) — considered
Packman Packaging Supplies Inc., Re (1995), 42 C.B.R. (3d) 143, 1995 CarswellQue 84 (C.S. Que.) — referred to
PCI Chemicals Canada Inc., Re (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (C.S. Que.) — considered
People's Department Stores Ltd. (1992) Inc., Re (1994), 37 C.B.R. (3d) 28, [1995] R.J.Q. 224, 1994 CarswellQue 151 (C.S. Que.) — referred to
Philip Services Corp., Re (1999), 1999 CarswellOnt 4495, 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]) — referred to
Place Fleur de Lys c. Tag's Kiosque Inc. (1995), [1995] R.J.Q. 1659, 1995 CarswellQue 651 (C.A. Que.) — referred to
Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193, 2 C.B.R. (3d) 291, 1990 CarswellBC 382 (B.C. S.C.) — referred to
Smith Brothers Contracting Ltd., Re (1998), 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264, 13 P.P.S.A.C. (2d) 316 (B.C. S.C.) — referred to
St-Lawrence Chemical Inc. v. A.R.C. Resins Corp. (May 16, 1997), Doc. 505-11-001681-977 (C.S. Que.) — considered
Steinberg Inc. c. Colgate-Palmolive Canada Inc. (1992), 13 C.B.R. (3d) 139, 1992 CarswellQue 22 (C.S. Que.) — considered
Steinberg Inc. c. Gillette Canada Inc. (1992), [1992] R.J.Q. 1602 (C.S. Que.) — considered
Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered
Woodward's Ltd., Re (1993), 77 B.C.L.R. (2d) 332, 100 D.L.R. (4th) 133, 1993 CarswellBC 75 (B.C. S.C.) — considered
Woodward's Ltd., Re (1993), 23 B.C.A.C. 224, 39 W.A.C. 224, 105 D.L.R. (4th) 517, 83 B.C.L.R. (2d) 31, 22 C.B.R. (3d) 25, 1993 CarswellBC 564 (B.C. C.A.) — referred to
166606 Canada inc. c. Bashtanik (1996), 1997 CarswellQue 1797 (C.S. Que.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — referred to

s. 81.1(4) [en. 1992, c. 27, s. 38(1)] — referred to

s. 81.1(8) [en. 1992, c. 27, s. 38(1)] — referred to

Code civil du Bas-Canada, S. Prov. C. 1865, c. 41

art. 1543 — considered
Code civil du Québec, L.Q. 1991, c. 64
art. 1597 — considered

art. 1605 — considered

art. 1741 — considered

art. 1851 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(3) — considered

s. 11(3)(a) — considered

s. 11(3)(b) — considered

s. 11(3)(c) — considered

MOTIONS by two suppliers for stay of proceedings against corporation protected by *Companies' Creditors Arrangement Act* to be lifted and declared inapplicable to suppliers or for deposit of proceeds of sale of unpaid goods in separate trust.

***Gascon J.S.C.*:**

1) THE ISSUES

1 This judgment deals with the right of unpaid suppliers to repossess their goods still in the hands of a debtor company that availed itself of the protection of the *Companies' Creditors Arrangement Act* [1] (*CCAA*).

2 The facts giving rise to the dispute are simple and can be summarized as follows.

3 On December 17, 2003, Les Boutiques San Francisco incorporées, Les Ailes de la Mode incorporées and Les Éditions San Francisco incorporée (BSF Group) sought and obtained some of the protections available under the *CCAA*. The Initial Order issued on that day provided notably for a stay of the proceedings against the BSF Group.

4 A stay of proceedings is a standard conclusion in the initial orders made under the *CCAA* and section 11 (3) specifically provides for such a possibility:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> (Emphasis added)

5 On the date of the Initial Order issued here, one supplier, L'Oréal Canada Inc., was owed $413,557.08 by the BSF Group, $360,395,32 of which represented goods delivered within the 30 days prior to December 17, 2003 [2]. After the application of some credits for services rendered, the amount owed was reduced to $299,840.09 on the day of hearing of L'Oréal's motion [3].

6 Similarly, another supplier, Make Up For Ever S.A., was also owed a sum of $67,420.97 on December 17, 2003, $30,015.58 of which represented goods delivered to the BSF Group within the 30 days preceding the date of the Initial Order [4].

7 In early January 2004, L'Oréal and Make Up For Ever each filed a motion by which they claimed that the stay of proceedings should be lifted and declared inapplicable inasmuch as they were concerned. The reason invoked: they each want to exercise their right to revendicate the goods sold and delivered still in the possession of the BSF Group, as any sale which took place is now resolved and resiliated automatically because of the BSF Group's failure to perform its obligations, namely to pay for the goods.

8 They rely upon article 1605 C.C.Q. which states:

> "**1605.** A contract may be resolved or resiliated without judicial proceedings where the debtor is in default by operation of law or where he has failed to perform his obligation within the time allowed in the writing putting him in default."
>
> (Emphasis added)

9 Subsidiarily, if the Court does not agree to lift the stay of proceedings against them, they ask that the proceeds of the sales of their goods be kept from now on in a separate trust account by the BSF Group, in order to protect their future rights and recourses.

10 Finally, in its own motion, L'Oréal asks that the BSF Group be ordered to either pay for the continued use of the display units ("agencements") it recently provided to them or return those immediately to L'Oréal in the absence of payment.

11 Not surprisingly, the BSF Group vigorously contests these requests. In that contestation, it also has the support of many: the Monitor, the Bank Syndicate and the Ad Hoc Committee of Unsecured Creditors.

12 Their position is clear and unanimous. There is no reason to treat these two suppliers any different than the other creditors of the BSF Group. To lift the stay of proceedings for these two suppliers would go against the specific objectives of the *CCAA* and the principles of the status quo that it should protect. Furthermore, the demands of these suppliers are not supported by any of the relevant precedents, be it from the Quebec or the Common Law provinces courts. Finally, they say that not only are the requests unjustified under the circumstances as these two suppliers, in particular, do not suffer any serious prejudice, but granting those would create an impact of such a nature as to put seriously in jeopardy the proposed arrangement of the BSF Group.

13 On the issue of the display units, they reply that nothing is owed at this stage since this debt preceded the Initial Order and should therefore be treated in the same manner as any others.

14 For sake of clarity and as the issues are very distinct from one another, the Court will deal, firstly, with the requests of L'Oréal and Make Up For Ever for the lift of the stay of proceedings and for the deposit of moneys in trust, and secondly, with the claim of L'Oréal pertaining to the display units.

2) THE LIFT OF THE STAY OF PROCEEDINGS AND, SUBSIDIARILY, THE DEPOSIT OF MONEYS IN TRUST

15 On the basis of the applicable statutes, the relevant case law and the evidence adduced, the Court is of the view that neither the lift of the stay of proceedings nor the deposit of moneys in trust should be ordered here, be it for the benefit of L'Oréal or Make Up For Ever. In reaching this conclusion, the Court relies on the following considerations:

a) The purpose and objectives of the *CCAA*;

b) The precedents in Quebec and Canada; and

c) The absence of a serious and distinct prejudice to the two suppliers involved.

a) The purpose and objectives of the CCAA

16 It has been said often, and rightly so, that the *CCAA* is a remedial legislation. Its purpose is to allow companies in financial difficulties to reorganize themselves. As one judgment of the Quebec Superior Court recently reminded, it should be interpreted and applied as a flexible tool to assist in the restructuring of companies in financial difficulties [5] .

17 One of the main goals of the *CCAA* is to allow the debtor company seeking its protection to stay in business as a going concern while attempting to solve its financial difficulties. The Courts indeed recognize that the Act should be given a large and generous interpretation to favour this objective [6] .

18 As the Quebec Court of Appeal stated lately, contrary for instance to recourses under the *Bankruptcy and Insolvency Act* [7] (BIA), the objective of the *CCAA* is not to end the operation of a business and distribute its assets to its creditors, but rather to reach an arrangement between the debtor company and its creditors to allow for its survival [8] .

19 One of the key elements to achieve these objectives is maintaining a status quo for the necessary time while the debtor company attempts to gain the approval of its creditors for a proposed arrangement [9] . Like the British Columbia Court of Appeal once said [10] :

> "[. . .] Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11."
>
> (Emphasis added)

20 In a judgment often cited on that subject, Mr. Justice Tysoe of the British Columbia Supreme Court summarized well what is meant by maintaining the status quo when a debtor company seeks the protection of the *CCAA* [11] :

> "It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:
>
> 1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order (which, in British Columbia, is normally the day on which the *CCAA* proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.
>
> 2. 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. The litigation may be resolved by way of 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, 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. This is the objective recognized by *Quintette* and *Alberta-Pacific Terminals*. [. . .]"
>
> (Emphasis added)

21 Therefore, as section 11 of the *CCAA* enacts and these precedents reiterate, in order to allow a debtor company to restructure itself and continue its operations, the stay of proceedings is a basic component of the maintenance of the status quo. Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning amongst creditors. This obviously includes the possibility of creditors seeking to repossess their goods in the

hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the *CCAA*.

22 From that standpoint, the motions of L'Oréal and Make Up For Ever are going directly against these objectives and the key element of maintaining the status quo during the course of the restructuring under the *CCAA*. The lift they are seeking is directly opposed to what the Act specifically provides for at section 11 and would place both of them in a preferred position compared to that of the other unsecured creditors.

23 Surely, maintaining the status quo involves balancing the interests of all affected parties and avoiding advantages to some over the others. Under the *CCAA*, the restructuring process and the general interest of all the creditors should always be preferred over the particular interests of individual ones[12].

24 The Court does not believe that it is appropriate to set aside these objectives and principles in this case.

25 In its Initial Amended Order of January 15, 2004, the Court has already indicated that the contemplated arrangement of the BSF Group appeared practical, workable and realistic from an economic standpoint. At this stage, it has very strong support within the creditors of the BSF Group and no one has suggested that there exists a better solution to the problems now faced by the BSF Group.

26 In a situation where there exists a contemplated arrangement which is not doomed to fail but rather appears reasonable, which has the support of a vast majority of the creditors, and which is still being pursued diligently, it is the Court's opinion that the pursuit of the objectives of the *CCAA* should strongly be favoured, not countered.

27 As a result, with a contemplated arrangement such as the one involved here, the solutions should be pursued and the issues resolved within the context of this arrangement, not outside of it.

28 To that end, one must remember that the contemplated arrangement described by the BSF Group already gives consideration to the situation of suppliers such as L'Oréal and Make Up For Ever. One of its guiding principles is indeed expressed as follows by the BSF Group[13]:

> The participation of claims in the baskets could be adjusted so that the first dollars of each claim and sums due for merchandise sold and delivered within 30 days of the Initial Order, could be entitled to a greater participation in the basket than the remaining claims;

29 Since the proposed arrangement is not yet finalized, it is certainly too soon to comment on this potential treatment of the particular situation of the "30 days goods" suppliers. At this stage, it is sufficient to note that proper attention is being given to the situation of these suppliers who may otherwise have had other rights save for the protection afforded by the *CCAA*. Presently, there is no reason to believe that the arrangement that will eventually be submitted to the creditors for approval, and thereafter to the Court for sanction if fair and reasonable, will not be governed by similar considerations.

30 Still, L'Oréal and Make Up For Ever argued that the stay of proceedings will potentially deprive them of some of their alleged rights under the Civil Code of Quebec or the *BIA*, particularly if the arrangement fails and a bankruptcy is declared. Even though this possibility exists, when a proposed arrangement is characterized by qualifiers such as "not doomed to failure", "apparently reasonable", "strongly supported" and "diligently pursued", the Court considers that it should assess the situation with an assumption of success, not of failure, of the process.

31 Accordingly, even if these concerns of L'Oréal and Make Up For Ever should the arrangement fails are legitimate, they should not be the guiding criteria of the Court under the circumstances. Especially so when a proper arrangement can eventually alleviate, partially or totally, the loss of the alleged rights that the suppliers may now be denied.

32 To minimize the consequences of their requests, L'Oréal and Make Up For Ever have also argued that their claims represent less than $370,000, while the total accounts payable of the unsecured creditors, including the suppliers, represent

more than $31,000,000 [14]. The impact, if any, of their motions upon the restructuring of the BSF Group would therefore be, so they say, minimal.

33 Since no similar motions from other suppliers are presently pending, they are saying that the Court should not conclude that granting their requests will have the detrimental impact upon the restructuring process that the other parties are voicing.

34 With respect, the Court cannot agree with this argument.

35 Even though no other similar motions are now pending, the Court cannot simply close the eyes or look in the opposite direction and just pretend not to see the obvious. In a business such as that of the BSF Group, which is involved in the retail sale of men's, women's and children's apparels and accessories, it is clear that there are many other suppliers in a situation similar to that of L'Oréal and Make Up For Ever.

36 It is also clear that if the requests of L'Oréal and Make Up For Ever are granted, there will be many others presented to the Court. Opening this door would create a chaotic situation that will strike at the very heart of the going concern and continued operations objectives that the *CCAA* aims at protecting.

37 The Court does not need to have specific evidence from other suppliers confirming that they will proceed similarly to L'Oréal and Make Up For Ever should the motions be granted. This is self-evident and the Court cannot ignore it. This is exactly what Mr. Justice Lagacé from the Quebec Superior Court relied upon, amongst other things, in refusing to grant a similar request in the context of the restructuring of Steinberg Inc. under the *CCAA* [15]:

> "[. . .] Or le tribunal ne peut ignorer que plusieurs autres créanciers pourraientréclamer le même droit que désire exercer la débitrice-requérante. [. . .]"
>
> (Emphasis added)

38 All in all, when one considers the purpose and objectives of the *CCAA,*there are simply no justifications for the conclusions sought by L'Oréal and Make Up For Ever in their motions.

b) The precedents in Quebec and in Canada

39 That said, the Court notes further that there are no precedents, be it in Quebec or elsewhere in Canada, that support the requests made here by L'Oréal and Make Up for Ever. Indeed, all the judgments that bare any kind of similarity to the situation at hand go against the granting of what is being asked.

i. The Quebec Cases

40 To this date, the cases in Quebec have refused the claims of unpaid suppliers to repossess their goods in the context of a stay of proceedings pursuant to a reorganization or restructuring process, be it under the *CCAA* or the *BIA*.

41 For instance, in the context of the Steinberg Inc. restructuring under the *CCAA*, Mr. Justice Lagacé twice refused motions to authorize an unpaid supplier to seize before judgment the merchandises sold and delivered within the 30 days prior to the Initial Order [16].

42 In the two judgments he rendered, Mr. Justice Lagacé concluded that when faced with an arrangement that appeared serious, the individual interest of a creditor should not be preferred over the general interest of all the creditors. For Mr. Justice Lagacé, granting the requests would have most likely resulted in a number of similar motions by other suppliers and it would have basically led to the failure of the arrangement before it was even submitted to the creditors for approval. This would have been contrary to the objectives of the *CCAA*.

43 It is worth noting that in these two decisions, the suppliers were relying upon article 1543 C.C.B.C. and their corresponding right to revendicate the goods sold and delivered within the prior 30 days. Since 1994, article 1741 C.C.Q. has replaced article 1543 C.C.B.C. It now states the following:

> **1741.** Except in the case of a sale with a term, the seller of movable property may, within thirty days of delivery, consider the sale resolved and revendicate the property if the buyer, being in default, has failed to pay the price and if the property is still entire and in the same condition and has not passed into the hands of a third person who has paid the price thereof, or of a hypothecary creditor who has obtained surrender thereof.
>
> Where the buyer is in default to pay the price and the property meets the conditions prescribed for resolution of the sale, the seizure of the property by a third person is no hindrance to the rights of the seller.
>
> (Emphasis added)

44 Here, L'Oréal and Make Up For Ever are not relying upon this article which is specific to the situation of an unpaid vendor of movable property in the Quebec Civil Code. As their sales were with a term, they do not meet the conditions necessary for its application. Thus, to justify their requests, they are relying upon the general provisions of obligations applicable to all contracts found at article 1605 C.C.Q.

45 It is difficult to see why the reasoning applicable for a claim made under article 1543 C.C.B.C. (now 1741 C.C.Q.) in cases like the two *Steinberg* decisions would be any different inasmuch as the general provisions of article 1605 C.C.Q. are concerned. At the very least, L'Oréal and Make Up For Ever did not present any convincing argument to that end.

46 Likewise, in the context of the *BIA* this time, Mr. Justice Denis has reached a conclusion similar to that of Mr. Justice Lagacé on a demand by suppliers for the repossession of goods after the filing of a notice of intention to make a proposal [17].

47 In that matter, the suppliers were again invoking article 1543 C.C.B.C. Nonetheless, Mr. Justice Denis concluded that there was no reason not to apply the stay of proceedings to them. He emphasized that sections 81.1(4) and 50.4 of the *BIA* intended to temporarily deny certain rights to creditors in order to allow a company to make a proposal to solve its financial difficulties. The protection that the *BIA* afforded to suppliers of goods in section 81.1 was not applicable in a proposal context, hence the absence of any basis to provide them with a similar protection through article 1543 C.C.Q.

48 The same conclusion was reached by Mr. Justice Halperin in *Henry Birks & Sons Ltd., Re* [18]. On a petition for an order pursuant to section 81.1(8) of the *BIA*, he denied the request of unpaid suppliers to exercise their remedies as unpaid vendors, as such could have well placed in jeopardy the whole reorganization process of the debtor company. He noted that section 81.1 was clear and only suspended the running of the 30 days period upon the commencement of a proposal proceeding, even though any rights as unpaid vendors in the future would often be illusory if the goods were no longer in the possession of the debtor company once a bankruptcy was finally declared [19].

49 No Quebec courts decisions granting the requests sought by L'Oréal or Make Up For Ever could be found to support their position. The situation was no different in the Common Law provinces.

ii. The Common Law Provinces Cases

50 In proceedings taken under the *CCAA*, the British Columbia Supreme Court has twice denied requests similar to those presented by L'Oréal and Make Up For Ever.

51 In *Agro Pacific Industries Ltd., Re* [20], Mr. Justice Thackray denied an application by suppliers to set aside a stay of proceedings granted under the *CCAA*. He stated notably that ordering that the supplies made to the debtor company within 30 days of the Initial Order be traced and identified and their proceeds put in a trust account would be an attempt to improperly

introduce into the *CCAA* proceedings requirements similar to those contained in section 81.1 of the *BIA*. In his reasons, Mr. Justice Thackray had these comments which are worth citing:

> "[52] An order establishing a trust fund in favour of the applicant suppliers would create a class of secured creditors after the fact. It would turn the Court into the author of a new class of creditor. Classes of creditors should be created by the parties on a contractual basis when entering into their business relationships.
>
> [. . .]
>
> [55] Mr. Justice Tysoe in *Re Woodward's* also alluded to the potential that the Court cannot lose sight of legislative intention. He pointed out that the *CCAA* is « silent as to the creation of a trust fund to be held for the benefit of the suppliers in the event that the reorganization is not successful. » Many of the challenges by the suppliers in the case at bar are legislative.
>
> [56] The *CCAA* must be accepted as Parliament's approval of the continued business activities of an insolvent company, to be carried out in as normal a manner as possible while reorganizing. The Court is not allowed to suggest that the legislative intent is one designed, *per se*, to disadvantage the suppliers. It must, rather, be taken as giving hope that reorganization, rather than bankruptcy, will eventually benefit all interested parties."
>
> (Emphasis added)

52 In this judgment, Mr. Justice Thackray found no basis to justify the requests made by the suppliers under the *CCAA*.

53 In *Woodward's Ltd., Re* [21] , Mr. Justice Tysoe reached a similar conclusion. In that case, applications by suppliers of goods for relief under the *CCAA* were also denied. Applications for leave to appeal of that decision were furthermore dismissed [22] .

54 For Mr. Justice Tysoe, in addition to the fact that section 81.1 of the *BIA* could not be of any use to the suppliers as the *CCAA* did not contain any similar provision, the creation of any trust fund was not justified as it would not serve to maintain the status quo. He wrote this on the issue [23] :

> "Apart from consideration of s. 81.1 of the *B. & I. Act*, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible."
>
> (Emphasis added)

55 Finally, and similarly to what the Quebec courts did conclude, in *Bruce Agra Foods Inc.*, Mr. Justice Farley denied a motion made by unpaid suppliers this time within the context of a notice of intention to file a proposal under the *BIA*. In that case, Mr. Justice Farley concluded that in a reorganization scenario, unpaid suppliers could not avail themselves of a protection similar to that of section 81.1 of the *BIA*. He mentioned [24] :

> "2. If Parliament had intended that unpaid suppliers have direct *immediate*rights in a reorganization scenario as envisaged by a Notice of Intention to File a Proposal, then it would seem to me that it would have provided for same to take place in s. 81.1(b) but rather Parliament addressed the Notice of Intention situation by having a suspension during the relevant time period: see s. 81.1(4). Unfortunately for those affected, in order to promote reorganizations (which is an underlying fundamental of the BIA including the 1992 amendments which puts some teeth or perhaps « life blood » into that part of the BIA), there will be some prejudice to creditors (who may be unpaid sellers). If the rights of unpaid suppliers were to override, then there would have to be an amendment to section 69.1 (a) to that effect. [. . .]
>
> [. . .]

6. It would seem to me that unpaid supplier rights are truly intended to protect against the unfair consequences in liquidation as seen by Parliament and are not intended to affect or disrupt reorganizations proposed pursuant to Part IV of the BIA. [. . .]"

(Emphasis added)

56 Again, L'Oréal and Make Up For Ever could not refer the Court to any decision from the Common Law provinces which had granted a motion similar to theirs.

iii) L'Oréal and Make Up For Ever reply to the precedents

57 Notwithstanding, to distinguish these decisions, L'Oréal and Make Up For Ever first argued that in the Quebec decisions in *Steinberg* or in *Shirmax*[25], no claims for the deposit of moneys in a trust account similar to what is requested here were apparently made.

58 While it is true that this issue was not specifically dealt with in these three judgments, the Court fails to see on what basis their conclusions would have been any different with respect to the deposit of moneys in a trust account.

59 The protection given to an unpaid supplier under article 1543 C.C.B.C. (now 1741 C.C.Q.) discussed in these decisions was limited to the right to repossess its goods. If the exercise of that right was considered by the Courts as inappropriate in the context of proceedings under the *CCAA* or the *BIA*, it follows that, logically, the exercise of the same right "by equivalent", namely by having the proceeds of the sale of the goods deposited in a trust account, would normally trigger the same answer.

60 Second, L'Oréal and Make Up For Ever further argued that the judgment in *Shirmax*[26] should be distinguished because in that case, the impact upon the restructuring would have been very significant considering the extent of the debt owed to the suppliers involved when compared to the whole debt of the company. This argument cannot be retained because it would require the Court to ignore the obvious consequences of a judgment granting the requests made, namely that it will in all likelihood trigger an avalanche of similar type of requests by the numerous suppliers of the BSF Group.

61 Third, L'Oréal and Make Up For Ever argued that the decisions of the Common Law provinces should be distinguished and ignored as there are no recourses similar to that of article 1605 C.C.Q. in those jurisdictions.

62 While that is true, it remains that the decisions rendered in the Common Law provinces are quite relevant and useful to the issues to be decided here.

63 On the one hand, these judgments have correctly emphasized that the *CCAA*, while providing for a stay of proceedings in the context of a restructuring, has made no exceptions for the rights of suppliers as, for instance, the *BIA* has done in some limited circumstances, albeit not for proposals.

64 On the other hand, in denying the requests made, these judgments have also emphasized, again rightfully, that the issues raised by the suppliers were more legislative than judicial in nature, since Parliament had decided to protect specifically the unpaid suppliers rights only in limited circumstances in the *BIA*.

65 These decisions have correctly noted that in situations of reorganizations or restructurings, neither the *CCAA* nor the *BIA* contain provisions addressing these rights, except for the suspension of the running of the 30 day delay of section 81.1 in the case of a proposal under the *BIA*. On that issue, and as it was decided for example in *Woodward's Ltd., Re*, the terms of the Court's Initial Order already include a similar suspension for the benefit of the suppliers.

66 In addition, and again similarly to what this Court did here, these judgments of the other provinces have considered and given weight to the detrimental impact the granting of the motions involved would have had upon the key objectives of the protections offered by the *CCAA*.

67 On the whole, even though provisions similar to article 1605 C.C.Q. do not exist in these other jurisdictions, these decisions can be relied on since their conclusions are based upon reasons that do apply in this case.

68 As a fourth and final point, L'Oréal and Make Up For Ever argue that, notwithstanding all these precedents, in two cases decided in the context of restructurings conducted under the *CCAA* and the *BIA*, the Quebec courts have granted requests to put in a trust account the proceeds of merchandise sold pending the outcome of the reorganization process.

69 In this respect, they refer to the Superior Court judgment of Mr. Justice Archambault in *Century Industries Inc. v. Enterprises Union Électrique Ltée* [27] and to the Court of Appeal decision in *Gestion Max Boutin inc. v. Brasserie Molson O'Keefe* [28] .

70 However, as it was indicated at the hearing, these decisions can be distinguished easily as the creditors involved had specifically retained by contract their rights of ownership in the goods at issue, which is not the case for L'Oréal or Make Up For Ever.

71 In short, the review of these precedents in Quebec and in Canada confirms the absence of justification for the remedies sought here by these two suppliers.

c) The absence of a serious and distinct prejudice to the two suppliers involved

72 But that is not all. In addition to the fact that the conclusions sought by L'Oréal and Make Up For Ever would be contrary to the applicable case law as well as the purpose and objectives of the *CCAA*, the Court is satisfied that under the circumstances, neither L'Oréal nor Make Up For Ever would suffer a prejudice sufficiently serious as to justify lifting the stay of proceedings.

73 In summary, L'Oréal and Make Up For Ever are alleging that they are suffering a serious and distinct prejudice because the stay of proceedings will result in them losing a right to repossess goods that they have under article 1605 C.C.Q., hence their justification to lift the stay.

74 To emphasize their prejudice, they are also asserting that an arrangement under the *CCAA* must give creditors something more than what they would otherwise receive in the context of a bankruptcy. Since they will end up, in all likelihood, receiving less in the context of an arrangement under the *CCAA* than in a bankruptcy process under the *BIA*, they consider that their motions should be granted.

75 The Court disagrees with these arguments.

76 On the first of these arguments, in *Canadian Airlines Corp., Re*, it was stated that under the *CCAA*, there are simply no statutory tests to guide a court in lifting a stay against a certain creditor. In that case, to give some indications of what could be considered to that end, Madam Justice Paperny referred to the following [29] :

> "20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> 3. The applicant shows necessity for payment (where the creditors financial problems are created by the order of where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
>
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period."

(Emphasis added)

77 When one considers these situations, none apply here, except potentially the fifth one. However, even in such a situation, the only alleged prejudice suffered by L'Oréal and Make Up For Ever would be one directly caused by the mere application of the Act, namely by the stay of proceedings which the *CCAA* authorizes.

78 On that specific issue, in the decision of *St-Lawrence Chemical Inc. v. A.R.C. Resins Corp.*, Madam Justice Lemelin of the Quebec Superior Court concluded this [30] :

"Le préjudice de la requérante ne peut être que celui causé par l'application normale de la loi qui suspend les recours de tous les créanciers et fournisseurs. Le juge Trudeau qualifie même ce préjudice "de sérieux" dans l'affaire de faillite Goineau.

La requérante ne peut demander au Tribunal de mettre de côté l'application d'une loi qui dans le voeu du législateur doit favoriser la réorganisation d'entreprises en difficultés en les mettant à l'abri des procédures temporairement. Permettre aux fournisseurs de reprendre les marchandises vendues compromet les opérations de la personne insolvable. La requérante doit satisfaire le Tribunal de ce préjudice sérieux, ce qu'elle ne fait pas."

(Emphasis added)

79 The Court agrees with these comments. Simply stated, the application of the *CCAA* cannot of itself constitute a sufficiently serious and distinct prejudice to justify the lift of a stay of proceedings.

80 Consequently, even though much time was spent in argument by the attorneys for both sides on the right of an unpaid supplier to even invoke the application of article 1605 C.C.Q. in a situation similar to that of L'Oréal and Make Up For Ever, the Court considers that it is not necessary to decide this question.

81 There are sufficient reasons here to deny the motions of L'Oréal and Make Up For Ever without having to decide whether or not an unpaid supplier who does not meet the conditions of article 1741 C.C.Q. can nevertheless invoke the benefit of the general provision of article 1605 C.C.Q. This question appears to be far from settled in the civil law doctrine or in the case law [31] .

82 In any event, on that issue of the alleged right to repossess of these suppliers, the Court notes that the resolution or resiliation of a contract without judicial proceedings as invoked by L'Oréal and Make Up For Ever only applies where the debtor, namely the BSF Group, is in default by writing or by operation of law.

83 The BSF Group was apparently not put in default in writing by these suppliers and article 1597 C.C.Q. describes the situations where a debtor is in default by operation of law:

"**1597**. A debtor is in default by the sole operation of law where the performance of the obligation would have been useful only within a certain time which he allowed to expire or where he failed to perform the obligation immediately despite the urgency that he do so.

A debtor is also in default by operation of law where he has violated an obligation not to do, or where specific performance of the obligation has become impossible through his fault, and also where he has made clear to the creditor his intention not to perform the obligation or where, in the case of an obligation of successive performance, he has repeatedly refused or neglected to perform it."

(Emphasis added)

84 Here, there is only one instance where the BSF Group would potentially be in default by operation of law towards these two suppliers: because it would have "*made clear to* (these) *creditors* (its) *intention not to perform* (its) *obligations*".

85 However, it does not appear that this is the case yet.

86 When a creditor avails itself of the protection that the law offers, and as result is afforded it with a corresponding stay of proceedings, one cannot conclude that this debtor then makes it clear to its creditors that it intends not to perform its obligations. As a matter of fact, under the *CCAA*, the objective of this debtor is rather to propose an arrangement to these creditors for the compromise of these obligations and this may include a partial and even a total performance of these obligations in some cases.

87 Therefore, it is far from obvious that L'Oréal and Make Up For Ever even qualify here for the application of article 1605 C.C.Q. If this were so, then their position would be even less justified under the circumstances.

88 Concerning now the second argument that in proceedings conducted under the *CCAA*, L'Oréal and Make Up For Ever should not be put in a situation worst than the one they would be in under the *BIA*, the Court considers that if anything, it is the situation of all the creditors collectively that must be looked at.

89 While it is true that one of the objectives of the *CCAA* is to provide a better solution than what a bankruptcy would offer, this is so from the standpoint of the benefit to all the creditors, not to individual ones. L'Oréal and Make Up For Ever are looking at the situation only from their own viewpoint, while in the context of proceedings under the *CCAA*, the prejudice and interest of the parties must in every respect be looked at collectively.

90 Indeed, under the circumstances, the prejudice alleged by L'Oréal and Make Up For Ever, even from an individual standpoint, is far from being serious in the overall picture of the restructuring of the BSF Group.

91 Both companies are involved in the cosmetics and perfumes business and they supply mostly, if not exclusively, Les Ailes de la Mode. In the restructuring business plan submitted to the Court [32] , one of the key elements of the repositioning of the BSF Group is to focus upon what it calls its core business, notably with its banner Les Ailes de la Mode. This core business includes for one thing the cosmetics and perfumes.

92 Therefore, these two suppliers, perhaps much more so than many others, are well within the specific business and banner upon which the BSF Group intends to focus for its restructuring. As a result, they appear to be creditors who would definitely benefit, not suffer, from a successful restructuring of the BSF Group.

93 It is in fact striking to note this from the admissions filed in the record [33] . The sales of L'Oréal to the BSF Group totalled $3,609,000 in 2002 and $3,155,000 in 2003, for an average of $281,833 per month over these 24 months. In comparison, the sales of L'Oréal to the BSF Group for the first month immediately following the Initial Order totalled more than $335,000, namely a higher monthly average, even in the context of the restructuring process.

94 Finally, on this issue of the prejudice, it must be remembered that, in this case, there is no evidence of bad faith in the BSF Group's behaviour towards these two suppliers. Notwithstanding what is alleged in their motions, the Court is of the view that the circumstances surrounding the discussions and exchanges of cheques in December 2003 indicate that they were carried on in good faith, in the normal course of business of the BSF Group.

95 To sum up, be it from the angles of the lack of serious and distinct prejudice to L'Oréal and Make Up For Ever, of the applicable precedents and their reasoning, or of the purpose and objectives of the *CCAA*, nothing warrants the Court to lift the stay of proceedings or to order the deposit of moneys in trust in the actual situation of these two suppliers.

3) THE CLAIM OF L'ORÉAL CONCERNING THE DISPLAY UNITS

96 Turning now to the claim of L'Oréal concerning the display units it provided to the BSF Group in November 2003, this is what the evidence indicates.

97 Even if the written contract presented by L'Oréal in that month was never signed by the BSF Group, the exchanges of e-mails [34] that were filed in the record nevertheless suggest that the parties had agreed as follows.

98 L'Oréal accepted to provide to the BSF Group some display units that were to be used by the BSF Group to exhibit the products and facilitate their sales. The parties were to share equally in the cost of creating, constructing and installing these display units but at all times, L'Oréal was to remain the owner. For its share, it was agreed that a first amount of $28,000 would be paid by the BSF Group within 90 days of delivery and another amount of $28,000 would be spent by them as « coop-advertising » during 2003-2004.

99 L'Oréal considers that this is covered by section 11.3 of the *CCAA* which indicates in part that:

> "**11.3** No order made under section 11 shall have the effect of
>
> (*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; [. . .]"
>
> (Emphasis added)

100 The BSF Group replies that the agreement at issue is not per se a contract of lease but rather a *sui generis* agreement and that section 11.3 does not apply.

101 Even though this agreement is not a traditional lease, it remains that it shares a lot of the characteristics that one would normally find in a contract of lease (article 1851 C.C.Q.). More specifically, we definitely have here a person, L'Oréal, who provides another, the BSF Group, with the use and enjoyment of display units for a certain period, in exchange for payments that are detailed in the e-mails filed. The display units are also not to be kept by the BSF Group but returned to L'Oréal after their use.

102 This is certainly closer to a traditional lease for use than, for instance, to some sort of financing agreement [35] .

103 With respect to these display units, it is the Court's opinion that we have a situation which is quite analogous to the use of leased property provided after the initial order is made. The BSF Group continues to this day to make use of those display units for the purpose of selling the products of L'Oréal. Similarly to the use of leased premises, these are still being enjoyed and benefited from by the BSF Group in order to help the sale of the products of L'Oréal. It is a continuing benefit that the BSF Group still wants to make use of and the Court fails to see why it should be treated differently than the other situations covered by section 11.3 of the *CCAA*.

104 As a result, with respect to these conclusions of the motion of L'Oréal, the Court considers that if it is indeed the intent of the BSF Group to continue to use these display units, it should abide by the terms of the obligations it agreed to. These include the payment of an amount of $28,000 within 90 days of delivery of the display units and an allowance of $28,000 as "coop-advertising" for the period 2003-2004.

105 Since there has been no indication or evidence suggesting that the BSF Group has yet defaulted on these obligations, the Court will simply issue in this respect a declaration confirming this conclusion.

106 **FOR THESE REASONS, THE COURT:**

WITH RESPECT TO L'ORÉAL CANADA INC.:

107 DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

108 DECLARES that with respect to the display units provided by L'Oréal Canada Inc. to Les Ailes de la Mode pursuant to the terms of the e-mails filed as Exhibit R-10, Les Ailes de la Mode must comply with the obligations agreed upon between the parties, namely to:

- Pay an amount of $28,000 to L'Oréal Canada Inc. within 90 days following the delivery of the display units; and
- Provide for an allowance of $28,000 as "coop-advertising" for the period 2003-2004;

109 WITH COSTS.

WITH RESPECT TO MAKE UP FOR EVER S.A.:

110 DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

111 WITH COSTS.

Motions dismissed.

Footnotes

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

2 See "Requête de L'Oréal Canada inc. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes et pour exiger le paiement de sommes relatives à l'utilisation de biens" dated January 13, 2004, paragraphs 2 and 3, and Exhibits R-1 to R-4.

3 See "Liste d'admissions" dated January 29, 2004.

4 See "Requête de Make Up For Ever S.A. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes" dated January 19, 2004, paragraphs 2 and 3, and Exhibit R-1.

5 *PCI Chemicals Canada Inc., Re* (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (C.S. Que.).

6 *Olympia & York Developments Ltd., Re*, [1994] O.J. No. 1335 (Ont. Gen. Div. [Commercial List]); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.).

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

8 *Mine Jeffrey inc., Re*, [2003] R.J.Q. 420 (C.A. Que.), par. 30.

9 *Id.*, par. 31.

10 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), 315; see also *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), 114.

11 *Woodward's Ltd., Re* (1993), 100 D.L.R. (4th) 133 (B.C. S.C.), 140.

12 See, on these issues *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.), 11; *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); and *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 291 (B.C. S.C.), 297.

13 See Motion for the Extension of the Initial Order dated January 14, 2004, paragraph 17 f).

14 First Report of the Monitor, January 14, 2004, paragraphs 19 and 20.

15 *Steinberg Inc. c. Colgate-Palmolive Canada Inc.* (1992), 13 C.B.R. (3d) 139 (C.S. Que.), 141.

16 *Steinberg Inc. c. Colgate-Palmolive Canada Inc.*, *id.*; *Steinberg Inc. c. Gillette Canada Inc.*, [1992] R.J.Q. 1602 (C.S. Que.).

17 *Détaillants Shirmax Ltée/Shirmax Retail Ltd. c. 170974 Canada Inc.* (1994), 28 C.B.R. (3d) 177 (C.S. Que.).

18 *Henry Birks & Sons Ltd., Re* (1993), 22 C.B.R. (3d) 235 (C.S. Que.).

19 See also *People's Department Stores Ltd. (1992) Inc., Re* (1994), 37 C.B.R. (3d) 28 (C.S. Que.).

20 [2000] B.C.J. No. 1069 (B.C. S.C.).

21 *Woodward's Ltd., Re*, *supra*, note 11.

22 *Woodward's Ltd., Re* (1993), 105 D.L.R. (4th) 517 (B.C. C.A.).

23 *Woodward's Ltd., Re*, *supra*, note 11, p. 141.

24 *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.), 171-173.

25 *Supra*, note 17.

26 *Supra*, note 17.

27 C.S. Montreal, nº 500-05-005804-925, 1992-04-29, j. Archambault, 1992 CarswellQue 1869 (C.S. Que.).

28 J.E. 94-804 (C.A.).

29 *Supra*, note 12, p. 7-8.

30 (May 16, 1997), Doc. 505-11-001681-977 (C.S. Que.), J. Lemelin, AZ-97026278, p. 5.

31 See on this issue Jean-Louis BAUDOUIN et Pierre-Gabriel JOBIN, *Les obligations*, 5 e édition, Cowansville, Éditions Yvon Blais, 1998, p. 592-593; Pierre-Gabriel JOBIN, *La vente*, 2 e édition, Cowansville, Éditions Yvon Blais, 2001, p. 262-264; Denys-Claude LAMONTAGNE, *Droit de la vente*, Cowansville, Éditions Yvon Blais, 1995, p. 146-147; *Place Fleur de Lys c. Tag's Kiosque Inc.*, [1995] R.J.Q. 1659 (C.A. Que.); *Packman Packaging Supplies Inc., Re* (1995), 42 C.B.R. (3d) 143 (C.S. Que.); *166606 Canada inc. c. Bashtanik* (1996), 1997 CarswellQue 1797 (C.S. Que.), J.E. 96-1556.

32 Exhibit R-5 in support of the Motion for the Extension of the Initial Order dated January 14, 2004.

33 "Liste d'admissions" dated January 29, 2004.

34 Exhibit R-10 in support of the motion of L'Oréal.

35 See on that issue *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264 (B.C. S.C.); *Philip Services Corp., Re* (1999), 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]); *International Wallcoverings Ltd., Re* (1999), 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]).

TAB 13

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.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Applicant was unsecured creditor of C Corp. — Board appointed by A Corp. caused C Corp. to commence proceedings under CCAA under which A Corp. stood to gain substantial benefits — Proposed plan of compromise and arrangement filed under Act — Order made that classification of creditors not be fragmented to exclude A Corp. as separate class from applicant in terms of unsecured creditors, that A Corp. be entitled to vote on plan pursuant to s. 6 of Act, that there be no separation of unsecured creditors of two divisions of C Corp. for voting purposes, and that votes in respect of claims assigned to A Corp. be recorded and tabulated separately for purpose of consideration in application for court approval of plan — Applicant brought application for leave to appeal that order — Application dismissed — Decisions of supervising judge under Act entitled to considerable deference — Person seeking leave to appeal required to show error in principle of law or palpable and overriding error of fact — Exercise of discretion by reviewing judge not subject to review so long as discretion exercised judicially — Reviewing judge made no error of law — Applicant failed to make out prima facie meritorious case — Granting of leave would likely unduly hinder progress of action — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

Table of Authorities

Cases considered by *Wittmann J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — referred to

Blue Range Resource Corp., Re, (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 172, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 172, 15 C.B.R. (4th) 160, 2000 ABCA 3 (Alta. C.A. [In Chambers]) — referred to

Blue Range Resource Corp., Re (2000), (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 239, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 239, 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]) — referred to
Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — referred to
Med Finance Co. S.A. v. Bank of Montreal (1993), 24 B.C.A.C. 318, 40 W.A.C. 318, 22 C.B.R. (3d) 279 (B.C. C.A.) — referred to
Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — referred to
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to
Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — referred to
Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — referred to
NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — referred to
Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered
Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) — referred to
Royal Bank v. Fracmaster Ltd. (1999), (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — considered
Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — referred to
Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to
Smoky River Coal Ltd., Re, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to
Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered
Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — referred to
Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — referred to
Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — referred to

Statutes considered:

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

s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 6(a) — considered

s. 6(b) — considered

s. 13 — considered

APPLICATION for leave to appeal from judgment reported at (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

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 as creditors 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.