COURT OF APPEAL

ON APPEAL FROM the order of Madam Justice Fitzpatrick of the Supreme Court of British Columbia pronounced on October 31, 2023

BETWEEN:

M&M BUSINESS GROUP, L.P., MUFEED HADDAD and MIKE BUDKA

APPELLANT

AND:

NEXTPOINT FINANCIAL, INC. AND THOSE PARTIES LISTED ON SCHEDULE "A"

RESPONDENTS
(PETITIONERS)

AND:

FTI CONSULTING CANADA INC., FIRST CENTURY BANK, N.A., BASEPOINT, DRAKE ENTERPRISES LTD., FRONTIER CAPITAL GROUP LTD., CHILMARK ADMINISTRATIVE LLC, TMI TRUST COMPANY, CMB TAX SERVICE, LLC, and HIS MAJESTY THE KING IN RIGHT OF CANADA

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RESPONDENT'S BOOK OF AUTHORITIES

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Schedule "A"

1. Next Point Financial, Inc.
2. NPI Holdco LLC

Liberty Tax Entities

1. LT Holdco, LLC
2. LT Intermediate Holdco, LLC
3. SiempreTax+ LLC
4. JTH Tax LLC
5. Liberty Tax Holding Corporation
6. Liberty Tax Service Inc.
7. JTH Financial, LLC
8. JTH Properties 1632, LLC
9. Liberty Credit Repair, LLC
10. Wefile, LLC
11. JTH Tax Office Properties, LLC
12. LTS Software LLC
13. JTH Court Plaza, LLC
14. 360 Accounting Solutions, LLC
15. LTS Properties, LLC

Community Tax Entities

16. CTAX Acquisition LLC
17. Community Tax Puerto Rico LLC
18. Community Tax LLC

LoanMe Entities

19. NPLM Holdco LLC
20. MMS Servicing LLC

21. LoanMe, LLC
22. LoanMe Funding, LLC
23. LM Retention Holdings, LLC
24. LoanMe Stores LLC
25. LM BP Holdings, LLC
26. InsightsLogic LLC
27. LM 2020 CM I SPE, LLC

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1296371 B.C. Ltd. v. Domain Mortgage Corp.,* 2022 BCCA 331

Date: 20220920
Docket: CA48534

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

- and -

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as amended

- and -

In the Matter of a Plan of Compromise and Arrangement of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

Between:

1296371 B.C. Ltd.

Appellant
(Respondent)

And

Domain Mortgage Corp. and Aviva Insurance Company of Canada

Respondents
(Respondents)

And

Evergreen House Development Limited Partnership

Respondent
(Petitioner)

Before: The Honourable Madam Justice DeWitt-Van Oosten
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 29, 2022 (*Port Capital Development (EV) Inc. (Re)*, Vancouver Docket S205095).

Oral Reasons for Judgment

Counsel for the Appellant:	H.C.R. Clark, K.C.
Counsel for the Respondent, Domain Mortgage Corp.:	S.H. Stephens
Counsel for the Respondent, Aviva Insurance Company of Canada:	W.L. Roberts S.B. Hannigan
Counsel for the Monitor, Ernst & Young Inc.:	P. Bychawski
Counsel for the Proposed Respondent, Solterra Acquisitions Corp. (via videoconference):	K.M. Jackson T.A. Posyniak
Place and Date of Hearing:	Vancouver, British Columbia September 16, 2022
Place and Date of Judgment with Oral Reasons to Follow:	Vancouver, British Columbia September 16, 2022
Place and Date of Oral Reasons:	Vancouver, British Columbia September 20, 2022

Summary:

The appellant applies for leave to appeal a Supreme Court order denying an extension of time to bring an application for leave to appeal/appeal from an approved sale of assets. The appellant also seeks an interim stay of the order approving the sale. HELD: The applications for leave to appeal and an interim stay are dismissed. In the circumstances of this case, it is not in the interests of justice to grant either of these orders.

[1] **DEWITT-VAN OOSTEN J.A.**: On September 16, 2022, I made a number of orders arising out of two "urgent applications" brought pursuant to Rule 57 of the *Court of Appeal Rules*, B.C. Reg. 120/2022, with reasons to follow. These are the reasons.

Background

[2] On July 22, 2022, Justice Fitzpatrick of the Supreme Court approved a sale of the assets of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (the "Petitioners") to Solterra Acquisitions Corp. ("Solterra"). The purchase price is $18.5 million. The sale is scheduled to close on September 20, 2022. Reasons for judgment are indexed as 2022 BCSC 1464.

[3] The Petitioners' assets consist of a proposed 19-storey luxury residential and commercial strata development in Vancouver known as the Terrace House. The Solterra sale is supported by the first secured creditor, Domain Mortgage Corp. ("Domain"); the second most senior secured creditor, Aviva Insurance Company of Canada ("Aviva"); and the Monitor in related proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

[4] Justice Fitzpatrick is supervising the *CCAA* proceedings and approved the Solterra sale in that context. She was satisfied the sale "is the best achievable in the circumstances" (at para. 56). She also found the sale to be in the best interests of the stakeholder group, as a whole, given significant ongoing risks and costs associated with the Terrace House development (at para. 57).

[5] The *CCAA* proceedings have been ongoing since May 2020. It is not necessary to detail the entirety of the protracted background. The litigation

chronology, the parties involved and the myriad developments that led to the applications before me are comprehensively set out in 2022 BCSC 1464, as well as the reasons of this Court in 2021 BCCA 382.

[6] On August 15, 2022, 1296371 B.C. Ltd. ("129") filed a notice of appeal from the order approving the Solterra sale (CA48485). 129 is also a secured creditor. The grounds of appeal were stated as:

> 1. The Learned Chambers Judge erred in law in granting an order in breach of the rules of natural justice.
>
> 2. The Learned Chambers Judge erred in principle in failing to consider potentially higher offers, failing to direct service on [129] who, along with Aviva Insurance Company of Canada had the only financial interest in a higher price and failing to require production of a private agreement between Aviva and Solterra Acquisitions Corp.

[7] Two days later, 129 filed an application seeking leave to appeal in CA48485, and a stay of the order approving the sale:

> The Order of the Honourable Madam Justice Fitzpatrick, made July 22, 2022, approving an Agreement of Purchase of Sale entered into on July 22, 2022, be reversed and that the appeal brought by [129] be allowed; and The Order of the Honourable Madam Justice Fitzpatrick be stayed pending the hearing of the appeal. Directions be granted for an expedited appeal. The time limited for bringing this appeal be extended to August 15, 2022.

Both applications were scheduled to be heard in this Court on September 7, 2022.

[8] It is common ground that 129's notice of appeal was filed out of time. An extension of time was required to proceed. 129 brought an application for an extension before Justice Fitzpatrick. Sections 13–14 of the *CCAA* provide that:

> 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.
>
> 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.
>
> (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.
>
> [Emphasis added.]

[9] The application for an extension was heard on August 29, 2022. It was dismissed, with reasons to follow. Those reasons are expected to be released some time the week of September 19, 2022.

[10] 129 subsequently filed a requisition in CA48485 adjourning its applications for leave to appeal and a stay. That file is now in abeyance and nothing has occurred since August 31, 2022. Given the denial of an extension, CA48485 is functionally no longer extant.

[11] On September 13, 2022, 129 filed a second notice of appeal, this time from the dismissal of its application for an extension: CA48534. The notice of appeal does not articulate specific errors in principle. Rather, it simply states that: “The decision [of Justice Fitzpatrick] was unreasonable and clearly wrong”.

[12] On September 15, 2022, 129 filed a notice of urgent application in CA48534 for a hearing on September 16, 2022, along with an application book consisting of two volumes of material. In its material, 129 sought:

> 1. Leave to appeal the decision of Madame Justice Fitzpatrick, made August 29, 2022. 2. Execution of the order of Madam Justice Fitzpatrick made July 22, 2022 be stayed until the hearing of the within appeal. 3. The time for bringing this application be shortened to permit it to be heard on September 16, 2022 or such other date as the court may direct. 4. Directions for an expedited appeal.

[13] Solterra also filed an urgent application on September 15, asking to be added as a respondent to CA48534. The application was not contested. Accordingly, I allowed Solterra’s application to be heard and granted the order sought.

[14] All parties were ready to proceed with 129’s applications on September 16. Given the pending closing, I allowed 129’s request for an urgent hearing and agreed

to proceed. It was not ideal in the absence of Justice Fitzpatrick's reasons for the denial of the extension, but the parties required a decision. The Petitioners were given notice of 129's applications. They elected to not participate.

Legal Principles

[15] The legal principles that govern 129's applications are not in dispute.

Application for Leave to Appeal

[16] To obtain leave to appeal, 129 must show that: (1) the appeal is *prima facie* meritorious, or not frivolous; (2) one or more points it seeks to raise is of significance to the practice; (3) one or more points is of significance to the action; and (4) the appeal will not unduly hinder the progress of the action: *Vancouver (City) v. Zhang,* 2007 BCCA 280 (Chambers) at para. 10; *Goldman, Sachs & Co. v. Sessions et al.*, 2000 BCCA 326 (Chambers). The ultimate question to be answered is whether granting leave is in the interests of justice: *Zhang* at para. 10. Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice: *South Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364 at para. 23.

[17] The threshold for a *prima facie* meritorious appeal is relatively low. There need only be an arguable case of sufficient merit to warrant appellate scrutiny: *Bartram v. Glaxosmithkline Inc.,* 2011 BCCA 539 (Chambers) at para. 16.

Application for a Stay of Proceedings, Including Execution

[18] The power to stay an order is found in ss. 30(c) and 33 of the *Court of Appeal Act*, S.B.C. 2021, c. 6. Section 33(1) authorizes a justice to "order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought".

[19] This is a discretionary power and should only be exercised "where it is necessary to preserve the subject matter of the litigation" or to prevent irremediable damage: *Contact Airways Limited v. De Havilland Aircraft of Canada Limited* (1982),

42 B.C.L.R. 141 (C.A.) at 143. The applicant bears the onus of justifying a stay: *Bancroft-Wilson v. Murphy,* 2008 BCCA 498 at para. 9.

[20] A three-part test applies. As set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the applicant for a stay must establish:

a) there is some merit to the appeal;

b) the applicant will suffer irreparable harm if a stay is refused; and

c) the balance of convenience favours granting a stay.

[21] The threshold for the first of these criteria is not high. An arguable case is generally sufficient: *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 (Chambers) at para. 18. The third of the *RJR-MacDonald* criterion requires a weighing of the interests of the parties and a balancing of the potential harm should a stay issue, or be refused: *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 146 (Chambers) at paras. 36–37. Ultimately, the court must ask itself whether granting a stay is in the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607 at para. 9.

Application of Legal Principles

[22] It is not necessary to detail the positions taken by the parties. Instead, I will focus on the conclusions reached. Domain, Aviva and Solterra opposed 129's applications. The Monitor does not support the relief sought by 129.

Application for Leave to Appeal

[23] As a preliminary issue, some of the respondents asserted that this Court has no jurisdiction to entertain an application for leave to appeal from the August 29, 2022 order and the matter should be dismissed on that basis. In making that argument, they relied on *Bank of Montreal v. Cage Logistics Inc.*, 2003 ABCA 36.

[24] I have read *Bank of Montreal*. I accept that on a plain reading of ss. 13–14 of the *CCAA*, the jurisdiction to grant an extension to file an appeal from an "order or a

decision made under" that statute lies exclusively with the court appealed from. However, at least on a preliminary basis, I do not agree with the suggestion in *Bank of Montreal* that the court appealed to has no jurisdiction to review a decision to deny an extension. The case is not binding on me and to adopt its interpretation of the *CCAA* would mean that a supervising judge in *CCAA* proceedings can immunize their denial of an extension from appellate review even in the face of a clear error in principle, no evidentiary support for the denial, or a palpable injustice. I question whether that result is consistent with the plain text of ss. 13–14, a harmonious reading of those provisions, the objectives of the statute, or Parliament's intent.

[25] However, for the purposes of this case, I need not resolve the interpretation issue. That is because assuming, without deciding, that this Court has jurisdiction to entertain 129's application for leave to appeal, I was satisfied the application should be dismissed on the merits.

Merits of the Appeal

[26] Without access to Justice Fitzpatrick's reasons, I cannot say 129's proposed appeal from the extension denial is frivolous or that it raises no arguable issues. The notice of appeal was filed and served less than one week past the prescribed deadline; the reasons for delay appear to be grounded in inadvertent error by counsel and technical difficulties with electronic filings; and the affected parties were notified of the intention to seek leave to appeal before the filing deadline.

[27] However, I also cannot say the appeal is one of any substance. The denial of an extension of time is discretionary. Discretionary decisions attract significant deference in this Court and a division would only interfere if 129 was able to establish a material error in principle, that the impugned order was not supported by the evidence, or that it resulted in an injustice: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 35.

[28] Before me, 129 acknowledged it cannot presently identify an error in principle or any misapprehension of evidence. Instead, distilled to its essence, the argument advanced in support of a meritorious appeal was that given the facts surrounding the

late filing, Justice Fitzpatrick must have erred in principle or misapprehended the relevant evidence because otherwise, she would have granted the extension.

[29] Respectfully, I did not find that submission persuasive. It fails to appreciate that the discretion to grant or deny an extension of time is contextually informed and considers more than simply the reasons for the late filing. A judge must also consider the merits of the proposed application for leave to appeal/appeal, whether the respondents would be unduly prejudiced by an extension and, importantly, whether an extension is in the interests of justice: *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260 (C.A.); *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283 at paras. 29–31.

[30] Moreover, the order at issue was granted by a supervising judge with extensive knowledge of the *CCAA* proceedings. She was well-positioned to assess the merits of 129's proposed challenge to the approval of the Solterra sale, which was based on allegations of inadequate notice. Critically, she was also well-positioned to assess prejudice and whether an extension was in the interests of justice. Because of her familiarity with the circumstances, Justice Fitzpatrick would have appreciated the adverse effects of appellate delay on the respondents; the nature and extent of prejudice realistically borne by 129 if denied an extension; and the impact of an application for leave to appeal and potential appeal on the *CCAA* proceedings themselves.

[31] At the time Justice Fitzpatrick approved the Solterra sale, she was satisfied there was "no evidence before [her] to suggest the availability of any sale transaction that would achieve [the] result" sought by 129, namely, full repayment as a creditor: 2022 BCSC 1464 at para. 49. She also found "no evidence to suggest that any further sales process … would produce a superior offer to the Solterra Offer, either in terms of price or closing terms" (at para. 56).

[32] As at May 2022, the Petitioners had run out of working capital (a fact not disputed by 129). Attempts to secure additional financing fell through. The

Petitioners lacked liquidity to make payments. By July 2022, their accounts payable exceeded $400,000. There were no funds to defray ongoing expenses and no funds to pay the Monitor. The Monitor estimated site preservation costs accruing at approximately $79,000 per month. The Monitor, its legal counsel and the Petitioners' counsel had gone unpaid. The respondents contend, and I accept, that nothing had materially changed by August 29, 2022, when 129 applied for an extension of time. In fact, the overall financial situation had worsened.

[33] All of these circumstances were known to Justice Fitzpatrick when she denied an extension. Her application of the relevant legal principles would necessarily have been informed by the surrounding circumstances; her role as the supervising judge; her familiarity with the parties; their conduct during the *CCAA* proceedings; the viability of plans previously put forward; potentially outstanding expressions of intent; the urgent need for a resolution to protect stakeholders' interests; and the Monitor's support for the Solterra sale. That support came after the Monitor reviewed Aviva's efforts to produce a sale and satisfied itself "that those efforts had produced the best and timeliest offer available" (at para. 47).

[34] 129's appeal from the denial of an extension may not be frivolous; but, in light of the discretionary nature of the decision, the overall context and Justice Fitzpatrick's unique position as the supervising judge, I consider it highly unlikely that 129 would be able to convince this Court to interfere with the ruling.

Significance to Practice and the Action

[35] The principles governing extensions of time are well-settled. I see nothing about the proposed appeal that raises questions of significance to practice specific to that issue. Rather, 129's complaint about the August 29, 2022 order is focused on the application of those principles to the particular facts of this case. It is an individualized complaint.

[36] The ultimate objective of 129's appeal is to overturn the extension denial so that it can proceed with challenging the order approving the Solterra sale. 129 argues that its appeal from that order raises issues of significance to practice and I

should give that fact weight on this application, including the extent to which the real-time litigation nature of *CCAA* proceedings properly allows a supervising judge to dispense with formal notice of an application for the approval of a sale.

[37] The difficulty with that argument, as emphasized by the respondents, is that even if it is proper for me to take issues raised by the first-in-time appeal into account, Justice Fitzpatrick found as a fact that Tobi Reyes, the principal of 129 and Port Capital Development (EV) Inc., was "well aware" before July 22 of creditor intentions to revive a sale of Terrace House and, in fact, had "been making efforts to generate his own offer, to no effect": 2022 BCSC 1464 at para. 56. There is also considerable merit to the submissions of Domain and Solterra that it is readily apparent from the record that all parties, including 129 and the Petitioners, were aware before the July 22 hearing that a "return to market had occurred and an application for court approval [of a sale] was imminent". The Petitioners' counsel was present at the July 22 hearing and informed the court of 129's opposition to any sale that would not provide for full repayment. Mr. Reyes instructs counsel for the Petitioners. This discussion took place before the court stood down until 3:20 p.m. for presentation of the Solterra offer. Counsel for the Petitioners was also present at two hearings preceding July 22, in which it was anticipated that an offer to purchase might be ready for approval by July 22.

[38] Given these circumstances, appeal CA48485, even if allowed to proceed, would not be about the authority of a supervising judge to dispense with formal notice or process requirements, generally, or the factors that properly guide the exercise of that discretion. Rather, it would ask whether the manner in which this case proceeded was procedurally unfair in light of the judge's factual findings and the evidentiary record. I have reviewed a transcript of the July 22, 2022 hearing. I saw nothing there, from a practice perspective, that would transcend the factual matrix of the case. Although not strictly necessary for present purposes, I am also of the view based on the transcript and the argument made by 129 when applying for an extension (included in its material), that 129's application for leave to appeal the July 22 order is not compelling.

[39] There is no doubt the appeal carries significance to the parties. Whether leave is granted or denied has significant implications for all involved. However, as will be apparent from my discussion under the heading “Interests of Justice”, I am satisfied the respondents would suffer significant and likely irremediable prejudice if leave is granted (particularly, if coupled with an interim stay), and I have no confidence that 129’s proposed amelioration of that prejudice sufficiently counterbalances the risks.

Unduly Hinder the Progress of the Action

[40] The *CCAA* proceedings remain outstanding. I have been told that the stay of proceedings granted in the ordinary course of *CCAA* proceedings remains in place and will not expire until September 30, 2022, subject to an extension. The most significant and pending development in those proceedings is the Solterra sale.

[41] If 129 is granted leave to appeal the denial of an extension, it will next proceed to an appeal before a division. If that appeal succeeds, the denial of the extension is overturned and an extension is granted by this Court, to challenge the order approving the Solterra sale, 129 would still need to obtain leave to appeal that order and, if successful, appear before a division to persuade the division to set the order aside. It is plain that even if the two appeals were expedited, the appellate process would likely require months if not more than a year to complete. In submissions before me, it was made clear that if leave to appeal and an interim stay are granted, thereby preventing the September 20 closing, Solterra will abandon its purchase of Terrace House. I agree with the respondents that if this occurs, it will unduly hinder the progress of the *CCAA* proceedings. In fact, in the words of counsel, it will result in “chaos”. The parties will be back to square one, with no approved sale and rapidly accruing development costs for which there is no working capital. Moreover, as I understand it, there would be no order in place granting the Monitor expanded powers and allowing it to marshal another offer to purchase without further appearances before Justice Fitzpatrick.

[42] Domain put it this way in its written argument:

> … the one qualified purchaser with a firm offer will be lost. Interest and critical site preservation costs accrue at more than $310,000 per month … in order to simply tread water, any subsequent offer would need to exceed Solterra's $18.5 million purchase price by at least $310,000 (increasing with compounding) for each passing month. On the evidence, that is highly unlikely …

[43] 129 argues that granting leave and an interim stay will not be catastrophic, as suggested by the respondents, because 129 has secured an irrevocable offer to purchase Terrace House from another entity and that offer is more favourable than the Solterra sale.

[44] In support of this position, 129 tendered affidavits from Tobi Reyes and Bruce Martinuik. Mr. Martinuik is the principal of Martinuik Properties Ltd. ("Martinuik Properties").

[45] Mr. Reyes deposes that after the August 29, 2022 hearing, he approached two parties (other than Solterra) that expressed interest in purchasing Terrace House at the time of the July 22, 2022 approval. According to Mr. Reyes, these parties remain interested in a purchase; however, following dismissal of the extension of time, they were not prepared to proceed with an offer given the tight timeframe. Mr. Reyes says he subsequently entered into negotiations with Martinuik Properties, which led to an irrevocable offer to purchase Terrace House. The offer (dated September 12, 2022), is for $18,750,000, plus an additional $5,203,381 payable to 129 upon an assignment of its security to Martinuik Properties. Mr. Reyes says he believes Martinuik Properties has the financing necessary to complete the proposed purchase. He has also deposed that he is willing to fund the cost and expenses of the Monitor if leave to appeal the August 29 order is granted and the July 22 order is stayed.

[46] In his affidavit, Bruce Martinuik confirms the offer to purchase. He says Martinuik Properties was incorporated in 2018 to "develop and partner in real estate projects". The affidavit states that either Mr. Martinuik or Martinuik Properties (it is unclear to me), owns interests in projects in the Lower Mainland, the Okanagan and

Vancouver Island. However, none of those projects are identified. Mr. Martinuik confirms he has been able to make financial arrangements in support of the irrevocable offer to purchase. However, details of the arrangements have not been provided, including the identity of any lenders, amounts available, confirmation of letter(s) of commitment, or the terms of the lending.

[47] When the September 16 hearing commenced, counsel for 129 informed me that as a show of good faith, a first deposit of $1,000,000 under the new offer was scheduled to have been made first thing in the morning. He candidly acknowledged that without payment of the deposit, 129 likely faced an “uphill battle” in justifying a stay. By the time submissions completed in late afternoon, no deposit had been made. When we resumed at 3:45 p.m. for a decision, I was informed that approximately $500,000 had been or was in the process of being transferred. This was, at best, half the amount I was initially told would be paid and it was transferred at the last minute. I also note, in any event, that under the terms of the Martinuik Properties offer, the $1,000,000 deposit does not become binding until two business days after execution of the sale agreement, which would be well into the future.

[48] I am not prepared to assign the Reyes and Martinuik affidavits much weight. The affidavits are general; provide few details about Martinuik Properties and whether it is an entity of proven financial means; and, importantly, there is no supportive documentation confirming the financing arrangements that have apparently been put in place to facilitate an $18,750,000 purchase. In my view, a more robust and assuring evidentiary foundation was necessary to sufficiently counterbalance the palpable risk borne by the respondents if Solterra withdraws its agreement to purchase because the sale cannot close.

[49] Granting leave to appeal, particularly if coupled with an interim stay, would unduly hinder the progress of the *CCAA* proceedings.

Interests of Justice

[50] 129 contends that without leave to appeal and the ability to challenge the denial of the extension and, ultimately, the order of July 22, 2022, any opportunity to facilitate a sale of Terrace House that allows 129 to recover its funds as creditor will be lost. As I understand it, the current debt-stack of the development includes a third charge of approximately $8.4 million that is shared between 129 and Aviva, respectively, in a 65/35% split. The Solterra purchase price is insufficient to cover 129's liability. From the perspective of 129, to proceed with the Solterra sale is grossly unfair and the interests of justice weigh heavily in favour of granting leave and an interim stay.

[51] In my view, the interests of justice do not weigh in favour of granting leave. To the contrary, they weigh in the opposite direction. I see little possibility (if any) of a division of this Court interfering with the denial of the extension. 129's proposed appeal does not raise issues of significance to practice and the uncertainty, unpredictability and delay engendered by appeal proceedings (particularly if accompanied by an interim stay), realistically carries the risk of substantial prejudice to the respondents. 129 has sought to ameliorate that prejudice, but I have serious concerns about the reliability of the supporting evidence and no confidence, given the history of this matter, that a sale to Martinuik Properties would actually materialize. This history includes the fact that 129's October 2021 refinancing plan has collapsed; the Petitioners, with Mr. Reyes as a principal, have run out of working capital and are unable to meet their project payables; and an arrangement by the Petitioners to secure additional financing in May 2022, did not close as they said it would: 2022 BCSC 1464 at paras. 18–27.

[52] I also agree with the respondents, based on my review of the application record, that even if a sale to Martinuik Properties occurred, by the time it took place, the accrued costs of the development would render that sale markedly inferior to the one set to close on September 20. I agree with the respondents that the actual purchase price of this latest offer is only $250,000 more than the Solterra offer.

Martinuik Properties' intention to acquire 129's debt and security does not form part of the funds payable to the vendors.

[53] 129 recognizes in its written argument that if granting its applications means Solterra is likely to withdraw its agreement to purchase (which appears to be the case), the interests of justice would not "permit" granting leave in the absence of sufficiently mitigating the respondents' prejudice. In my view, the evidence surrounding the Martinuik Properties' offer does not do so.

[54] I also agree with the respondents that in the circumstances of this case, the comments of Justice Tysoe in *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 are apposite:

> [19] … In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons …
>
> [20] First, 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 endeavouring to balance the various interests. Secondly, *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. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).
>
> [21] … In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to *CCAA* proceedings as "real-time" litigation.
>
> [22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an

> appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.
>
> [Emphasis added.]

See also *Southern Start Developments* at paras. 21–25; *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 319 at paras. 45–48; *Wedgemount* at paras. 43–44.

[55] For these reasons, I dismissed the application for leave to appeal.

Stay of Execution

[56] The purpose of an interim stay would be to prevent prejudice to 129 while pursuing its appeal and to avoid rendering that appeal moot. Without leave to appeal, the need for a stay loses its force.

[57] However, given the fact that the issue was fully argued before me and my decision to deny leave is subject to review under s. 29(1) of the *Court of Appeal Act,* I consider it appropriate to state my conclusions on this component of 129's applications.

[58] Before doing so, it is necessary to address a preliminary issue. Some of the respondents suggested that I have no jurisdiction to stay the order approving the Solterra sale because 129's application for leave to appeal/appeal of that order is extant. 129 argued that I do have jurisdiction because of the broad wording of s. 33(1) of the *Court of Appeal Act*. 129 says the denial of an extension and 129's attempt to appeal the order approving the sale are so closely intertwined that the July 22 order reasonably forms part of the "cause or matter from which the appeal is brought".

[59] For the purpose of this application, I did not consider it necessary to resolve the jurisdictional issue. That is because assuming, without deciding, that I do have jurisdiction to grant an interim stay, I dismissed 129's application for that remedy on the merits. 129 did not persuade me that it met the *RJR-MacDonald* criteria.

Merits of the Appeal

[60] My conclusions on the request for a stay will be briefly stated. There is considerable overlap between this issue and the application for leave to appeal. There is no need to reiterate the relevant portions of my analysis. For the reasons set out earlier, I consider it highly unlikely that 129 would succeed in convincing this Court to intervene with the denial of an extension.

Irreparable Harm and Balance of Convenience

[61] 129's arguments of irreparable harm are the same as the arguments it advanced in support of leave to appeal, namely: that without a stay, 129 will lose the opportunity of a sale to Martinuik Properties (or some other entity) and full repayment.

[62] As noted, I have serious concerns about the reliability of the evidence surrounding the Martinuik Properties offer and no confidence, given the history of this matter, that this sale would actually materialize. I also agree with the respondents that, considered in context, the Martinuik Properties offer is markedly inferior to the sale set to close on September 20.

[63] I am satisfied it is the respondents who are likely to suffer irreparable harm if an interim stay is granted, pending the hearing of an appeal, and the balance of convenience weighs in favour of allowing the pending closing to proceed. If a stay is granted, the respondents will likely lose the benefit of a sale that Justice Fitzpatrick has determined is in the best interests of the stakeholder group because of significant ongoing risk and costs associated with the development project.

Interests of Justice

[64] As stated, 129 acknowledges in its written argument that if the risk of Solterra withdrawing its agreement to purchase cannot be sufficiently ameliorated, a stay should not be granted. In other words, 129 does not dispute that in those circumstances, the respondents will suffer irreparable harm and it is not in the interests of justice to put the approved sale on hold. On the basis of the material

before me, what unfolded on September 16, and the history of this matter, 129 has not persuaded me that its proposed amelioration sufficiently addresses the respondents' risks. In her reasons explaining the approved sale, Justice Fitzpatrick stated (at para. 56):

> As he has done many times in this proceeding, Mr. Reyes only wishes to avoid a sale at this time to buy himself more time; however, it is crystal clear that any further time will come at a significant cost and risk to other stakeholders. In essence, Mr. Reyes' only remaining "kernel of a plan" is simply delay.

[65] Regrettably, I am left with this same impression.

Disposition

[66] For the reasons provided, I:

a) granted 129 an urgent hearing and agreed to have the matter proceed on September 16, 2022;

b) dismissed the application for leave to appeal Justice Fitzpatrick's order of August 29, 2022 denying an extension of time;

c) dismissed the application for a stay of Justice Fitzpatrick's order of July 22, 2022, approving a sale of the Petitioners' assets to Solterra; and

d) granted Solterra's application for an urgent chambers hearing, agreed to have the related application proceed on September 16, 2022 and, with consent, ordered that Solterra be added as a party to appeal CA48534.

"The Honourable Madam Justice DeWitt-Van Oosten"

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

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

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

INDEXED AS: 9354-9186 QUÉBEC INC. *v.* CALLIDUS CAPITAL CORP.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

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

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

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

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

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

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

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

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

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

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

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

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

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

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

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

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

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

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

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

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

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

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la *LACC*. Dans sa requête, Bluberi allègue

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

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

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

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

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

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

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

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

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

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

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

B. *The Initial Competing Plans of Arrangement*

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

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

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

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. *Les premiers plans d'arrangement concurrents*

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 $; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

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

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

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

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la *LACC* prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 $) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 $). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

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

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

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

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

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

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

[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.

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

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

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

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

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

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

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

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

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

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

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

> [TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

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

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

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

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la *LACC*, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

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

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

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

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l'AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu'il n'est pas nécessaire que l'AFL soit assorti d'un plan étant donné que Bluberi a exprimé l'intention d'en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l'AFL respecte le critère d'approbation applicable en matière de financement d'un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d'investissement et de risque. Il rejette en outre l'argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l'AFL donne trop de latitude à Bentham. Il conclut que l'AFL ne permet pas à Bentham d'exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu'il contient ont déjà été approuvées dans le contexte de la *LACC* (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s'il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l'engagement financier de Bentham dans le litige; et le fait que Bentham n'exige aucune provision pour frais ou intérêts (c.-à-d. qu'elle ne tirera profit de l'accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu'elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l'ordonnance du juge surveillant et met en cause Bentham.

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

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

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

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

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

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

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

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

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

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

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.

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

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

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

(1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?

(2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la *LACC*?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of *CCAA* Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

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

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

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

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

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

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

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[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).

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

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[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

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la *LACC*, art. 6). Le juge surveillant tiendra ce qu'on appelle communément une [TRADUCTION] « audience d'équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (*LACC*, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d'arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la *LACC* n'interdit à un créancier de voter sur un plan d'arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu'une interprétation téléologique du par. 22(3) de la *LACC* révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d'harmoniser le régime de la *LACC* avec le par. 54(3) de la *LFI*, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la *LFI*, seuls les débiteurs peuvent faire la promotion d'un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s'entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la *LACC* doit également les viser. Pour cette raison, les appelantes nous demandent d'étendre la restriction au droit de

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

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

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

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

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

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

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

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

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

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

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n'a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC,* le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l'adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l'adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d'établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d'autres mécanismes qui réduisent le risque qu'un créancier en situation de conflit d'intérêts par rapport au plan qu'il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l'interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n'ont pas suffisamment d'intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l'expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d'interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d'appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: ". . . courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

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

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

General power of court

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

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

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the

(*Century Services*, par. 61; voir aussi par. 62). Dans l'arrêt *Century Services*, notre Cour a souscrit à l'approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la *LACC* suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Après avoir appliqué cette approche, nous concluons que l'art. 11 de la *LACC* confère au tribunal le pouvoir d'interdire à un créancier de voter sur un plan d'arrangement ou une transaction s'il agit dans un but illégitime.

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :

Pouvoir général du tribunal

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

Selon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus

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. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

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

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

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, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

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

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

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

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

[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

[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.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

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

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

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

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

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

[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

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n'avaient pas réellement changé. Pourtant, Callidus a tenté d'évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d'arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d'un vote, le fait d'ordonner la tenue d'une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu'il ne servirait ou n'accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C'est particulièrement le cas en l'espèce étant donné que la tenue d'une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 $ (voir les motifs du juge surveillant, par. 72).

[80] Ajoutons que la façon d'agir de Callidus était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d'actif garantissant la réclamation de Callidus. Cette dernière n'a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n'avaient aucune valeur, on se serait attendu à ce qu'elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

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

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

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

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. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

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

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

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

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

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".

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

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

Financement temporaire

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

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

[5] 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.

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

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

Priority — secured creditors

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

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

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

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

Priorité — créanciers garantis

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

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

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

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

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

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

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

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

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

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

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

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La *LACC* énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*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; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

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

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

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

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

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

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

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

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

[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,

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

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

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

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

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

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

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

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.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

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

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

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

[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

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

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

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

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

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

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

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

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

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

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

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

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

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

[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.
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> . . . 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

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

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

> [TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.
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> . . .
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> . . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

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

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

Court of Appeal for Ontario
Cineplex Odeon Corp. (Re)
Date: 2001-03-27
Docket: CA M27138

David M. McNevin, for Applicant, Mady Development Corporation

MacPherson J.A.:

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

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

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

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

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

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

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

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

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

[5] I do not think that the proposed appeal is *prima facie* meritorious. Farley J. specifically considered the leading authorities and the relevant provisions of the lease. In

my view, his conclusion that the theatre seats and movie screens were trade fixtures is correct.

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

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

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

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

Application dismissed.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Edgewater Casino Inc. (Re),***
2009 BCCA 40

Date: 20090206
Docket: CA035922; CA035924

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*,
S.B.C. 2002, c 57, as amended

In the Matter of Edgewater Casino Inc. and
Edgewater Management Inc.

Between:

Canadian Metropolitan Properties Corp.

Appellant
(Applicant)

And

**Libin Holdings Ltd., Gary Jackson Holdings Ltd.
and Phoebe Holdings Ltd.**

Respondents
(Respondents)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

J.J.L. Hunter, Q.C. and J.A. Henshall	Counsel for the Appellant
J.R. Sandrelli and A. Folino	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia January 7, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA"*).

[2] On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

[3] The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately $15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first

dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

[4] Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

[5] On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient

funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

[6] The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

[7] By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

[8] In his reasons for judgment dealing with the property tax dispute, indexed as 2008 BCSC 280, the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust

enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

[9] In his reasons for judgment dealing with the utilities dispute, indexed as 2007 BCSC 1829, the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

[10] In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (C.A. Chambers), and *Re Pine Valley Mining Corporation*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (Chambers), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

[11] The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

Discussion

[12] The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225.

[13] The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in *CCAA* proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

> [30] 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.
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> [31] 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 orders in proceedings for which he has no further responsibility.

> [32] 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.

Numerous subsequent decisions have referred to these comments. These decisions include *Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (C.A.) at para. 57; *Re Woodward's Ltd.* (1993), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (B.C.C.A. Chambers) at para. 34; *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 (B.C.C.A. Chambers) at para. 8; *Luscar Ltd. v. Smoky River Coal Ltd.,* 1999 ABCA 179, 175 D.L.R. (4th) 703 at para. 62; *Re Blue Range Resource Corp.*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Chambers) at para. 3; *Re Canadian Airlines Corp.*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Chambers) at para. 42; *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at para. 52; *Re Fantom Technologies Inc.* (2003), 41 C.B.R. (4th) 55 (Ont. C.A. Chambers) at para. 17; and *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, [2005] 8 W.W.R. 224 at para. 20.

[14] The Landlord accepts the general proposition that leave to appeal from *CCAA* orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical *CCAA* situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice

McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease*, McEachern C.J.B.C. said the following:

> [58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, [1993] 2 S.C.R. 448, and the Court agreed generally with his dissenting reasons.

[15] The respondents submit that there should be the same test for leave to appeal from all orders made in *CCAA* proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

[16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA*

proceedings should be limited: see *Re Algoma Steel Inc.* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 at para. 8.

[17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

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

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

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

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

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. Chambers).

[18] This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a

recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

[19] The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

[20] First, 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 endeavouring to balance the various interests. Secondly, *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. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that “[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters

and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

[21] The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to *CCAA* proceedings as "real-time" litigation.

[22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

[23] Similar views were expressed by Mr. Justice O'Brien in *Re Calpine Canada Energy Ltd.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Chambers):

> [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.

Other decisions on leave applications where the usual factors were expressly considered include *Re Blue Range Resource Corp*., *Re Canadian Airlines Corporation* and *Re Fantom Technologies Inc*., each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease*.

[24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena*

Forest Products at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

[25] The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

[26] I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

[27] I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

[28] There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have be an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

[29] I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.

2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).

3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.

4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

[30] A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as

of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

[31] I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice D. Smith"

COURT OF APPEAL FOR ONTARIO

CITATION: Essar Steel Algoma Inc. (Re) 2016 ONCA 138
DATE: 20160219
DOCKET: M46093 & M46104

Brown J.A. (In Chambers)

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

And in the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Markus Koehnen and Jeffrey Levine, for the moving parties/responding parties by way of cross-motion, The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company

Eliot Kolers and Maria Konyukhova, for the responding parties/moving parties by way of cross-motion, Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA

Nicholas Kluge and Delna Contractor, for the Monitor, Ernst & Young Inc.

Heard: February 16, 2016

ENDORSEMENT

I. THE MOTIONS

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

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

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

II. BACKGROUND

[4] Essar manufactures steel in Sault Ste. Marie, Ontario. Iron ore pellets are a key input in its manufacturing process. In 2002, Essar's predecessor entered

into a long-term iron ore pellet supply contract with Cliffs (the "Contract"). The Contract obliged Essar to purchase iron ore pellets exclusively from Cliffs until 2016 and to purchase a portion of its pellets from Cliffs from 2017 until 2024.

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

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

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

[8] On November 9, 2015, Essar sought and obtained an initial order under the *CCAA*. On November 10, 2015, Essar's foreign representative sought and obtained orders under Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C (2010)

recognizing and enforcing in the United States the orders granted in the *CCAA* proceeding, which was recognized as the foreign main proceeding.

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

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

III. PROCEEDINGS UNDER APPEAL

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

[12] On December 23, 2015, Cliffs served a motion seeking an order dismissing Essar's Contract Dispute Motion on the ground that the Ontario court

lacks jurisdiction to grant the relief sought or, alternatively, Ontario is not the convenient forum in which to adjudicate the dispute.

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

IV. ISSUES

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

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

V. WHETHER CLIFFS REQUIRES LEAVE TO APPEAL THE ORDER

[16] Section 13 of the *CCAA* requires that "any person dissatisfied with an order or a decision made under this Act" obtain leave to appeal. The sole issue

on Cliffs' motion for directions is whether the Order of the *CCAA* judge was "made under" the *CCAA.*

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

A. Positions of the Parties

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

Sanderson of Fish Creek (Calgary) Developments Ltd., 2014 ABCA 143, 575 A.R. 46.

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

B. Analysis

The Purpose of s. 13 of the *CCAA*

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

> To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay…The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62, [1999] A.J. No. 185 at para. 22, citing *Re Pacific National Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

> The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 237 A.R. 326 at para. 31.

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

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

[22] That legislative purpose for the leave requirement supports an expansive interpretation of the term “made under” the Act in s. 13: *Re Smoky River Coal Ltd.*, 1999 ABCA 62, 237 A.R. 83, at para. 20. Such an expansive interpretation was adopted by Paperny J.A. in *Re Concrete Equities Inc.*, 2012 ABCA 91, [2012] A.W.L.D. 2836, at para. 16, where she held that when “*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge … it can be fairly said that the order was made ‘under’ the *CCAA* in accordance with section 13 of the Act.”

The Decisions in *Sandvik Mining* and *Monarch Lands*

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

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

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

not rely on any provision of the *CCAA*, and the determination of the issue in question was not incidental to any order made under the *CCAA*." Tysoe J.A. went on to state, at para. 11:

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

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

> In my opinion, the order or decision of [the judge below] was not made under the *CCAA*. The efforts to reorganize Redcorp had come to an end, and there was no ongoing attempt to have Redcorp file a plan of arrangement. [The receiver] simply filed its application in the *CCAA* proceeding as a matter of convenience. The fact that [the receiver] was appointed

> in the *CCAA* proceeding did not require the application to be filed in that proceeding. [The receiver] could have, and more properly should have, commenced a separate proceeding. [The receiver] was not appointed as interim receiver or receiver pursuant to the *CCAA*, but rather pursuant to the *BIA* and the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (while the order lifting the stay undoubtedly had to be made within the *CCAA* proceeding, there is a question in my mind about the appropriateness of appointing receivers within *CCAA* proceedings after the reorganization attempt has failed).

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

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

[29] Sanderson was one of a group of companies that obtained an initial order under the *CCAA*. In those proceedings, a trial of issues was directed. Prior to the trial, the list of issues was expanded. As a result, the trial judge considered two

issues: (i) an accounting for sale proceeds as between two of the secured creditors of the debtors; and (ii) the ownership of parking stalls pursuant to an agreement between the debtor and a secured creditor.

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

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

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

> Here the order of Horner J., the supervising judge in the CCAA proceedings, granted "a trial of an issue ... to determine whether the Purchase and Sale Agreement of December 1, 2010, between [Sanderson] and [Monarch] included parking stalls for the development of phase 3 of the Sanderson project". She lifted the stay in the CCAA proceedings specifically for that purpose. It is common ground that the subject Purchase and Sale Agreement was approved by an order made in the CCAA proceedings…
>
> In my view, it cannot be said, as it was in *Sandvik*, that "the determination of the issue in question was not

> incidental to any order made in the CCAA". To the contrary, the issue Horner J directed to trial required the interpretation of an agreement that the court had expressly approved in the CCAA proceedings, and involved the need to interpret the order approving the sale. Both interpretations had a potential impact upon other Sanderson's other creditors in addition to CMI and Monarch.

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

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

[33] The inquiry, instead, should be purpose-focused. When asked to determine whether an order requires leave to appeal under s. 13 of the *CCAA*, an appellate court should ascertain whether the order was made in a *CCAA* proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the *CCAA* by supervising an attempt to reorganize the

financial affairs of the debtor company, either by way of plan of arrangement or compromise, sale, or liquidation: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 59. If the order resulted from such an exercise of judicial decision-making, then it is an order "made under" the *CCAA* for purposes of s. 13.

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

> In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the CCAA within the meaning of s. 13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly

> state that the matter is a CCAA proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding.

Application of the Purpose-Focused Approach

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

with in this Court." See also, *Re Montréal, Maine & Atlantic Canada Co.,* 2013 QCCS 5194 (Que. S.C.), at paras. 17 and 19.

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

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

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

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

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

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

[40] Second, Cliffs argues that because the contractual claim Essar seeks to assert against Cliffs could properly have been made in a normal civil action without regard to the *CCAA*, the Order was not "made under" the *CCAA*. I do not accept this submission. To decide the appeal route Cliffs must follow, the issue is not what claims Essar could have asserted in some hypothetical proceeding; the issue is how to characterize the Order – was it "made under" the *CCAA*? The purpose-focused inquiry under s. 13 of the *CCAA* must look at the order actually made, not at some order that could have been made in a hypothetical proceeding.

Conclusion

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

VI. ORDER EXPEDITING LEAVE TO APPEAL

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

VII. STAY PENDING APPEAL

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

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

A. Serious Question

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

B. Irreparable harm

Positions of the parties

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

[47] The parties provided an update on what has transpired in that proceeding since the Order was made. Last week, the parties participated in two conference calls with the *CCAA* judge to discuss the procedure by which Essar's Contract Dispute Motion would be adjudicated in the *CCAA* proceeding. Counsel advised that a further videoconference call was scheduled to take place on Wednesday, February 17, 2016 before the *CCAA* judge at which time they expected the judge would render a decision on the adjudication procedure. Cliffs stated it was not participating voluntarily in those scheduling calls, even though it had been

permitted to file its procedural proposals with the *CCAA* judge on a without prejudice basis.

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

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

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

> (i) Cliffs would not be required to file in the *CCAA* court any affidavit or other material delivered in preparation for the contract dispute hearing;

(ii) Essar undertakes not to argue that the delivery of such materials by Cliffs or the taking of any steps toward a hearing of Essar's motion would amount to an act of attornment to the jurisdiction of the Ontario court; and

(iii) Essar would not invoke the jurisdiction of the Ontario court until Cliffs' appeal or motion for leave to appeal has been decided.

Analysis

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

[52] I need not express a view on the effect of court-ordered participation in a proceeding on a party's ability to continue to advance a jurisdictional challenge

because decisions of this court uniformly have held that where the responding party provides the court with undertakings of the kind given by Essar in this case, the undertakings significantly reduce or remove the risk of irreparable harm.

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

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

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

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

C. Balance of convenience

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

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

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

[59] In those circumstances, the balance of convenience favours granting a stay. I have ordered Cliffs’ leave to appeal motion to be expedited. As a result, within the next two weeks the leave motion will be placed before a panel of this

court for determination. If leave is not granted, the Contract Dispute Motion can proceed on the merits with little delay in preparation having occurred. If leave to appeal is granted, then the leave panel will consider whether or not to continue the stay.

D. Conclusion

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

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

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

> Of course, nothing in this endorsement prevents Cliffs from voluntarily taking steps to prepare for an adjudication of the contract dispute with Essar, without prejudice to its argument that the Superior Court of Justice of Ontario lacks the jurisdiction to adjudicate that dispute. As part of such voluntary steps, it is always

> open to Cliffs to request, on a voluntary, without prejudice basis, the informal assistance of the *CCAA* judge on any hearing planning or preparation issues, and it is always open to the *CCAA* judge to provide any such requested informal assistance on a without prejudice basis.

VIII. DISPOSITION

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

"David Brown J.A."

In the Court of Appeal of Alberta

Citation: Hurricane Hydrocarbons Ltd. v. Komarnicki, 2007 ABCA 361

Date: 20071119
Docket: 0701-0086-AC
Registry: Calgary

Between: **Action No.: 0101-04991**

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC

Applicants (Respondents/Plaintiffs)

- and -

John J. Komarnicki

Respondent (Appellant/Defendant)

Between: **Action No.: 0101-5441**

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC

Applicants (Respondents/Plaintiffs)

- and -

John J. Komarnicki

Respondent (Appellant/Defendant)

Between: **Action No.: 0001-16208**

John J. Komarnicki

Respondent (Appellant/Defendant)

- and -

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC

Applicants (Respondents/Plaintiffs)

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Application to Strike the Appeal

Memorandum of Judgment

The Court:

[1] The applicants, Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (collectively, the Hurricane companies), apply to strike the appeal of the respondent, Komarnicki, on the basis that he failed to obtain leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). The application is granted and the appeal is struck.

Factual background

[2] The applicants, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., received creditor protection under the CCAA on May 14, 1999. The respondent submitted a notice of claim in the CCAA proceedings alleging wrongful dismissal from employment with Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., which they disputed.

[3] No determination was made on the merits of the disputed claim prior to February 28, 2000 when the Plan of Compromise and Arrangement (Plan) received court approval. The Plan provided that any disputed claim not resolved by March 31, 2005 was deemed to be forever extinguished, terminated and cancelled.

[4] In October 2000, the respondent commenced a claim in the Court of Queen's Bench seeking damages for wrongful dismissal from Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc.

[5] On February 28, 2001, the Hurricane companies commenced an action in the Court of Queen's Bench seeking indemnity from the respondent for costs or damages resulting from the Hurricane companies' defence of various claims (Hurricane #1 action). Because counsel for the Hurricane companies did not immediately receive a filed copy of the statement of claim, out of an abundance of caution to avoid expiry of a limitation period, a second identical statement of claim was filed on March 1, 2001 (Hurricane #2 action). The Hurricane #1 action was served in January 2002 and the Hurricane #2 action was never served. The Hurricane #1 and #2 actions were not claims within the CCAA proceedings.

[6] On August 9, 2002, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc. filed a statement of defence to the respondent's wrongful dismissal action. On August 14, 2002, the respondent filed a statement of defence to the Hurricane #1 action.

[7] The March 31, 2005 drop dead date passed without resolution of the respondent's wrongful dismissal claim.

[8] On March 22, 2006, almost one year past the drop dead date, the respondent filed a statement of defence and counterclaim in the Hurricane #2 action. The counterclaim is virtually identical to the wrongful dismissal action. On October 13, 2006, the respondent applied to the Court of Queen's Bench for a declaration that he was entitled to take the next step in his wrongful dismissal action and counterclaim in Hurricane #2 action, and sought to add to the Hurricane #1 action a counterclaim, which was, again, virtually identical to the wrongful dismissal action and the counterclaim in the Hurricane #2 action. The Hurricane companies applied to strike the wrongful dismissal action and the counterclaim in Hurricane #2 action, and opposed the addition of a counterclaim in the Hurricane #1 action.

[9] The chambers judge dismissed the wrongful dismissal action, struck the counterclaim and refused to allow the addition of a counterclaim to the Hurricane #1 action.

[10] The respondent filed a notice of appeal in this Court and was advised by the Deputy Registrar that leave pursuant to section 13 of the CCAA might be required. The Hurricane companies brought this motion to strike the appeal.

Issue

[11] Does section 13 of the CCAA apply to the respondent's wrongful dismissal action and counterclaim?

Relevant legislation

[12] Section 13 of the CCAA provides:

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

Decision

[13] The requirement for leave furthers the objects and purpose of the CCAA which has been described by Farley J. in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para.31 (Ont.Gen. Div.) as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

[14] To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay. A drop dead date is one means of bringing disputed claims to an end and allowing a company to move forward. The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62, [1999] A.J. No. 185 at para. 22, citing *Re Pacific National Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.).

[15] The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 237 A.R. 326 at para. 31.

[16] Before us, the respondent conceded that the wrongful dismissal action was a "claim" in the CCAA proceeding and that leave is required. However, the respondent says that the counterclaims ought not to be considered "claims" because they were filed in the Hurricane #1 and #2 actions which were not CCAA proceedings. The respondent submits that it would be unfair to permit Hurricane to pursue its actions, but to prevent him from advancing his counterclaim.

[17] We conclude that the decision of the chambers judge is an order or decision made under the CCAA because its operation affects a claim submitted in the CCAA proceedings. The respondent submitted a claim in the CCAA for wrongful dismissal. His claim was disputed; it was not excluded from the Plan, was not resolved before the drop dead date and no extension of that deadline was obtained. The Court of Queen's Bench action and the counterclaims are all based on the same alleged wrongful dismissal that the respondent claimed in the CCAA proceedings. The chambers judge recognized that the respondent was attempting to prosecute his wrongful dismissal claim when it has already been deemed to be extinguished, terminated and cancelled by the terms of the Plan.

[18] It follows that the respondent must obtain leave to appeal the decision of the chambers judge. There was no proper application for leave before us and we make no decision in that regard. Accordingly, the application is granted and the appeal is struck.

Application heard on November 15, 2007

Memorandum filed at Calgary, Alberta
this 19th day of November, 2007

McFadyen J.A.

Hunt J.A.

Rowbotham J.A.

Appearances:

R. F. Steele
for the Applicants

L. W. Scott, Q.C.
for the Respondent

COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian University of Sudbury (Re), 2021 ONCA 199
DATE: 20210331
DOCKET: M52287

Hoy, Pepall and Zarnett JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended;
And in the Matter of a Plan of Compromise or Arrangement
of Laurentian University of Sudbury

Murray Gold and James Harnum, for the moving party the Ontario Confederation of University Faculty Associations

Susan Philpott and Charles Sinclair, for the moving party the Laurentian University Faculty Association

Miriam Martin, for the moving party the Canadian Union of Public Employees

D.J. Miller, Scott McGrath and Derek Harland, for the responding party Laurentian University of Sudbury

Ashley Taylor, Elizabeth Pillon and Zev Smith, for the responding party Ernst & Young Inc., acting as the Monitor

Heard: in writing

Motion for leave to appeal from the order of Chief Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated February 26, 2021.

REASONS FOR DECISION

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

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

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

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

Background

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

[6] Four days later, on February 5, 2021, the CCAA judge made an order appointing Dunphy J. as mediator to conduct a confidential mediation among Laurentian's key stakeholders. The mediation is intended to address various issues concerning Laurentian's restructuring, including a new collective agreement with LUFA, which represents 612 Laurentian faculty, accounting for 60% of the university's payroll. LUFA supported the appointment of the mediator.

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

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

[9] The sealing provision states that the Exhibits "are herby sealed pending further order of the Court, and shall not form part of the public record". Both the

Initial Order and the Amended and Restated Order provide that any interested party may apply on seven days' notice to vary or amend the order.

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

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

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

[13] The CCAA judge held that the sealing provision was authorized under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and by the application of the principles in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002

SCC 41, [2002] 2 S.C.R. 522. According to *Sierra Club*, at para. 53, a confidentiality or sealing order should only be granted when:

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

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

[15] Considering the first branch of the *Sierra Club* test, he concluded that disclosure of the Exhibits, "at this time, could be detrimental to any potential restructuring of [Laurentian]" (emphasis added). Accordingly, "the risk in disclosing the Exhibits is real and substantial and poses a serious risk to the

future viability of [Laurentian].” He also noted that “it is speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian’s] position.”

[16] He found that the commercial interest was that of the entire Laurentian community, including the faculty, students, employees, third-party suppliers and the City of Greater Sudbury and the surrounding area; that it is of paramount importance to these groups that all efforts to restructure Laurentian be explored; and that it is necessary to maintain the confidentiality of the Exhibits in order to do so. He reiterated that “[t]he disclosure of the Exhibits, at this time, could undermine the restructuring efforts being undertaken by [Laurentian]” (emphasis added).

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

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

Leave Test

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

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

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

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

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

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

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

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

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

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

Leave is Not Warranted

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

Leave Not *Prima Facie* Meritorious

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

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

> 2. Did the CCAA judge err in granting the sealing provision without a sufficient evidentiary foundation?
>
> 3. Did the CCAA judge err in concluding that the sealing provision was justified as a result of speculative concerns about the impact that disclosure of the Exhibits that were sealed would have on the CCAA restructuring process?

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

[27] We note that one of the moving parties, OCUFA, is not a creditor of Laurentian and is apparently not participating in the court-ordered mediation, the aim of which is a consensual restructuring. It is not clear in what sense OCUFA is a party to the CCAA proceeding or is in any different position than any other member of the public who may be interested in the court-filed materials. Yet the moving parties do not differentiate, in their proposed appeal questions or in the relief they propose to seek, between the entitlements of OCUFA to obtain the documents and those of the other moving parties. In other words, although reference is made to the denial of access to "litigants", the underlying theory of

the moving parties actually starts and stops with the proposition that there should be no sealing order at all.

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

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

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

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

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

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

[34] In seeking leave, the moving parties have raised questions about how s. 2(d) of the *Charter of Rights and Freedoms* comes into play, as one of the purposes of the mediation is to conclude a new collective agreement with LUFA. But they do not dispute Laurentian's submission that this issue was not argued

below. It is difficult to fault the CCAA judge for not weighing a competing interest that was not asserted before him.

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

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

[37] The CCAA judge was satisfied that there was a sufficient evidentiary basis. He based his conclusion that disclosing the Exhibits posed a serious risk to the restructuring on his review of the Exhibits and Dr. Haché’s evidence. The moving parties are correct that Dr. Haché did not opine in his affidavit that disclosure of the Exhibits posed a serious risk to the viability of the restructuring. But Dr. Haché’s evidence describes something of the dynamics at play and is clear as to Laurentian’s dire position and the timeframe within which the restructuring must be completed, if it is to be successful. It provided the foundation on which the

Monitor, an officer of the court, supported Laurentian's position that disclosure posed a serious risk, and the CCAA judge, who has extensive experience in CCAA restructurings, concluded that disclosure posed a serious risk. The CCAA judge exercised his judgment, based on an evidentiary record.

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

Appeal Would Hinder Progress of the Action

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

No Significance to the Action

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

Significance to the Practice

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

Disposition

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

"Alexandra Hoy J.A.
"S.E. Pepall J.A."
"B. Zarnett J.A."

Luscar Ltd. v. Smoky River Coal Limited, 1999 ABCA 179

Date: 19990609
Docket: 99-18164

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE McINTYRE

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

AND IN THE MATTER OF SMOKY RIVER COAL LIMITED

ALLSTATE INSURANCE COMPANY, ALLSTATE LIFE INSURANCE COMPANY, SECURITY LIFE OF DENVER INSURANCE COMPANY, INDIANA INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, PACIFIC LIFE INSURANCE COMPANY, AH (MICHIGAN) LIFE INSURANCE COMPANY, NORTHERN LIFE INSURANCE COMPANY, RELIASTAR LIFE INSURANCE COMPANY, MODERN WOODMEN OF AMERICA, PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, and PHOENIX AMERICAN LIFE INSURANCE COMPANY;

Petitioners/(not Parties to the Appeal)

BETWEEN:

LUSCAR LTD. and CONSOL OF CANADA INC.

Appellants

- and -

SMOKY RIVER COAL LIMITED

Respondent/(Debtor)

- and -

CANADIAN NATIONAL RAILWAY COMPANY

Respondent/(Creditor)

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE S. J. LOVECCHIO
GRANTED FEBRUARY 1, 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE McINTYRE

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REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE HUNT

[1] This case raises a question about the scope of the powers of a judge pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*"), R.S.C. 1985, c. C-36. Specifically, does a judge have the discretion to establish a procedure for resolving a dispute between parties who have agreed to arbitrate their disputes under a contract? In my view, the judge is granted that power by the *CCAA*, in this case his discretion was exercised properly, and the appeal must be dismissed.

FACTS

[2] The Appellants Luscar Ltd. and Consol of Canada Inc. ("the Appellants") and the Respondent Smoky River Coal Limited ("Smoky") are owners and operators of coal mines in Western Canada. Neptune Bulk Terminals (Canada) Ltd. ("Neptune") owns and operates a port facility in Vancouver. Smoky and the Appellants are shareholders of Neptune and ship coal for export through the port facility.

[3] The relationship between Neptune and its shareholders is governed by a Shareholders' Agreement ("the Agreement"), key provisions of which are reproduced below. Briefly, the Agreement restricts the manner in which a shareholder may dispose of rights arising from the Agreement. Among the consequences of a breach specified in the Agreement are that shareholders are given a right of refusal to purchase, at book value, the Neptune shares belonging to an offending shareholder. The Agreement also provides that disputes among the parties will be arbitrated in British Columbia.

[4] In April 1998, a dispute arose between the Appellants and Smoky when the Appellants alleged that Smoky had breached its obligations under the Agreement. Neptune issued a Notice of Default as required by the Agreement. Over the next several months, information was exchanged among the parties concerning the facts giving rise to the alleged breach. The Appellants say it was not until September 1998 that they received information, on a "with prejudice" basis, that confirmed their view that Smoky had breached its contractual obligations. Because until September they had been unable to use the information obtained earlier, they had taken no further steps in the interim to trigger formally the default provisions of the Agreement.

[5] In the meantime, on July 30, 1998, a syndicate of Smoky's lenders had filed a petition to place Smoky under the protection of the *CCAA*. They, along with Canadian National Railway Company (a major unsecured creditor of Smoky) are also Respondents. On August 7, 1998, an order was made retroactive to July 31, 1998, staying all actions against Smoky and its assets. This order ("the Cairns order") made specific reference to rights arising under the Agreement, even though Neptune and the Appellants had been

unaware of the *CCAA* filing. The Cairns order, which was of limited duration, has since been extended several times. A Monitor has been appointed to oversee Smoky's affairs, although not empowered to take possession of Smoky's assets or manage Smoky's business.

[6] Upon learning of the Cairns order, the Appellants became involved in the *CCAA* proceedings, arguing that the stay should not be extended against them and asserting that their dispute with Smoky should be resolved by arbitration pursuant to the Agreement. The chambers judge suggested that the parties attempt to resolve this issue among themselves. When they were unable to do so, cross-motions resulted. In its motion, Smoky sought various declarations concerning the status of the "dispute" under the Agreement or, alternatively, an order prohibiting arbitration proceedings under the Agreement and giving directions for the determination of issues arising under the Agreement. The Appellants' motion sought a stay of Smoky's motion pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "B.C. *Arbitration Act*").

DECISION APPEALED FROM

[7] The learned chambers judge dismissed the Appellants' motion, concluding that the Court of Queen's Bench (which is the "court" under s. 2 of the *CCAA*) has jurisdiction "to hear and determine ... whether Smoky has been or is in default under the ... Agreement and any and all related issues arising therefrom." He ordered the parties to appear before him for further directions concerning a trial of the issues arising from the Agreement.

[8] Among his undisputed findings were that:

- the law of British Columbia applies to the dispute under the Agreement
- the question of whether or not Smoky was in default under the Agreement was an issue that, pursuant to the Agreement, the parties had agreed would be decided by arbitration
- Smoky's motion was a commencement of "legal proceedings" within the meaning of s. 15 (1) of the B.C. *Arbitration Act*
- the Appellants had applied to stay Smoky's motion

[9] He framed the question this way at para. 1: "Should this Court establish a procedure to resolve a dispute between [the Appellants and Smoky] as part of its supervisory role of the reorganization of Smoky under the *CCAA*, or should this Court stay the pending Notice of Motion of Smoky dated January 6, 1999 while that dispute is resolved by an arbitrator in British Columbia in accordance with the *Commercial Arbitration Act*?"

[10] He concluded that s. 15 of the B.C. *Arbitration Act* obliged him to stay Smoky's motion and send the matter to British Columbia for arbitration unless, in the words of that section, the agreement to arbitrate was "void, inoperative or incapable of being

performed." He suggested at para. 31 that the latter condition applied because of Smoky's insolvency, the appointment of the Monitor, and the role of the Court under the *CCAA*. He said this incapacity was beyond the parties' control.

[11] He considered that the *CCAA* process would be compromised if the contractual dispute was not settled within its ambit. But he noted that, in so dealing with the matter, the resolution of the dispute would be neither precluded nor postponed. Rather, it had to be addressed expeditiously because of its likely impact on the viability of a plan of arrangement. Were it not resolved under the umbrella of the *CCAA*, moreover, the efforts of Smoky's officers could be drained through involvement in the B.C. arbitration, at a time when they should be attending to Smoky's reorganization. Additionally, other stakeholders (including the Monitor) would be excluded from an arbitration in B.C. He rejected the Appellants' argument that their rights as non-creditors could not be affected by *CCAA* orders. He concluded that the dispute should be resolved as expeditiously as possible in the Court of Queen's Bench under the *CCAA* proceedings, "so as to permit Smoky to move forward with certainty as to its status as a shareholder of Neptune" (para. 43).

[12] O'Leary J.A. subsequently granted leave to appeal pursuant to s. 13 of the *CCAA*. He suggested the following as the issues for the appeal:

> (1) Did the chambers judge err in finding that the arbitration agreement was "incapable of performance" because Smoky is subject to proceedings under the CCAA?
>
> (2) If [the chambers judge] erred in finding that the arbitration agreement was incapable of performance, did he nevertheless have jurisdiction under the CCAA to override the NSA arbitration agreement with respect to the forum and procedure for resolving disputes?
>
> (3) If the Order appealed adversely affected the substantive rights of Luscar and Consol under the *Commercial Arbitration Act* and the arbitration rules of the British Columbia International Commercial Arbitration Centre, did the chambers judge have jurisdiction under the CCAA to make the Order?

[13] Because of the approach I have taken to this case, I do not find it necessary to deal with the first issue in quite the way framed by O'Leary J.A. The second and third issues are considered in the reasons that follow.

CONTRACTUAL PROVISIONS

[14] A number of provisions of the Agreement are relevant to the issue under appeal.

[15] Paragraph 8.01 provides:

> Except as otherwise expressly permitted by this agreement or a Terminal Contract, no Shareholder or Affiliate shall sell, transfer or otherwise dispose of or offer to sell, transfer or otherwise dispose of, any of its Interest, or any Terminal Contract or any of its rights thereunder.

[16] It is alleged that Smoky breached this provision when it transported six train loads of coal through the terminal. According to the Appellants, on this occasion Smoky "subcontracted" its capacity at the terminal.

[17] Paragraph 8.04 describes the sole method by which a shareholder may dispose of its contracted shipping capacity. Briefly, it must offer that capacity to the other shareholders and only if they do not take up the right may the capacity be subcontracted to a third party.

[18] Paragraph 10 deals with default:

> 10.01 It is an event of default, if a Shareholder (the "Defaulting Shareholder") (the other Shareholders being the "Non-Defaulting Shareholders"):
>
> > (a) fails to observe, perform or carry out any of its obligations hereunder and such failure continues for 30 days after Neptune has given notice in writing to the Defaulting Shareholder specifying the nature of the default and requiring that the default be cured within 30 days; or
> >
> > (b) becomes a bankrupt or commits an act of bankruptcy, or permits or authorizes the appointment of a receiver or if a receiver-manager of its assets is appointed or if the Defaulting Shareholder makes an assignment for the benefit of creditors or otherwise.

Neptune shall give a copy of any notice under this paragraph to the Non-Defaulting Shareholders.

> 10.02 Upon the expiration of the 30 day period referred to in subparagraph 10.01(a) hereof or upon Neptune becoming aware of an event described in 10.01(b) hereof, Neptune shall declare a Default and give notice thereof to the Non-Defaulting Shareholders.

[19] In the event of a continuing default, paragraph 11.01 grants other shareholders the option to purchase the defaulting shareholder's shares at book value. In this case, the evidence

suggests that the book value of Smoky's shares is about $880,000, while the market value of Smoky's rights in the Neptune Terminal may exceed $46,000,000. During the course of argument, the chambers judge observed that, from a practical perspective, a plan of arrangement under the *CCAA* could not go forward without a resolution of the dispute between Smoky and the Appellants. (AB 83-84)

[20] The relevant paragraph dealing with dispute resolution is 12.02:

> The parties agree that all disputes or differences between or among the parties hereto, other than a dispute or difference decided by the auditors pursuant to paragraph 12.01, shall be submitted to a single arbitrator under the auspices of and pursuant to the rules of the British Columbia International Commercial Arbitration Centre and pursuant to the Commercial Arbitration Act of British Columbia whose decision shall be final and binding upon the parties to the arbitration. The arbitrator may determine all questions of procedure and after hearing any evidence and representations of the parties, the arbitrator shall make an award and reduce the same to writing together with the reasons therefor.

[21] Paragraph 15.11 provides that the Agreement will be governed by and construed in accordance with the laws of British Columbia.

STATUTORY PROVISIONS

[22] Section 11(4) of the *CCAA* is central to this appeal.

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (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)

[23] Part I of the *CCAA* (ss. 4 to 8) provides for the making of a compromise or arrangement between the company and its creditors. If accepted by two-thirds of the creditors, the plan may be sanctioned by the court.

[24] Section 2 of the *CCAA* contains the following definitions:

> "secured creditor"
>
> "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"
>
> "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 issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

[25] Section 12 sets out the claims procedure. Section 12(1) states that a "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act." Section 12(2) mandates how the "amount" of a "claim" is to be determined. Section 12(2)(a) states:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount . . .
>
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor . . .

[26] For reasons that will become apparent, the following provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") are also relevant.

Definitions - s. 2(1)

"claim provable in bankruptcy", "provable claim" or "claim provable"

> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

"creditor"

> "creditor" means a person having a claim, unsecured, preferred by virtue of priority under section 136 or secured, provable as a claim under this Act;

. . .

Persons claiming property in possession of bankrupt

81(1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

Claims provable

121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

121(2) The determination of whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

121(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a

rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

[27] Section 15(2) of the B.C. *Arbitration Act*, referred to by the chambers judge, provides:

> In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
> (Emphasis added)

[28] Section 23 states:

> An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
> (Emphasis added)

[29] Under ss. 8 and 9 of the *Domestic Commercial Arbitration, Rules of Procedure* of the B.C. International Commercial Arbitration Centre (as amended June 1, 1998) ("Rules"), arbitration may be commenced by a notice from one party to another and to the Centre or by the filing of a Joint Submission to Arbitrate to the Centre. The arbitration is deemed to have commenced following this filing and the payment of fees (s. 10). There is no evidence to suggest that arbitration was commenced in this case.

[30] Section 33 of the Rules provides:

> An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
> (Emphasis added)

ANALYSIS

1. Did the Chambers Judge Have the Authority under s. 11 of the *CCAA* to Order a Stay of the B.C. Arbitration Proceedings?

(A) Does the term "proceedings" in s. 11 of the *CCAA* include the proposed arbitration in B.C.?

[31] There is little doubt that the term "proceedings" in s. 11 is broad enough to encompass extra-judicial proceedings. Trial and appellate courts have treated the term expansively, relying upon jurisprudence that takes a broad, liberal approach to the interpretation of the *CCAA*. ***Meridian Developments Inc.* v. *Toronto Dominion Bank; Meridian Developments Inc.* v. *Nu-West Group Ltd.*** (1984), 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.); ***Quintette Coal Ltd.* v. *Nippon Steel Corp.*** (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) ("***Quintette Coal***"). Such courts have observed that, were it otherwise, non-judicial proceedings could operate against the interests of creditors and render impossible the achievement of effective arrangements.

[32] Thus, in ***Quintette Coal***, the term "proceedings" was held to include extra-judicial conduct such as the withholding of payments to the debtor company. In ***Meridian***, it was said to embrace payment pursuant to a letter of credit. Without specific discussion of the point, it seems also to have been assumed that "proceedings" includes the exercise of a contractual right to replace an operator of jointly-owned petroleum properties. ***Norcen Energy Resources Ltd.* v. *Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.).

[33] The above jurisprudence persuades me that "proceedings" in s. 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 s. 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 s. 11 of the *CCAA*.

(B) Are the Appellants creditors for the purposes of the *CCAA*?

[34] If the Appellants can be considered creditors under the *CCAA*, there is little doubt that the chambers judge had the power to affect their rights in the way he did. It is obvious that the contractual rights of a creditor can be affected permanently under the *CCAA*. To take a simple example, a plan of arrangement or compromise that is approved by the requisite number of creditors can alter permanently the contractual rights of even those creditors that have not approved the plan (*CCAA*, s.6).

[35] To explain my conclusion that the Appellants can be considered creditors under the *CCAA*, it is necessary to examine the statutory linkage between the *CCAA* and the *BIA* and the courts' view of that linkage.

[36] The relevant provisions of the *CCAA* and the *BIA* have been set out above. For the purposes of the claims procedure in s. 12 of the *CCAA*, "claim" is defined as the *BIA's* meaning of "a debt provable in bankruptcy". Could the Appellants' claims in this case constitute a "debt provable in bankruptcy"?

[37] The answer is not readily apparent from the *BIA*, since nowhere does it define "debt provable in bankruptcy". The closest definition is "claim provable in bankruptcy". A contingent and unliquidated claim recoverable by legal process is a "claim provable in bankruptcy" for the purposes of s. 121(1) of the *BIA*: ***Farm Credit Corp.* v. *Holowach (Trustee of)***, [1988] 5 W.W.R. 87 at 90, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx. Section 81(1) of the *BIA* contemplates proof of a claim arising from "any property, or interest therein" in the possession of the bankrupt at the time of bankruptcy. Some of the Respondents argue that the Appellants' claim against Smoky under the Agreement would fall under one of these sections and is, therefore, a "claim" under the *CCAA* that would give the Appellants access to the s. 12 claims procedure, making them creditors under that statute.

[38] This legal result is contingent on whether the terms "debt" and "claim" are interchangeable under the *BIA*. Both terms are used in s. 121, which is entitled "Claims Provable". There are cases which, without directly considering the point, appear to have assumed that the two terms are synonymous: ***Re Central Capital Corp.*** (1995), 22 B.L.R. (2d) 210 (Ont. Gen. Div.); affirmed (1996), 27 O.R. (3d) 494 (C.A.).

[39] There are also cases where the point has been addressed directly. In ***Algoma Steel Corp.* v. *Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.), the issue was whether the holder of a loan guaranteed by the debtor company should be treated as a creditor for the purposes of the plan of arrangement filed by the debtor company, notwithstanding the fact that the loan holder had made no demand of payment under the loan agreement or the guarantee. Farley J. concluded that the loan holder was a creditor. He distinguished ***Quebec Steel Products (Industries) Ltd.* v. *James United Steel Ltd.***, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (H.C.) because of changes that had been made to the wording of s. 12 of the *CCAA* in the meantime. Specifically, he noted that the earlier wording had bundled together the concepts of "claim" and "amount", leading in ***Quebec Steel*** to the application of the common law definition of "debt" as a certain sum of money.

[40] At 6-7, Farley J. said:

> It strikes me that [under the current *CCAA*] the double recitation in s. 12(1) and (2) of "[f]or the purposes of this Act" and the segregation of these subsections was intended to allow "claim" to be determined as any "indebtedness, liability or obligation of any kind" by reference to whether it "could be a debt provable in

bankruptcy within the meaning of the *Bankruptcy Act*". The determination of the amount of that claim is to be determined under another provision, also "[f]or the purposes of this Act". Under the structure and context of the C.C.A.A. could there be a claim (unsecured debt provable as such under the *Bankruptcy Act*) without there being a creditor as the holder of that claim. I think not. I therefore conclude that the B. of M. is creditor of Algoma vis-à-vis the guarantee (see *Re Film House Ltd.* (1974), 19 C.B.R. (N.S.) 231 (Ont. S.C.), varied (1974), 19 C.B.R. (N.S.) 231 at 234 (Ont. S.C.); *Re Froment*, 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377 (Alta. T.D.), which indicate that the contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid should be considered a debt provable in bankruptcy pursuant to the *Bankruptcy Act*).

[41] He held to similar effect in ***Re Cadillac Fairview Inc.*** (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div.), where the party found to be a "claimant" for the purposes of the *CCAA* had merely launched a lawsuit against the debtor company, seeking, among other things, declarations concerning the validity of certain agreements and recovery of damages for the breach of the agreements by the debtor company. See also ***Re Quintette Coal Ltd.*** (1991), 7 C.B.R. (3d) 165 (B.C. S.C.) at 174 where it was held that "claim" under the *CCAA* included "future prospects".

[42] I find this reasoning persuasive. There is a possible explanation for the fact that the *CCAA* refers to a "debt", rather than a "claim", provable under the *BIA*. At the time the *CCAA* was passed, the *Bankruptcy Act*, R.S.C. 1927, c. 11, contained s. 104, entitled "Debts provable". That section is the forerunner of s. 121, now entitled "Claims provable". The language used in the body of s. 104 was "debts provable"; in the current s. 121, it is "claims provable". The definitions at that time also referred to "debts" rather than "claims". It may be that Parliament failed to re-align the language of the *CCAA* when the relevant language of the *Bankruptcy Act* was amended in 1949, S.C. 1949, 2nd sess., c. 7.

[43] Nor am I convinced there are compelling reasons why the notion of a "debt" should be treated narrowly under the *CCAA*, rather than as broadly as a "claim" under the *BIA*. It is true that, in comparison to *CCAA* proceedings, bankruptcy proceedings are by nature more final. If it is ever to be dealt with, a claim must be resolved during the bankruptcy proceedings. In contrast, if a *CCAA* plan of arrangement is accepted, there is the future possibility of a going concern against which a claim may be asserted.

[44] But there may also be situations (like the present one) where it would be difficult for a plan of arrangement to be prepared and voted upon without some resolution, in the same process, of a claim that is relatively unripe. This appears to have been the reasoning of Blair J. in ***Campeau* v. *Olympia & York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). There, the plaintiffs had served a statement of claim (seeking damages

for breach of contract against the debtor company) before an initial stay under the *CCAA* was ordered. In refusing to lift the stay and permit the action to proceed, he noted that, unless the claim was dealt with in the context of *CCAA* proceedings, the creditors would have no way to assess whether to accept or reject the debtor company's plan (notwithstanding that the plan itself had treated the plaintiffs as parties that were unaffected by it). His language at 311 suggests a tacit acceptance of the fact that the plaintiffs were not "creditors" in the same sense as other creditors. He held, nevertheless, that their "claim" should be dealt with under the *CCAA*.

[45] In this case, the essence of the Appellants' claim is that Smoky has breached the Agreement. Although paragraph 11.01 of the Agreement grants an option to purchase the defaulting shareholder's shares, it is clear from paragraph 11.02 that other remedies are contemplated. Viewed this way, the Appellants' claim is not significantly different than the breach of contract claims in some of the cases just discussed. To the extent that the Appellants might exercise an option to acquire Smoky's shares, moreover, it could be said that they claim a right to "property" in Smoky's possession, a right that would be provable under s. 81 of the *BIA*.

[46] For these reasons, I conclude that the Appellant's claim against Smoky can be treated under the claims process of s. 12 and that they are creditors for the purposes of the *CCAA*. In case I am wrong, I will now consider whether, if the Appellants cannot be considered creditors, the chambers judge nevertheless had the power to make the order.

(C) Even if the Appellants are not creditors for the purposes of the *CCAA*, does s. 11 authorize the order made in this case?

[47] The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as ***Norcen***, *supra*, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the *CCAA*. They assert that, if the order is upheld, they will have lost forever the opportunity to resolve the dispute pursuant to the arbitration procedure accepted by the parties to the Agreement. As discussed later, in my view the nature of the contractual right being affected is an important factor to take into account.

[48] The Respondents disagree with the Appellants' assessment of the jurisprudence. They also maintain that the impugned order affects the Appellants' procedural, not substantive, rights.

[49] In my opinion, the language of s. 11(4), considered in the context of the *CCAA's* purpose, authorizes the order made by the chambers judge. To recapitulate, that order declared that

the Alberta Court of Queen's Bench "has jurisdiction to hear and determine the issue of whether Smoky has been or is in default under the Neptune Shareholders' Agreement and any and all related issues arising therefrom", required the parties to appear before him for further directions, and dismissed the Appellants' motion for a stay pursuant to the B.C. *Arbitration Act*. Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).

[50] The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.

[51] This interpretation is supported by the legislative objectives underlying the *CCAA*. The purpose of the *CCAA* and the proper approach to its interpretation have been described as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order [sic] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> per Farley J. in ***Re Lehndorff General Partner Ltd.*** (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Gen. Div.)

[52] As has been noted often, the *CCAA* was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the *Bankruptcy Act* and the *Winding-Up Act*. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The *CCAA* was intended to provide a means of enabling the insolvent company to remain in business: ***Hongkong Bank of Canada* v. *Chef Ready Foods Ltd.*** (1990), 4 C.B.R. (3d) 311 (B.C. C.A.); ***Quintette Coal***, *supra*.

[53] The courts have underscored that the *CCAA* requires account to be taken of a number of diverse societal interests. Obviously, the *CCAA* is designed to "provide a structured

environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both": ***Re Lehndorff General Partner Ltd.***, *supra*, at 31. It is intended to "prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed": ***Meridian***, *supra*, at 114. But the *CCAA* also serves the interests of a broad constituency of investors, creditors and employees: ***Chef Ready***, *supra,* at 320; ***Quintette Coal,*** *supra,* at 314. These statements about the goals and operation of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

[54] There are a number of cases where third party rights have been affected by a stay order. ***Norcen*** provides a convenient starting point.

[55] Under the terms of the contract pursuant to which the debtor company (Oakwood) operated jointly owned oil and gas properties, the parties were entitled to replace the operator in the event of insolvency. Norcen was a party to the operating agreement, but not a creditor of Oakwood, nor present at the initial *CCAA* application. The stay order specifically enjoined Oakwood's removal as operator under any operating agreements. Norcen applied to vary the stay order and replace Oakwood pursuant to the terms of its operating agreement.

[56] In denying Norcen's application, Forsyth J. agreed that, by bringing its *CCAA* application, Oakwood had declared itself insolvent and that, normally, this would bring into play the replacement of operator provisions. He acknowledged at 11 (C.B.R.) that Norcen's rights might be affected permanently under the operating agreement were it not prevented from replacing Oakwood: if Oakwood's plan of arrangement was approved by its creditors and its insolvency thereby "cured", Norcen might lose forever its claim to replace Oakwood as operator. While not deciding the issue of whether the insolvency was capable of being "cured", he approached the case as involving more than a mere suspension of Norcen's rights. He concluded at 12, nevertheless, that the s. 11 powers were broad enough to affect the rights of non-creditors, noting that there was much room for discretion within the application of s. 11 "to refuse a stay when third party rights will be seriously prejudiced by its terms."

[57] Having determined that the s. 11 powers permitted interference with Norcen's contractual rights, Forsyth J. addressed the *CCAA*'s constitutional validity, observing that it had been upheld by the Supreme Court of Canada in ***Re Companies' Creditors Arrangement Act; A.G. Can.*** **v.** ***A.G. Que.***, [1934] S.C.R. 659, 16 C.B.R.1, [1934] 4 D.L.R. 75. Thus, he said, the continuance of insolvent companies must be considered a constitutionally valid statutory objective. "[I]t follows that a stay which happens to affect some non-creditors in pursuit of that end is valid" (p. 16). He concluded that continuance of a company

involves more than a consideration of creditor claims, adding that s. 11 of the *CCAA* could be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. In *obiter*, he expressed the view that fairness required that such interference "should be effective only for a relatively short period of time" (p. 16).

[58] A related case is ***Re T. Eaton Co.*** (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.). Dylex (not a creditor of T. Eaton but an operator of stores in malls where T. Eaton was the anchor tenant) applied to amend a *CCAA* stay order so that it could exercise rights pursuant to its leases. Those leases permitted Dylex to alter the lease terms if T. Eaton ceased to operate in the shopping centres. Houlden J.A. denied the motion, noting that, if such rights were accorded to Dylex, there might be other tenants who would make the same claim. This would likely increase the claims of landlords against T. Eaton and seriously impact its re-structuring plan. He took account of T. Eaton's position as a large employer and purchaser from suppliers. At 295-96, without extensive analysis, he opined that s. 11 and the inherent jurisdiction of the Court gave him the power to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan. I acknowledge that it is not clear that his order had the effect of altering contractual rights permanently, since, depending on the outcome of the re-organization proceedings, at a future time the tenants might still be able to exercise their rights under the leases. In this regard, the situation was akin to that in ***Norcen***.

[59] In ***Re Dylex Ltd.*** (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.), the debtor company was permitted to terminate its leases in shopping malls, as part of its restructuring program. Farley J. viewed s. 11 as giving the court the inherent jurisdiction, in the interim between the filing and the approval of a plan, to "fill in gaps in [the] legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan" (p. 110).

[60] To summarize, the language of s. 11(4) is very broad. The *CCAA* must be interpreted in a remedial fashion. Cases support the view that third-party rights may be affected by a stay order, although there are none where the third-party rights appear to have been affected in quite the same way as those of the Appellants as a result of this order. I am satisfied, nevertheless, that the *CCAA* gives the chambers judge the discretion to make the impugned order. It remains to consider whether he properly exercised that discretion.

2. Did the Chambers Judge Properly Exercise his Discretion under s. 11(4) of the *CCAA*?

[61] 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.

[62] A similar opinion was expressed by Macfarlane J.A. in ***Re Pacific National Lease Holding Corp.*** (1992), 15 C.B.R. (3d) 265 (B.C. C.A.). In considering whether to grant leave to appeal, he observed at 272:

> . . . 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. . . .
>
> 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.

[63] The Appellants point to cases where a specific issue arising under the *CCAA* has been sent for resolution to a forum other than the *CCAA* court. In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the *CCAA*. In each such case, moreover, the *CCAA* judge has retained control over the impact of the outside determination.

[64] For example, in ***Re Philip's Manufacturing Ltd.*** (1991), 9 C.B.R. (3d) 1 (B.C. S.C.), the debtor company's landlord alleged that its leases were about to expire since the company had not given requisite notice. The judge noted that it was essential to the reorganization plan that the company be able to remain in the leased premises. He permitted the landlord to pursue proceedings under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54. But that legislation contained a summary procedure for determining the issue at hand (whether the landlord was entitled to a writ of possession). The judge, moreover, maintained some control over the process by ordering that, if an order of possession was granted, it would be stayed for as long as the *CCAA* stay, "to be dealt with in the context of any reorganization plan ultimately brought before the court" (para. 44). Additionally, the summary procedure was to occur in the B.C. Supreme Court, the same court that supervised the *CCAA*.

[65] Similarly, in ***Re Cadillac Fairview Inc.*** (1995), O.J. No. 138 (Ont. Gen. Div.), an issue arose about the quantification of a claim affecting the debtor company. Farley J. permitted this issue to be determined by a court in Chicago, because that court undertook to resolve the matter expeditiously and in coordination with the *CCAA* proceedings.

[66] On the other hand, in ***Landawn Shopping Centres Ltd.* v. *Harzena Holdings Ltd.*** (1997), 44 O.T.C. 288 (Ont. Gen. Div.), a plan of arrangement was already in effect when

a landlord sought to proceed to arbitration with its claim against the debtor company. Instead, the court ordered that the claim be dealt with by the court under the terms of the plan of arrangement.

[67] These cases compel the conclusion that a judge has the discretion under the *CCAA* to permit issues to be determined in another forum but is under no obligation to do so. The proper exercise of the discretion will be very fact-dependent.

[68] As noted by Gibbs J.A. in ***Quintette Coal***, *supra*, at 312, the judicial exercise of discretion under s. 11 should "produce a result appropriate to the circumstances." The power under s. 11 should be exercised in a manner to give effect to the purpose of the *CCAA*, and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."

[69] In this case, the chambers judge considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the *CCAA* process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the *CCAA* proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organization.

[70] These were all legitimate matters to consider. Another factor, not mentioned by the chambers judge, is that arbitration had not been commenced in this case by the time the initial *CCAA* order was made. There may be reasons why the Appellants had not moved toward arbitration more rapidly. But the fact remains that several months had elapsed between the origin of the dispute under the Agreement and the *CCAA* petition, during which time no steps to commence arbitration were taken by the Appellants.

[71] It is also important to consider the nature of and the extent to which the Appellants' contractual rights may be compromised as a result of the order under appeal. I agree there are some potential advantages to the Appellants under arbitration. Specifically, they would be able to play a role in selecting the decision-maker. If their interpretation of s. 33 of the Rules and s. 23 of the B.C. *Arbitration Act* is correct, arguably the arbitration would limit Smoky's ability to rely on certain arguments that might be available in a court proceeding (for example, equitable arguments such as relief from forfeiture).

[72] But as the Appellants acknowledged during argument, no decision has yet been made about what rules will apply to the resolution of this dispute under the procedures to be determined by the chambers judge. It remains open to the Appellants to argue that Rule 33 and s. 23 of B.C. *Arbitration Act* ought to govern the resolution of their dispute in the *CCAA* proceedings. The only "rights" of the Appellants that have been affected so far are that they cannot help select the decision-maker and they must participate in proceedings

in the Court of Queen's Bench of Alberta. I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the *CCAA* proceedings. I assume that, in settling the details of the *CCAA* procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

3. What is the Relationship between the Discretion of the Chambers Judge under s. 11 of the *CCAA* and s. 15 of the B.C. *Arbitration Act*?

[73] It is apparent that I have taken a different approach than the chambers judge, who focussed largely on s. 15 of the B.C. *Arbitration Act*. He was correct in his opinion that, under that legislation, a stay must be ordered unless one of the three disabling events exists. If a case is governed by that legislation, a court should honour the choice of the parties to go to arbitration and has very limited power to refuse a stay of competing proceedings. ***Kaverit Steel and Crane Ltd.* v. *Kone Corp.*** (1992), 87 D.L.R. (4th) 129 (Alta. C.A.); ***Prince George (City)* v. *McElhanney Engineering Services Ltd.***, [1995] 9 W.W.R. 503 (B.C. C.A.).

[74] He concluded that, as a result of Smoky's insolvency, the appointment of a Monitor, and the court's role under the *CCAA*, the agreement to arbitrate was "incapable of being performed". The Appellants say this conclusion was wrong.

[75] But even if the chambers judge erred in interpreting s. 15, the outcome of this case would not change. There would then be a conflict between the *CCAA* and a provincial statute. The Appellants do not contest the constitutional validity of the *CCAA*. The authorities are clear that, in the event of a conflict with a provincial law, the *CCAA* must prevail. ***Wynden Canada Inc.* v. *Gaz Métropolitain Inc.*** (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); ***Re Pacific National Lease Holding Corp.***, *supra*; ***Pacific National Lease Holding Corp.* v. *Sun Life Trust Co.*** (1995), 34 C.B.R. (3d) 4 (B.C. C.A.). Accordingly, it is not necessary to decide whether he misapplied s. 15.

[76] For these reasons, I would dismiss the appeal.

APPEAL HEARD on APRIL 13, 1999

REASONS FILED at CALGARY, Alberta,
this 9th day of JUNE, 1999

_____
HUNT J.A.

I concur: _____
PICARD J.A.

I concur: _____
McINTYRE J.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North American Tungsten Corporation Ltd. (Re),* 2016 BCSC 12

Date: 20160107
Docket: S154746
Registry: Vancouver

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

And

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

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

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Counsel for Driving Force Inc.:	Jose A. Delgado
Counsel for Her Majesty the Queen in Right of Canada:	Kenneth Landa
Place and Date of Hearing:	Vancouver, B.C. November 16 and 17, 2015
Place and Date of Judgment:	Vancouver, B.C. January 7, 2016

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

a) Extension of the Stay of Proceedings to March 31, 2016;

b Enhancement of the powers of the Monitor during the extension;

c) A second administration charge to secure fees and disbursements for the Monitor and counsel during the extension; and

d) Lifting the stay of proceedings to permit redundant equipment to be released to security holders.

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

[3] At the same hearing, the Government of the Northwest Territories ("GNWT") brought an application for an order approving the sale of the Mactung mining claim property ("Mactung"), belonging to the Company, to it by way of an asset purchase agreement (the "APA") pursuant to a $4.5 million credit bid. The application was opposed by the Tungsten Purchasers. Callidus Capital Corporation ("Callidus") did not oppose the sale, but sought a variation in the terms of the sale regarding interest to be paid to the GNWT on funds it would advance pending sale of the Cantung Mine assets of the Company. At the conclusion of the hearing, I approved the sale of the Mactung property to the GNWT and indicated to the parties that I would provide brief reasons for the decision. These are my reasons.

Background

[4] The initial order made on June 9, 2015 was varied a number of times to extend the initial 30-day stay of proceedings. It was eventually extended to November 30, 2015. On July 17, 2015, an order was made authorizing the Company to conduct a sale and investment solicitation process ("SISP"). Alvarez & Marsal Canada Securities ULC was retained as the Financial Advisor to assist the Company and the Monitor in conducting the SISP. A number of bids were delivered to the Monitor. In consultation with the Company's senior secured creditors, Callidus and the GNWT, it was determined that none of the bids were likely to result in a transaction being consummated. The SISP was terminated by the Monitor and these applications were brought.

[5] In accordance with the Company's proposal, it discontinued production at the Cantung Mine as of late October 2015 and continued with the transition of the mine to care and maintenance. The majority of the remaining mine employees finished work on November 18, 2015. Some of the Company's head office employees were terminated effective November 30, 2015, although four were expected to be employed by the Company through December 2015 to assist the Monitor. The Chief Executive Officer and Chief Financial Officer resigned as officers and directors of the Company effective upon the granting of the order enhancing the powers of the Monitor.

[6] The Monitor described in detail the SISP process in its Tenth Report. A brief summary includes the following:

- the financial advisor contacted 256 potentially interested parties;
- 18 potential purchasers executed confidentiality agreements and received detailed information regarding the Company and the proposed sale; and
- three qualified bids for the Mactung property were received by the Monitor. When the bids were reviewed with the senior creditors it was

> determined that none of the bids were likely to result in a transaction. At the hearing of these applications the Monitor advised the Court that this was because of the inadequate financial terms contained in the offers.

[7] The GNWT holds security for the reclamation obligations of the Company, including a first registered charge over the Mactung property. There is no question that it is a valid charge. The GNWT charge is subordinate to the priority charges created by orders in the *CCAA* proceedings. These include the Administration Charge, the Directors Charge, the A/R Financing Charge and the Interim Lender's Charge. The Tungsten Purchasers also hold security against the Mactung property which ranks in priority up to $5.0 million plus interest and costs, behind the security held by the GNWT.

[8] The Company was required to post security for the reclamation obligations as a condition of the Water Licence required for the Cantung Mine which was issued by the GNWT. As of March 31, 2015, it had posted $6.2 million in cash (the "Deposit") and $5.5 million in promissory notes as security for the reclamation obligations. In March 2014, the Company submitted an application to the GNWT to amend the Water Licence. This was approved in March 2015 by the Water Board. The Water Board has the power to require an applicant to furnish and maintain security in an amount determined in accordance with regulations. It requested an increase in the reclamation security to $27.95 million. Section 11 of the relevant regulations (*Waters Regulations*, N.W.T. Reg 019-2014) states that the amount of the reclamation security fixed by the Water Board cannot exceed the aggregate of the costs of abandonment of the undertaking, the restoration of the site of the undertaking, and any ongoing measures that may remain to be taken after the abandonment of the undertaking. The Company disagrees with the amount assessed by the Water Board, but has conceded that the amount of the security should be at least $15 million.

[9] The Company's reclamation obligations are secured by the Amended and Restated Reclamation Security Agreement dated August 24, 2010 (the "RSA"). These obligations are defined in the RSA as "obligations pursuant to all permits and licenses with respect to environmental compliance, reclamation and post-closure control measures for environmental impacts in connection with the closure of mining operations at the Cantung Mine, including, without limitation [the Company's] obligations under the Surface Leases and the Water License." Pursuant to clause 3.1 of the RSA, the Company granted a general and continuing security interest in all the property, assets and undertakings of the Company relating to the Mactung property for "the payment and performance of any and all indebtedness, obligations and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by [the Company] hereunder and under the Water License…"

[10] Clause 3.4 of the RSA provides for defaults:

> The Obligations secured hereby shall become immediately due and payable and the security interests created hereunder shall become enforceable in each and every of the following events (herein called a "Default"):
>
> …
>
> (c) upon any default by [the Company] in respect of any indebtedness in excess of $100,000 in the aggregate, …;
>
> (d) if at any time after the date hereof [the Company]: (i) files a voluntary petition in bankruptcy or files any proposal or notice of intent to file a proposal, or files any application or otherwise commences any action or proceeding seeking reorganization, arrangement, consolidation or readjustment of its financial obligations or which seeks to stay or has the effect of staying any creditors, or for any other relief under the *Bankruptcy and Insolvency Act of Canada* or the CCAA…;
>
> …
>
> (h) if [the Company] abandons all or any material part of its assets or ceases or threatens to cease to carry on business, in each case, such that its ability to meet its obligations hereunder is at material risk; or
>
> (i) if [the Company] is in breach of any of its obligations under Section 2.1 of this Agreement.

[11] There is no doubt that events as described by these four subsections of clause 3.4 have occurred and that the Company has defaulted on its obligations under the RSA.

Position of the GNWT

[12] The GNWT notes that the *CCAA* gives courts a wide discretion to make any order which they consider to be appropriate in the context of the proceedings. It relies on s. 36 of the *CCAA*, which gives a court the authority to approve an asset sale outside of a plan of arrangement. Section 36(3) sets out a non-exhaustive list of factors which a court should consider when deciding to approve such a sale. The GNWT says that when all of the factors are considered in the case of the proposed sale of the Mactung property, it is clear that the sale should be approved. The process leading up to the sale was reasonable; the Monitor approved that process and is of the opinion that the sale would be at least as beneficial to creditors as a disposition under bankruptcy. There was adequate consultation with creditors and the consideration to be received is reasonable and fair, taking into account the market value of the Mactung property. The GNWT also notes that the Monitor is of the view that the sale price and terms are commercially reasonable and satisfactory and is supportive of the sale.

[13] The consideration for the sale is a credit bid. The GNWT says that credit bidding has been approved by courts in other Canadian jurisdictions and that there is no reason not to approve such a bid in the circumstances of this case where all of the other requirements under s. 36 of the *CCAA* are met.

Position of the Purchasers

[14] The Tungsten Purchasers oppose the proposed sale on a number of grounds. First, they say that there is no amount due and owing by the Company to the GNWT pursuant to its reclamation obligations. The *Waters Act*, S.N.W.T. 2014, c. 18, sets out specific circumstances in which the GNWT is permitted to make use of the reclamation security and those circumstances have not occurred. Nothing has been spent on reclamation activities to date.

[15] The Tungsten Purchasers say that if the Company performs reclamation activities and the environmental liability is reduced below the amount of the Deposit, there would be no need to resort to the security. Further, if another party acquires the Cantung Mine, it would have to post satisfactory security and the Company's security would be released. In these circumstances, the Tungsten Purchasers say that a credit bid should not be considered. This is because the GNWT is not entitled to a beneficial interest in the proceeds of the sale of the collateral because it could only call on the security if and when it has spent money on reclamation.

[16] The Tungsten Purchasers also say that the GNWT offer should be rejected based on consideration of the factors in s. 36(3) of the *CCAA*. It says there is no information from which the Court could conclude that the $4.5 million price is a reasonable reflection of the market value of the Mactung property. Further, the Tungsten Purchasers were not involved in the SISP, and so have little or no information about the offers made for the Mactung property. In addition, the credit bid is not reasonable or fair as the GNWT has no need or ability to reimburse itself for the costs of the reclamation obligations of the Cantung Mine.

[17] Finally, the Tungsten Purchasers say that, at the very least, the sale should be delayed until March 31, 2016. It is possible that tungsten prices could rebound in the first quarter of the year. If that occurs, a potential purchaser may offer well in excess of $4.5 million for the Mactung property or could offer to purchase the Cantung Mine. If the latter occurs, the purchaser would be required to post security for the reclamation obligations. This would allow the Company's security to be released. In the meantime, there is no prejudice to the GNWT as the care and maintenance costs could be paid from the $6.2 million Deposit.

[18] In short, the Tungsten Purchasers say that acceptance of the GNWT bid would turn a contingent liability of the Company into a hard asset. There is no prejudice to the GNWT if the bid is not accepted at this time as the Mactung property will only be more valuable in the future. The only parties suffering prejudice are the

Tungsten Purchasers, as they will lose any chance of recovery on the substantial debts owed to them by the Company.

Reasons for Decision

[19] The Tungsten Purchasers' arguments raise three issues: 1) do the reclamation obligations create a debt which is due and owing; 2) in the circumstances of this case, can the Court approve an asset sale which is entirely based on a credit bid; and 3) in all of the circumstances is it fair and reasonable to approve the sale of the Mactung property to the GNWT.

Is there a debt due and owing by the Company?

[20] The arguments of the Tungsten Purchasers, if accepted, would put the GNWT in an impossible situation: it could never enforce its reclamation security without actually performing the reclamation work and spending more on that work than the amount of the Deposit. This must be wrong as it ignores the language of the RSA. The Company granted the RSA to secure its obligation to perform the reclamation work that would be required after closure of the Cantung Mine. In doing so, it agreed that in the event of a default, its obligations "shall become immediately due and payable and the security interests created hereunder shall become enforceable".

[21] As I have already indicated, there is no doubt there have been several defaults by the Company. The filing of the *CCAA* proceeding was a default; the failure to post $27.95 million in security (or some lesser amount agreed to by the Water Board) when asked to do so by the Water Board was a default; the failure to satisfy indebtedness to other parties in excess of $100,000 was a default; and the fact the Company has now ceased to carry on business is a default. As a result of these events, the Company's reclamation obligations are due and owing. The fact that the precise amount of the indebtedness cannot be determined does not mean that the debt created by the reclamation obligations and secured by the RSA is not due and owing.

Can the Court approve an asset sale which is entirely based on a credit bid?

[22] As noted by the Tungsten Purchasers, credit bidding has not been dealt with extensively in Canadian jurisprudence. However, credit bids have been approved in *CCAA* proceedings. The leading case is *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915, in which the successful bidder incorporated a $78 million credit bid component in its offer in a stalking horse bid process. The approval of the bid was made without a great deal of analysis. The possibility that credit bids would be considered was set out in the bidding procedure established by the court. At para. 33, the court noted that when the "bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid." The court also noted at para. 34 that "if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely."

[23] In *White Birch*, the court also concluded that the successful bid met the requirements of s. 36 of the *CCAA*. In doing so it referred to *Nortel Networks Corp. (Re)* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J.) and adopted the comments of Morawetz J. at para. 35 regarding the duties of a court when considering a proposed sale of assets. In essence, the court analyzed the factors set out in s. 36(3) and concluded the sale should be approved. The inclusion of a substantial credit bid component in the terms of the bid was not objectionable and the credit component was to be valued on a dollar for dollar basis with a cash bid.

[24] As the GNWT argued, credit bids have been accepted in Canadian insolvency proceedings: Pamela Huff et al, "Credit Bidding - Recent Canadian and US Themes", in Janis P. Sarra, ed. *Annual Review of Insolvency Law* (Toronto: Carswell, 2010). Other courts have approved credit bids in *CCAA* proceedings: *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663.

[25] The Tungsten Purchasers' principal argument against the validity of the GNWT's credit bid was that it did not have a beneficial interest in the proceeds of sale of the collateral – the Mactung property. As I have accepted that the Company's reclamation obligations are a debt which is due and owing because of its defaults, this argument must be rejected. In other words, there is no principled reason why a credit bid should not be accepted.

[26] The Tungsten Purchasers' other arguments on the validity of the credit bid focused on the uncertainty regarding the amount of the reclamation obligation. While the total amount of the debt cannot be determined, it is abundantly clear that it is at least $15 million and likely higher. The GNWT says it is in excess of $21.5 million. In any event, the net result of acceptance of a credit bid for the Mactung property would be no different than a purchase for cash. The priority of the secured charges against that asset are:

a) the *CCAA* charges (approximately $3 million);

b) the GNWT (at least $15 million);

c) the Tungsten Purchasers (US $5 million).

[27] Whether the bid is cash or GNWT's credit bid, the purchase price must first satisfy the outstanding *CCAA* charges and then be applied against the GNWT security. Under the current market conditions, there is no possibility for the Tungsten Purchasers to recover on their security. The Monitor advised the Court that the highest offer received as a result of the SISP was $500,000 less than the GNWT credit bid.

Is it fair and reasonable to approve the sale of the Mactung property to the GNWT?

[28] Section 36 of the *CCAA* provides as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> …

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

> [35] The duties of the court in reviewing a proposed sale of assets are as follows:
>
> 1) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;
>
> 2) It should consider the interests of all parties;
>
> 3) It should consider the efficacy and integrity of the process by which offers have been obtained; and
>
> 4) It should consider whether there has been unfairness in the working out of the process

[30] When I consider all of the factors set out in s. 36(3) and the duty of the court as described in *Nortel*, I am satisfied that I should exercise my discretion to approve

the sale of the Mactung property to the GNWT. My reasons for doing so include the following:

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

> 10.8 The purchase price offered by GNWT of $4.5 million is greater than any purchase price offered pursuant to any of qualified bids received in the Amended SISP. The purchase price is also vastly less than the estimated gross amount due to GNWT and secured against the Mactung assets, estimates of which range from approximately $15 to $28 million before taking into account cash security held by the GNWT.
>
> 10.9 After considering the matters set out above, and after discussions with the Company, GNWT and Callidus, the Monitor is satisfied that (i) the purchase price under the Mactung APA is superior to any purchase price contained in the three qualified bids, and (ii) subject to one comment below regarding GNWT's entitlement to subrogation, the terms of the Mactung APA are commercially reasonable. Accordingly, the Monitor supports GNWT's application for the Mactung Credit Bid Order.

b) The SISP was a thorough sales process as a result of which a large number of potential purchasers were identified and contacted. Detailed confidential information regarding the Cantung Mine and the Mactung property was provided to 18 interested parties. Site visits were arranged and management presentations were offered to interested parties. The depth and the period of exposure to the market were adequate and appropriate given the nature of the assets. The process was approved by the Monitor and managed by the Financial Advisor appointed by the Court. While it is unfortunate that the offers were less than satisfactory, the only conclusion I can reach is that the process was fair and reasonable.

c) The Monitor opined that the sale or disposition would be equally beneficial to creditors as a sale or disposition on bankruptcy. The

Monitor could not state that it would be more beneficial given the large shortfall on the GNWT secured charge. In other words, whether the sale or disposition was conducted under bankruptcy or the *CCAA* would make no difference to creditors with a claim against the Mactung property.

d) The Monitor terminated the SISP after receipt of the inadequate offers from purchasers. The GNWT advanced the offer contained in the APA after the SISP was terminated. The Monitor consulted with Callidus and the GNWT, the senior creditors, about the offer. The Monitor did not consult more broadly given the circumstances: no offers had been received in excess of $4.0 million for the Mactung property; and the offer from the GNWT is not sufficient to satisfy the claims of creditors with either secured or unsecured claims against the Mactung property. The Tungsten Purchasers complain about the lack of consultation, however, in the circumstances of this case, I am satisfied that the consultation was adequate.

e) The acceptance of this offer means that the Tungsten Purchasers have no chance of any recovery on their security against the Mactung property. Similarly, unsecured creditors have no possibility of recovery against that property. However, the situation is no different from what would have occurred if an offer received as a result of the SISP had been accepted. The price of tungsten is so low that the Company's assets have little or no value and are encumbered by the substantial reclamation obligation owed to the GNWT. This situation arises because of market circumstances, not because of the terms of the GNWT credit bid.

f) The Tungsten Purchasers' alternate argument is that there is no prejudice to anyone if the GNWT offer is not approved and the matter is reconsidered in March 2016. The difficulty with this submission is

that there is no process in place, and none is anticipated to be in place, to market the Mactung property in three months. There is no financing in place to support a continuation of the SISP or to put some kind of new process in place. In addition, the Company has no management after November 18, 2015. Quite simply, it is too late to sit back and hope for an increase in the price of tungsten. The sole rationale for delaying the sale is to market the properties when the price of tungsten has increased. However, it is folly to assume that this can be done without a plan, financing or a proper process. In addition, no evidence was placed before the Court to support the proposition that the price may rise in the near future.

g) By the terms of the APA, the GNWT will advance sufficient funds to pay out the *CCAA* charges which rank in priority to the GNWT. This will enable the holders of those charges to be paid immediately. The *CCAA* charges secure loans that were advanced and administrative services which were provided based on the orders made by this Court for the purpose of enabling the restructuring of the Company and in anticipation that these charges would be paid in a reasonable period of time. In all of the circumstances, it would be unfair not to pay out those charges at this time.

h) The Monitor's strong support for the proposed sale is a significant factor in my decision to grant the authorization. The Monitor, assisted by the Financial Advisor, is in the best position to assess whether the price offered is reasonable taking into account the market value of the Mactung property. I accept the Monitor's assessment of value and note that no evidence was offered to the Court which suggests a higher value. The difficulty, as I have outlined, is the depressed price of tungsten. While the Mactung property has value, the Cantung Mine is saddled with the reclamation obligation which is secured against

Mactung. The Monitor is well aware of the issues which dictate the market value of the Company's assets.

i) The Monitor was not prepared to opine that the term in the APA which allowed the GNWT to be subrogated to the Interim Lender's Charge with an interest rate of 21% was commercially reasonable. As I will explain later, I was not prepared to authorize the sale with that term. The terms of the offer were thus revised to provide that the funds advanced by the GNWT, pending sale of the Cantung assets, will attract interest of 6.85%.

[31] In summary, I am satisfied that the effort made to obtain the best price for the Mactung property was more than sufficient. The attempts to market the Company's assets were extensive and there is no basis to criticize the integrity of the process. The large shortfall in the recovery is unfortunate, but there is no undue prejudice to the parties in authorizing the sale. The consideration received is fair and reasonable, taking into account the market value of the Mactung property.

Payment of the *CCAA* Charge, Allocation and Subrogation

[32] The parties recognize that there is a need to allocate the *CCAA* charges to the various assets and, in particular, to the Cantung assets and the Mactung property. Allocation of the restructuring costs must be done on a fair and even-handed basis amongst creditors, based on the particular circumstances of the case. Of course, allocation must be done equitably in a manner which does not re-adjust priorities: *Hunjan International Inc. (Re)* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.). The parties agree that the allocation should be made by the Monitor.

[33] The subrogation issue arose in this case because the terms of the APA required the GNWT to pay the *CCAA* charges. To the extent that those charges may be allocated to Cantung assets, the GNWT will be entitled to be repaid the amounts it advanced. Given these circumstances, the GNWT took the position it was entitled to be subrogated to the Interim Lender's Charge and to receive interest on the advance at the DIP loan rate of 21%. Callidus opposed this term in the agreement

on two bases: the GNWT has no right to be subrogated in the circumstances of this case; and even if it is, the Court should exercise its discretion to set an interest rate which is more reflective of the loan risk.

[34] I indicated to counsel that I was not inclined to authorize the sale with the subrogation term and certainly not at the interest rate of 21%. After some discussion between the parties, I was advised that the terms of the sale were revised to provide that the GNWT will be paid interest on the funds it advances at the rate of 6.85%. This will be an allocation charge; the GNWT is not subrogated to the Interim Lender's Charge.

[35] In summary, the sale of the Mactung property to the GNWT is approved as set out in the APA as modified in accordance with these reasons.

"Butler J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *North American Tungsten Corporation v. Global Tungsten and Powders Corp.*, 2015 BCCA 426

Date: 20150930

Docket: CA42990 and CA42991

Between:

North American Tungsten Corporation Ltd.

Respondent
(Petitioner)

And

Global Tungsten and Powders Corp.

Appellant

And

Alvarez & Marsal Canada Inc., Callidus Capital Corporation, Wolfram Bergbau und Hütten AG, and Government of the Northwest Territories

Respondent

Before: The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon

Application to vary: An order of the Court of Appeal for British Columbia, dated August 12, 2015 (*North American Tungsten Corporation Ltd. v. Global Tungsten and Powders Corp.*, Docket nos. CA42990 and CA42991)

Oral Reasons for Judgment

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Counsel for Wolfram Bergbau und Hütten:	A.L. Crimeni
Counsel for the Northwest Territories:	M. Buttery
Place and Date of Hearing:	Vancouver, British Columbia September 23, 2015
Place and Date of Judgment:	Vancouver, British Columbia September 30, 2015

Summary:

The Supreme Court judge administering CCAA proceedings granted an order staying the applicant's right to set off amounts owing to it against debts for current deliveries of product by the company under CCAA protection. The applicant applied for leave to appeal, contending that s. 21 of the CCAA prohibits a court from staying a right to set-off. The chambers judge denied leave, and the applicant applied to have the order reviewed. Held: Application refused. The chambers judge erred in suggesting that higher standards are to be applied to leave applications in CCAA matters than in other proceedings. The remainder of the judge's analysis, however, did not exhibit any error. The proposed appeal is not meritorious, and the interests of justice militate against granting leave. Applying the correct standard for granting leave to the judge's analysis of the issues, the denial of leave should stand.

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

Background to the Proposed Appeal

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

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

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

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

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

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

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

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

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, 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. [Emphasis added.]
>
> 21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

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

The Judgment Denying Leave to Appeal

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

> [9] The test for whether leave to appeal should be granted focuses primarily on the following considerations:
>
> 1. Whether the appeal is prima facie meritorious or whether it is frivolous;
> 2. Whether the point on appeal is of significance to the practice;
> 3. Whether the point raised is of significance to the parties;

4. Whether the appeal will unduly hinder the progress of the action: *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17;
5. An overriding consideration is whether [it] is in the interests of justice to grant leave: *Wallman v. Gill*, 2013 BCCA 110 at para. 12;
6. The discretion to grant leave to appeal in *CCAA* cases is to be exercised sparingly: *Edgewater*, at paras. 13, 18;
7. The *CCAA* judge is seized of proceedings below and is well-positioned to balance the interests of the competing stakeholders, and, accordingly, the decision below is entitled to deference. *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para. 20.

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

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

> [16] That s. 21 does not restrict the jurisdiction of the court is made clear when it is contrasted with other provisions of the *CCAA* which specifically prevent the court from staying certain rights and proceedings (see ss. 11.04, 11.06, 11.08, and 11.1). Set-off is clearly a remedy which is specifically stayed by the ARIO, but also generally stayed in insolvency proceedings: see e.g. *Quintette Coal* (1990), 51 B.C.L.R. (2d) 105 at 111-14, 2 C.B.R. (3d) 303. Clearly, if an attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding creditors at bay.

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

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

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

> [18] … Any interpretation issue, however weak, of the statutory provisions governing *CCAA* proceedings would be of significance to the practice. Of course, it is of significance to the parties here because if leave is granted and

> a stay ordered, the *CCAA* proceeding will likely fail. It would also have the consequential effect of vaulting the priority of GTP's debts ahead of the general security of Callidus.

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

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

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

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

> [19] … Had GTP raised its claim of set-off at the outset, it would have had nothing to set off against. NATC would not have shipped any product to GTP in the face of that claim, as GTP would not pay for it. By leaving the issue to this late stage, GTP built up its post-filing debt, at the expense of the other stakeholders, against the NATC pre-filing debt.
>
> [20] … [T]he GTP funds are critical to NATC's ability to continue operations and meet its obligations. The likely result of an order granting leave to appeal and a stay is that NATC will cease operations and fall into bankruptcy. The fundamental purpose of the underlying proceeding is to enable NATC to reorganize and restructure its affairs to allow it to continue operations pending sale. A shut-down and liquidation would terminate the *CCAA* proceedings. The reorganization and restructuring would be at an end.
>
> [21] Where granting leave would be fatal to the company's ability to restructure and would necessitate a shut-down of operations, leave has been denied: see *Canada v. Temple City Housing Inc.*, 2008 ABCA 1 at para. 15.

> As noted by the Court in *Edgewater Casino*, these events are unfolding in real time. In my view, a consideration of the objects of the *CCAA* demonstrates that the position advanced by GTP must fail.
>
> [22] By not raising set-off until a post-filing debt had accrued and a plan was in place, GTP is attempting to do precisely what the *CCAA* is designed to prevent. As Farley J. describes in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Ct. J.):
>
> > … the intention of the *CCAA* is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed.

Issues on the Review Application

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

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

1. Did the chambers judge apply too stringent a test for leave to appeal?
2. Did the chambers judge err in finding the appellant's interpretation of ss. 11 and 21 of the *CCAA* is not meritorious?
3. Did the chambers judge err in considering the probable failure of the *CCAA* restructuring as a factor militating against the granting of leave?
4. Did the chambers judge err in considering the appellant's conduct as a factor in denying leave?

The Test for Leave to Appeal in a *CCAA* Matter

[21] In the course of his reasons for judgment, the chambers judge made certain comments that the appellant says show that he considered that a more stringent test

applies to leave applications under the *CCAA* than to other applications for leave to appeal. In particular, the appellant points to the following statements of the trial judge:

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

[22] The factors that this court generally applies on applications for leave to appeal were succinctly set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. in Chambers):

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

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

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

> [16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This

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

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

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

[27] Some of the language used by the chambers judge in the case before us indicates that he was of the view that a particularly stringent standard applies to leave applications in *CCAA* matters. The law does not support such a view. I agree with the appellant that, to the extent that the judge's adoption of an incorrect standard affected his decision, the order that he made is the product of an error in

principle. I will return to the question of whether the standard he selected affected the result after considering the other issues raised on this review application.

The Merits of the Appeal

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

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

[30] As the judge noted, s. 11 of the *CCAA* is in Part II of the statute, which deals with the jurisdiction of the court. It has consistently been interpreted as giving the court extremely broad discretion (see, for example, the comments of the Supreme Court of Canada at para. 68 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60).

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

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

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

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

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

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

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

> [21] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), Huddart J. (as she then was) explained the importance to the continuing vitality of the *CCAA* regime of ensuring that creditors not be permitted to avoid the *CCAA* compromise in an effort to realize the full value of their claim. She emphasized, at pp. 127 and 129, the particular need to ensure that those who purchase companies emerging from reorganization can do so with the confidence that all claims have been compromised:
>
> > [M]odern *CCAA* re-organization plans contemplate the acquisition by third parties of the re-organized debtor company, frequently to the benefit of general creditors, employees, and the general community. I accept that courts should recognize this development. Tax losses are

> purchased. Liabilities are assumed. There is a need for certainty that all claims have been compromised.
>
> This is an important factor in this case because it is absolutely clear that no general creditor would have received anything on a bankruptcy or liquidation by a receiver. 8808's offer, founded on the proposition that all creditors were included in the Plan, came just in time to avert such a result. An extension of the stay of proceedings had been granted only to protect those claiming in tort. All parties were aware that another extension of the stay was unlikely. In a sense 8808's offer gave value to Mr. Lindsay's contingent claim it would not otherwise have had, even as it gave value to the claims of other unsecured creditors.
>
> ...
>
> Those who participate in *CCAA* proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.
>
> [Emphasis added.]
>
> [22] Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the *CCAA* compromise. A party claiming set-off, as Cam-Net notes in its factum, realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the *CCAA* proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the *CCAA* reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context. In that regard, see *Re/Max Metro-City Realty Ltd. v. Baker (Trustee of)* (1993), 16 C.B.R. (3d) 308 (Ont. Bktcy.) at 313, where set-off was refused when allowing equitable set-off would have the effect of defeating the intention of the bankruptcy legislation and, in particular, giving the claimant a preference over other creditors.

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

as suggesting that s. 11 of the *CCAA* does not extend to the staying of rights of set-off.

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

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

Interference with the *CCAA* proceeding

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

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

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

[44] I note, however, that in *Consolidated (China) Pulp* and in virtually all of the subsequent cases that set out the considerations on a leave application, the fourth

consideration is described as "undue hindrance of the progress of the action" rather than as "delay". I would be reluctant to accept that the consideration should be narrowed. In *Great Basin Gold Ltd. (Re)* (October 3, 2012), C.A. Docket no. CA40276, Tysoe J.A. said:

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

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

The Conduct of GTP as a Factor in the Leave Application

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

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

Conclusion

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

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

[50] **NEILSON J.A.**: I agree.

[51] **FENLON J.A.**: I agree.

[52] **NEILSON J.A.**: The application to vary the order of the chambers is accordingly dismissed.

"The Honourable Mr. Justice Groberman"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 319

Date: 20210820
Docket: CA47585

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

-and-

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended

-and-

In the Matter of the Plan of Compromise and Arrangement of Port Capital Development (EV) and Evergreen House Development Limited Partnership

Between:

Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

Respondents
(Petitioners/Applicants)

And

1296371 B.C. Ltd.

Appellant
(Respondent/Applicant)

And

Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Voith
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated June 15, 2021 (*Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272, Vancouver Docket S-205095).

Oral Reasons for Judgment

Counsel for the Appellant:	J.D. Schultz E. Watson
Counsel for the Respondents, Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.:	K.M. Jackson T.A. Posyniak G.P. Nesbitt
Counsel for the Respondents, Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership:	D.E. Gruber
Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company:	C.D. Brousson A.L. McCawley
Counsel for Ernst & Young Inc. in its capacity as the Monitor:	P. Bychawski
Counsel for Aviva Insurance Company of Canada:	W.L. Roberts
Place and Date of Hearing:	Vancouver, British Columbia August 17, 2021
Place and Date of Judgment:	Vancouver, British Columbia August 20, 2021

Summary:

The petitioners owned a commercial strata development that experienced financial difficulties when the construction lender stopped funding and demanded repayment of its secured debt. The petitioners sought and received an order under the Companies' Creditors Arrangement Act, staying proceedings against them and implementing a sales and investment solicitation plan. Several offers were forthcoming, including one by the appellant. The chambers judge rejected the appellant's offer but approved the project's acquisition by one of the respondents. The appellant seeks leave to appeal and a direction that the appeal be heard by a five-justice division to allow reconsideration of Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 [*Cliffs*]..

Held: Leave to appeal granted; appeal directed to be heard by a five-justice division. How the equity of redemption should be treated in an analysis under the Companies' Creditors Arrangement Act when faced with competing transactions and whether the intention to propose a plan of arrangement to creditors is a necessary precondition to relief were issues of significance. Whether the holding in Cliffs barred the appellant's proposal was highly relevant to the appeal. It was in the interests of justice for the division hearing the appeal to be able to reconsider the decision if necessary.

INTRODUCTION

[1] 1296371 B.C. Ltd. ("129") seeks leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] to appeal the June 15, 2021 orders of Justice Fitzpatrick, which dismissed 129's application to approve a proposed refinancing and granted the application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, "the Petitioners") for the sale to Solterra Acquisition Corp. ("Solterra") of the Terrace House Project (the "Project"), a residential strata development located in downtown Vancouver. The chambers judge's reasons are indexed at 2021 BCSC 1272. If leave is granted, 129 seeks a direction that the appeal be heard by a five-justice division to allow reconsideration of *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 327 [*Cliffs*].

[2] When the decision being challenged is based on binding authority from the court, a single justice cannot grant leave. In such circumstances, the leave application is heard by a division of the court and the division has the authority, in turn, to direct the appeal be heard by a five-justice division: *Sangha v. Reliance*

Investment Group Ltd., 2010 BCCA 340 (Chambers); *R. v. Zora,* 2018 BCCA 34 (Chambers); *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.). For this reason, this leave application was heard by a division of the Court rather than a single justice.

[3] There is some urgency attached to this proceeding. The sale of the Project approved by the chambers judge is scheduled to close on September 30, 2021. If leave is granted, the parties have arranged that the appeal will be heard on September 21, 2021.

BACKGROUND

[4] The Project is a proposed 19-storey high-rise luxury residential and commercial strata development located at 1250 West Hastings Street, Vancouver. The Project provides for 20 residential units and two commercial retail units above a three-level underground parking arcade. The Petitioners are the owners of the Project.

[5] The Petitioners entered into these *CCAA* proceedings to allow them to undertake a process towards resolution of their financial difficulties that would allow them to complete the Project. In her reasons, the chambers judge set out in detail the history of the Project and the *CCAA* proceedings leading up to the orders for which leave is now sought: at paras. 5–42. In these reasons, I will refer to that background information only to the extent necessary to give context to the issues arising on this application.

[6] In September 2017, presales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. (“CMLS”), which holds a first mortgage against the Project. Aviva Insurance Company of Canada (“Aviva”) provided deposit protection insurance for the presale depositors in order to allow the Petitioners to use the deposit money for the Project. Aviva holds a second mortgage against the Project to secure any claims under the insurance.

[7] As of mid-2020, the parkade and structure for the first level of the building were substantially complete, and approximately 20% of the Project was finished. At that time, approximately $16 million in presale deposits was in place for 17 residential units and both commercial units. Approximately $8 million of the deposit money has been spent on the Project.

[8] In May 2020, CMLS stopped funding and demanded payment of its secured debt. In late May 2020, the Petitioners filed these *CCAA* proceedings, supported by the evidence of Macario Reyes, a director and officer of the Petitioners. At that time, the evidence was that the Petitioners owed approximately $34.8 million secured debt and $8 million unsecured and lien debt. One of the lienholders is Centura Building Systems (2013) Ltd. (“Centura”), which is owed $473,277.

[9] On May 29, 2020, the chambers judge granted the initial order in the *CCAA* proceedings. The initial order stayed all proceedings against the Petitioners, granted an Administration Charge of $250,000, and appointed Ernst & Young Inc. as monitor (the “Monitor”), with enhanced powers to assume control of the Petitioners and the Project. Specifically, the Monitor was directed to implement a sales and investment solicitation plan (“SISP”) with input from CMLS and Aviva. The SISP sought a “dual-track” process to either produce bids or offers for a sale of the Project, or an investment in the Petitioners on a going-concern basis, such as in the form of a restructuring, reorganization, or refinancing of the Project.

[10] On June 8, 2020, the chambers judge granted the Amended and Restated Initial Order, extending the stay and other relief granted under the initial order and authorizing interim financing of $1.25 million—now $1.8 million—(the “Interim Lending Facility”) from Desjardins Financial Security Life Assurance Company (“Desjardins”), a company affiliated with CMLS.

[11] Over the next several months, as detailed in the judge’s reasons, various offers were forthcoming. Ultimately, at the time of the June 8, 2021 hearing, the chambers judge had before her two offers from Solterra (“Solterra Offer #1” and “Solterra Backup Offer”), an offer from Landa Global Acquisitions Inc. (“Landa Offer

#3"), and an offer from 129 ("129 Revised Offer"). 129 is a company controlled by Mr. Reyes and was incorporated to facilitate the proposed refinancing.

[12] The Solterra and Landa offers were asset purchase agreements. The 129 proposal contemplated a complex refinancing of the Project that would repay the Administration Charge, the Interim Lending Facility, and CMLS in full and take an assignment of the CMLS security. 129 said that the transaction was designed to create an opportunity to secure new construction financing that would allow the Petitioners to ultimately repay the new loans, exit *CCAA* proceedings, and proceed with the Project as intended.

[13] The chambers judge said that the crux of the issues relating to the 129 Revised Offer lay in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the court. She summarized that relief as follows:

> [48] The crux of the issues relating to the 129 Revised Offer lies in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the Court. They seek the following Court approval and orders, said to be necessary to implement the 129 Revised Offer:
>
> a) an extension of the stay of proceedings to December 11, 2021;
>
> b) Authorization to release the pre-sale deposits to 129 to allow 129 to pay $8 million to CMLS for the purchase and assignment of the CMLS security, to stand as an advance by 129 to the Petitioners secured by the CMLS security. All of these pre-sale purchasers consent to the release of the deposits;
>
> c) Authorization to borrow up to $750,000 from [1260780 B.C. Ltd. ("126")] for the "working capital" loan and approval of the terms of the commitment letter. Contrary to Mr. Reyes' statement that this would "likely" require a restructuring of the partnership interests, the Court is being asked to bless the commitment letter to seemingly grant 126 the "right, in its sole discretion" to convert the debt into limited partnership units that *will be* preferential to all classes of existing units in the limited partnership;
>
> d) The "Refinancing Transaction" involves granting Court approval to the Petitioners to borrow money from Domain to fund the Interim Lending Facility and repay CMLS in full and take an assignment of the CMLS security, up to $25 million. This "Refinancing" or "New Loan Facility" is to be documented in the usual fashion, with the significant proviso that the Petitioners are authorized to agree to amendments so as to provide that the CMLS security would secure *all obligations* of the Petitioners to both Domain, 126 and

> 129 (i.e. about $25 million) and stand as a first secured charge on the Project.
>
> [Emphasis in original.]

[14] The Monitor reported that if the 129 Revised Offer completed, it would result in a materially better outcome for the stakeholders than either the Solterra or Landa offers.

[15] The chambers judge summarized the financial consequences to the major secured creditors of the various offers as follows:

> [42] In broad strokes, as of June 8, 2021, the financial consequences to the two major secured creditors of the various offers before the Court were as follows:
>
> a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;
>
> b) Under any of the cash offers, the Petitioners would disclaim the $16 million of pre-sale agreements. Aviva would immediately crystalize its exposure (estimated at $8.6 million). Both CMLS and Aviva hold security against the $8 million cash deposits. CMLS/Aviva would then potentially advance arguments that these pre-sale purchasers had forfeited the right to a return of those cash deposits such that CMLS/Aviva could claim those amounts toward satisfaction of their loans; and
>
> c) Under the 129 Revised Offer, the material benefits, as noted by the Monitor were: 1) the Interim Lending Facility and CMLS would be paid in full; 2) Aviva's security position would be "improved" with the prospect of full or material recovery; and 3) the parties would avoid litigation with respect to the $8 million in pre-sale cash deposits by converting them into a secured position against the Project.

[16] 129 brought its application and rested its arguments on s. 11 of the *CCAA* as the jurisdictional basis upon which it asked the court to grant the relief sought. Section 11 allows the court broad discretion to grant relief that is "appropriate in the circumstances."

[17] At the hearing on June 8, the 129 application to approve the 129 Revised Offer was supported by CMLS and Aviva. CMLS' support was conditional on the

court approving either the Landa or Solterra offers as a backup in case the 129 Revised Offer did not complete. The Petitioners and the Monitor took no position on the 129 application. The 129 application was opposed by Centura and Solterra.

THE CHAMBERS JUDGE'S REASONS

[18] The chambers judge first considered whether she should approve the 129 Revised Offer. She found that the relief sought by 129 was not appropriate, including the stay and the refinancing approvals in 129's draft order. She declined to exercise her statutory discretion under s. 11 of the *CCAA* to grant the requested relief. In reaching this decision, she concluded, among other things:

a) the 129 refinancing was not a redemption of the CMLS mortgage;

b) comparing the 129 refinancing with the outcome if the Solterra or Landa offers were approved would be a "very unprincipled basis" upon which to argue the 129 financing was appropriate;

c) the 129 refinancing might not have been objectionable if it had been structured as a sale, whether via an outright sale or a reverse vesting order; and

d) the circumstances of this case were similar to those in *Cliffs*, and since there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, the 129 financing was not appropriate.

[19] Having found the 129 offer was not appropriate, the chambers judge then went on to consider the two competing cash offers. She found that the Solterra Backup Offer should be approved as reasonable and indicative of the fair market value of the Project. That offer would satisfy the priority debt, the professional charges, and the Interim Lending Facility—and provide almost full payment to CMLS. Aviva would face a shortfall of $8.6 million with limited prospect of any recovery. All other creditors would also be "out of the money."

GROUNDS OF APPEAL

[20] 129 now seeks leave to appeal. It submits the chambers judge erred:

a) in fact and law by concluding the 129 refinancing was not a redemption;

b) in fact and law by determining that it was not appropriate to grant the 129 application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, despite the application being on notice to all creditors and supported by the two senior secured creditors; and

c) in law by approving the Solterra offer in the face of the 129 refinancing, which would clearly result in a better outcome for all stakeholders and is consistent with the remedial purposes of the *CCAA*.

[21] Aviva supports the leave application. It is opposed by Centura, Solterra, CMLS, and Desjardins. The Monitor takes no position on the application. The Petitioners, notwithstanding that on July 30, 2021, they entered into a revised interim financing agreement with 129 and that they and 129 are controlled by Mr. Reyes, oppose the leave application. When questioned in regards to the contradictory nature of those positions, counsel for the Petitioners advised that in opposing the application for leave, he was acting on the Monitor's instructions. The Monitor acknowledged it had given such instructions but was unable to provide the basis on which it was entitled to do so.

POSITIONS OF THE PARTIES

A. 129

[22] 129 submits that the chambers judge erred in concluding that the 129 refinancing was not a redemption of the CMLS mortgage. In this regard, the chambers judge said:

> [56] 129 describes the transaction in its application materials as a "redemption financing" and counsel submits that it is "effectively" a redemption of the CMLS mortgage. Centura refers to well-settled law that the

> right of redemption in these circumstances allows the subordinate mortgagee (Aviva), not the mortgagor (the Petitioners), to redeem the CMLS mortgage by paying it out and taking an assignment of the security: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1100 at paras. 13-16.
>
> [57] This transaction is not a redemption of the CMLS mortgage. The Petitioners are not paying CMLS. Aviva is not paying CMLS, although I acknowledge that Aviva consents to CMLS being paid out by 129/Domain and the assignment of the CMLS mortgage to Domain/Newco. While there are features of this transaction that one might see in a redemption scenario, this is well beyond a redemption by which the CMLS security is simply assigned to Domain. In fact, Domain is not content with the existing terms of the CMLS security; it requires that the terms of the CMLS security be amended.

[23] While 129 does not quarrel with the broad proposition that the right of redemption allows only the subordinate mortgagee, not the mortgagor, to redeem, it submits that rule is subject to an exception that allows the mortgagor to redeem the first mortgage if it is done with the consent of the second mortgagee: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1225 at para. 43. In this case, Aviva consents to the redemption.

[24] 129 submits that an owner's right to redeem is a core principle of real estate law: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge, Inc.,* 2020 ONSC 3659 at paras. 37–40. 129 submits it was an error in principle for the chambers judge not to consider the right of redemption in weighing whether it was appropriate to approve the 129 Revised Offer. 129 submits that if the chambers judge had correctly determined that the 129 offer was a redemption, the appropriateness analysis may have been significantly different.

[25] 129 further submits that the chambers judge erred in principle in concluding that the 129 refinancing was not appropriate. In this regard, she failed to consider all of the circumstances and instead focused her analysis on only one issue, namely, the lack of evidence of an intention to propose a plan of arrangement or compromise to all the creditors.

[26] 129 submits that the chambers judge's analysis is premised on the basis that *Cliffs* stands for the broad principle that a debtor must provide evidence of its

intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA.* In support of this submission, it points to the judge's comment at para. 77, where she said, "Crucially … 129 also seeks an extension on the stay of creditors' rights without any indication that it will put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote."

[27] 129 submits that if the chambers judge is correct and that *Cliffs* stands for that broad principle, a five-justice division should reconsider *Cliffs*. In support of its submission that the remedial objectives of the *CCAA* are broader than articulated in *Cliffs*, 129 relies on the subsequent decisions of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 and *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 [*Callidus*]. In the alternative, 129 submits that, if *Cliffs* does not stand for that broad proposition, the chambers judge erred in her interpretation of *Cliffs.*

[28] 129 submits, in the circumstances of this case, the chambers judge's concerns for the rights of creditors ranked below Aviva was misplaced because those creditors will not recover anything from either of the proposals. It submits the appropriateness analysis should have centred on the outcome for parties who stood to benefit from the 129 Revised Offer. In particular, it notes that under the 129 Revised Offer, CMLS will be paid in full, Aviva may escape any exposure, and the pre-purchasers will not lose their rights to purchase a unit in the Project.

[29] 129 says the chambers judge's error is clearly illustrated by her comments at para. 73:

> [73] Again, as already stated, 129 does not seek relief under s. 11.2 of the *CCAA*. 129's counsel only suggests that its "refinancing" is appropriate in disregarding the interests of the other creditors, including the lienholders, since they are currently "out of the money". I agree with 129's counsel's assessment of the likely current monetary value of the other creditor's interests. However, in my view, that is a very unprincipled basis upon which to argue that this "refinancing" is an "appropriate" outcome in the balancing exercise with regard to all stakeholders.

B. Aviva

[30] Aviva supports 129's application for leave and adopts its submissions. It submits the issues raised in the proposed appeal have merit and are significant to the parties and to the practice. Aviva submits it may not be necessary to reconsider *Cliffs*, as the chambers judge erred in law and fact by failing to recognize that *Cliffs* is distinguishable and further erred in law in her interpretation of *Cliffs* by failing to consider the expanded formulation of the *CCAA*'s remedial purpose in more recent and binding authorities. Aviva submits, however, that if this Court finds *Cliffs* is binding authority in British Columbia for the principle that a debtor must provide evidence of their intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*, then Aviva agrees with 129 that *Cliffs* ought to be reconsidered by a five-justice division.

[31] Aviva submits that the chambers judge erred in her analysis by focusing on the structure of the 129 offer instead of its impact on the various stakeholders.

[32] Aviva submits the appeal is of particular significance to it. If the sale to Solterra completes, Aviva will immediately lose $8.6 million with limited prospects of recovery. This result may be avoided entirely if the 129 refinancing is approved.

[33] Aviva further submits that the chambers judge erred by failing to appreciate the two-staged nature of the 129 plan. In the first stage, CMLS would be paid in full, and the Project would remain in *CCAA* protection as it attempted to raise new construction financing that, if received, would allow the Project to be completed as originally contemplated. In those circumstances, Aviva and other creditors may have the chance of escaping unscathed.

[34] Aviva submits the judge failed to consider other countervailing factors in her appropriateness analysis, including Aviva's right to redeem and the Petitioners' right to compel an assignment of the CMLS mortgage. Aviva submits that the chambers judge's emphasis that the 129 offer does not deal with the claims of other creditors is misplaced. In that regard, Aviva points out that the concern for the creditors other

than CMLS and Aviva is artificial because those creditors will not recover anything under the approved Solterra offer.

C. Centura/Solterra

[35] Centura and Solterra are related companies. Solterra's offer to purchase the assets of the Project was approved subsequent to the judge dismissing the application of 129. Centura is a creditor who will receive nothing under either proposal. Notwithstanding their very different roles, they are represented by the same counsel.

[36] In their submissions before the chambers judge, Centura/Solterra opposed the 129 offer, and on this application, they oppose the granting of leave. On this application, they noted that leave is granted sparingly in *CCAA* proceedings. They submit that the appeal is without merit. They submit that the chambers judge was entitled to and did take note of the fact that there was no evidence of any intention on the part of 129 or the Petitioners to resolve or even address the claims of creditors affected by their proposed refinancing transaction, let alone seek approval of those transactions from affected creditors by proposing a plan on which the creditors could vote. They submit the judge was properly concerned about the commercial viability of the overall restructuring plan and found that the new construction financing 129 intended to secure at a later date was "speculative at best."

[37] Centura/Solterra submit that 129's arguments conveniently ignore the interest of all other stakeholders, including lienholders, which would be prejudiced by the order sought by 129. They submit that, in these circumstances, there is no basis on which one could suggest that 129 had found common ground amongst the stakeholders, notwithstanding that both CMLS and Aviva, the two parties directly affected by the proposals, were generally supportive of the 129 offer.

[38] Centura/Solterra submit that the proposed appeal raises no points of interest to the practice and that the judge's decision involved the exercise of her discretion with reference to established authorities. They submit there is no precedent for the

CCAA relief that 129 sought from the court and that the chambers judge did not err in refusing the application.

[39] Centura/Solterra put particular emphasis on the fact that the appeal will unduly hinder the progress of the action. They point out that the Solterra sale must close before the end of September 2021 and that if the appeal is allowed to go forward, there is a risk that either the Petitioners or Solterra may terminate the sales agreement. They submit leave, if granted, will create uncertainty as to the time of completion of the Solterra sale or whether it can be completed at all.

[40] Centura/Solterra also point out that there is no certainty that 129's plan will come to fruition, let alone in a timely fashion. In this regard, they note there is no assurance that anyone other than CMLS will make any recovery. In these circumstances, they submit that it is not in the interest of justice to grant leave.

[41] Centura/Solterra submit the Court should refuse the request for a five-justice division. In that regard, they submit that the judge could have exercised her discretion in the same way without reference to *Cliffs*. They further submit that *Cliffs* is not inconsistent with the subsequent Supreme Court of Canada authorities.

D. CMLS and Desjardins

[42] CMLS and Desjardins also oppose the request for leave. They do so because they doubt the ability of 129 to complete the proposed refinancing, notwithstanding that if the 129 financing completes, CMLS will be made whole. They submit that if leave is granted, it will unduly hinder the progress of the action. In this regard, they submit that if leave is granted and a five-justice division is allowed to hear the appeal, there is no certainty of a decision being reached before the September 30, 2021 closing date of the sale to Solterra. Even if a decision was reached in favour of 129 before September 30, 2021, the 129 refinancing is not set to fund until late October 2021. In these circumstances, CMLS submits there is jeopardy that the Solterra sale could be lost.

[43] In addition, CMLS submits that any delay will cause it significant prejudice. In that regard, it notes that priority funding ahead of CMLS includes payment of professional fees of the Monitor and its legal counsel as well as the Petitioners' counsel. The appeal will necessitate further payment to these groups of professionals, as well as CMLS and Desjardins incurring their own increased legal fees. These additional expenses will reduce the amount of funds available for recovery to CMLS if ultimately the appeal is dismissed or if the 129 Revised Offer is approved but 129 does not complete.

E. The Petitioners

[44] As noted, the Petitioners, although taking no position in the court below on this application, opposed leave on the basis it would unduly hinder the progress of the action. In this regard, it echoed the submissions of CMLS that the appeal would serve only to divert limited resources and also risk the closing of the Solterra transaction. The submissions of the Petitioners are, however, somewhat artificial. The Petitioners have entered into the interim financing agreement with 129. Mr. Reyes is a principal of both the Petitioners and 129. The Petitioners' submissions on this application were apparently dictated to them by the Monitor, which itself refused to take a position. In these circumstances, the weight to be given to these submissions is limited.

TEST FOR LEAVE

[45] The test to be applied in determining whether leave to appeal should be granted is set out in *Goldman, Sachs & Co. v. Sessions,* 2000 BCCA 326:

1. Is the point on appeal of significance to the practice?

2. Is the point raised of significance to the action itself?

3. Is the appeal *prima facie* meritorious or frivolous?

4. Will the appeal unduly hinder the progress of the action?

[46] The criteria for leave are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang,* 2007 BCCA 280 at para. 10.

[47] Where leave is sought to appeal a discretionary order, the third factor requires an assessment of "whether there is an arguable case that the chambers judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice": *Hagwilneghl v. Canadian Forest Products Ltd.,* 2011 BCCA 478 at para. 31. The applicants must establish a reasonable possibility that a division of the Court of Appeal would grant the appeal on its merits: *Webb v. Canada (Attorney General),* 2019 BCCA 288 at para. 15.

[48] For reasons explained by Justice Tysoe in *Edgewater Casino Inc. (Re),* 2009 BCCA 40, leave to appeal from *CCAA* orders is given sparingly. This is because in most cases the orders are discretionary in nature, and if leave is granted, it might unduly disrupt the ongoing *CCAA* proceedings.

DISCUSSION

A. Is the appeal significant to the practice?

[49] I agree with the appellant that the questions concerning how the equity of redemption should be factored into an analysis under the *CCAA* when faced with competing transactions and whether an intention to propose a plan of arrangement or compromise to creditors is a necessary precondition to relief under the *CCAA* raise issues of significance to the practice. While I agree with Centura/Solterra that there is no precedent for some of the relief sought, that in itself is not a basis to deny leave. To paraphrase Justice Fitzpatrick in *Quest University Canada (Re),* 2020 BCSC 1883 at paras. 153–154, leave to appeal ref'd *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, the history of *CCAA* jurisprudence under the court's broad statutory discretion is littered with court approval of innovative solutions. The question is whether the particular solution meets the remedial objectives of the *CCAA*: *Callidus* at para. 49.

B. Is the point of significance to the action itself?

[50] The appeal is obviously of significance to the parties. On the one hand, Solterra is currently the approved purchaser of the Project. On the other hand, 129 seeks to refinance the Project and proceed with the Project for the benefit of all creditors. The appeal is of particular significance to Aviva. If leave is denied, it stands to lose $8.6 million with little hope of recovery.

C. Is the appeal *prima facie* meritorious or frivolous?

[51] The answer to this question requires a consideration of the grounds of appeal. In this case, the parties are not in agreement as to whether the orders were strictly discretionary. If the decision below is considered a purely discretionary order, there must be an arguable case that the chambers judge erred in principle, made an order that was not supported by the evidence, or made an order that would result in an injustice. Even if the order is considered to be discretionary, the appellant has raised an arguable case that the chambers judge erred in principle. In this regard, I refer to the submissions concerning the equity of redemption, *Cliffs,* and the failure to compare the competing offers. I find the appellant has established a reasonable possibility that a division of this Court would grant the appeal on its merits.

D. Will the appeal unduly hinder the action?

[52] As to whether an appeal would unduly hinder the progress of the action, I acknowledge and recognise the concerns of CMLS concerning its potential prejudice if the appeal is allowed to go forward. If the appeal is ultimately dismissed, CMLS will recover less money than at present. Its position will be further prejudiced if, for any reason, the Solterra offer is withdrawn. Balanced against this potential prejudice, there is, of course, the possibility that the appeal might succeed and, if the 129 offer is funded, CMLS will indeed end up in a better position than they are at present. The prejudice to CMLS has to be balanced against the prejudice to Aviva and the pre-purchasers. Aviva stands to lose $8.6 million if leave is denied, and the pre-purchasers will be denied the units they purchased.

[53] In my view, in the present circumstances, the appeal will not unduly hinder the action's progress. While under the terms of the Solterra Backup Offer, the closing of the sale is to take place September 30, 2021, the appeal itself is scheduled to be heard on September 21, 2021. Solterra and the Monitor can agree under the terms of the sale agreement to extend the date for closing. While there is no assurance they will do so, given that Solterra, in the course of the bidding process, significantly raised its offer, it seems highly unlikely that, less than two months later, it would now withdraw from the transaction.

[54] Given all of the above, I am satisfied that it is in the interests of justice to grant leave to appeal.

FIVE-JUSTICE DIVISION

[55] The chambers judge found that a crucial consideration was that 129 was seeking an extension of the stay of creditor's rights without any indication it would put forward a plan of arrangement or compromise upon which the Petitioners' creditors may vote. She accepted the argument of Centura that the circumstances were similar to those in *Cliffs.* She quoted Justice Tysoe's comment in *Cliffs* that:

> [38] … The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[56] Whether those comments in *Cliffs* extend to and effectively prohibit the proposal of 129 is a matter of general import. While I appreciate the division hearing the appeal could conclude that *Cliffs* is distinguishable, it may hold otherwise, in which case it would be important that the division have the power, if they considered it appropriate, to reconsider *Cliffs*. Accordingly, in my view, a five-justice division is appropriate.

SUMMARY

[57] In summary, therefore, I would grant leave to appeal and direct the appeal be heard by a five-justice division. The appeal will proceed on September 21, 2021. The

chambers judge's order with respect to the Solterra Backup Order is stayed pending the hearing of the appeal. It will be up to the division hearing the appeal to determine whether the stay should or should not be continued. 129 will, by consent, post $10,000 for security for Solterra's costs of the appeal.

[58] **VOITH J.A.**: I agree.

[59] **MARCHAND J.A.**: I agree.

[Discussion with counsel re: timing of payment of the security]

[60] **GOEPEL J.A.**: The posting of security for costs in the sum of $10,000 will coincide with the date when the appellant's factum is due (September 1, 2021). A term of the order should include that if the security for costs is not posted, the appeal will be stayed and the stay of the sale will be lifted. By consent, security for costs will be held in counsel's the trust account.

[Further discussion with counsel re: filing schedule]

[61] **GOEPEL J.A.**: I would propose the appeal record and appeal book be filed separately. The filing of the certificate of readiness is dispensed with. The appellant will file its factum, appeal record, and appeal book by September 1, 2021. All of the respondents will file their factums, individual appeal books, and condensed books by September 13, 2021. If there is to be a reply filed, it will be filed by September 17, 2021. Any further evidence to be filed by the parties should be filed by their respective factum filing date.

"The Honourable Mr. Justice Goepel"

In the Court of Appeal of Alberta

Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABCA 266

Date: 20070817
Docket: 0701-0222-AC
0701-0223-AC
Registry: Calgary

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")

Between:

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)

And Between:

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)

Reasons for Decision of
The Honourable Mr. Justice Clifton O'Brien
In Chambers

Application for Leave to Appeal and
Stay Pending Appeal of the Orders granted by
The Honourable Madam Justice B. E. Romaine
Dated the 24th day of July, 2007
Filed on the 27th day of July, 2007
(Dockets: 0501-17864; 0601-14198)

Reasons for Decision of
The Honourable Mr. Justice Clifton O'Brien
In Chambers

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: *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABQB 504. 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 *Re Liberty Oil & Gas Ltd.*, 2003 ABCA 158, 44 C.B.R. (4th) 96 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: *Re Canadian Airlines Corp.*, 2000 ABCA 149, 261 A.R. 120. 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: *Re Smoky River Coal Ltd.*, 1999 ABCA 252, 237 A.R. 326 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 23rd 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 *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.), *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.) and *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 (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: *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at para. 8 (Ont. Gen. Div.).

[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 heard on August 15, 2007

Reasons filed at Calgary, Alberta
this 17th day of August, 2007

O'Brien J.A.

Appearances:

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R. Van Dorp
for the Applicant, CPL

L.B. Robinson, Q.C.
S.F. Collins
J.A. Carfagnini
for the CCAA Applicants and the CCAA Parties (Respondents)

H.A. Gorman
for the Ad Hoc ULC1 Noteholders Committee

P.H. Griffin
U. Sheikh
for the 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 the Lien Debtholders

R. De Waal
for the Unsecured Creditors Committee

Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149

Date: 20000529
Docket: 00-18816

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN IN CHAMBERS

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED;
AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA) S.A. 1981, c.B-15., AS AMENDED, Section 185
AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD.

BETWEEN:

RESURGENCE ASSET MANAGEMENT LLC

Applicant

- and -

CANADIAN AIRLINES CORPORATION
and CANADIAN AIRLINES INTERNATIONAL LTD.

Respondents

[Note: An erratum was filed on June 5, 2000; the corrections have been made to the text and the erratum is appended to this judgment.]

APPLICATION FOR LEAVE TO APPEAL THE ORDER
OF THE HONOURABLE MADAM JUSTICE M. S. PAPERNY
DATED THE 12th DAY OF MAY, 2000

MEMORANDUM OF DECISION

COUNSEL:

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A. J. McConnell (for Bank of Nova Scotia Trust Company of New York, Montreal Trust Co. of Canada)

P. T. McCarthy, Q.C.(for Price Waterhouse Coopers)

MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

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 District*** (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); ***Luscar Ltd. v. Smoky River Coal Ltd.***, [1999] A.J. No. 185 at para. 22 (C.A.); ***Re Blue Range Resource Corporation***, [1999] A.J. No. 975; ***Re Blue Range Resource Corporation***, [2000] A.J. No. 4;***Re Blue Range Resource Corporation***,

[2000] A.J. No. 31.

[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) at 396 (B.C.C.A.), and were adopted in ***Med Finance Company 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***, [1892] 2 Q.B. 573 (C.A.); ***Re Fairview Industries Ltd.*** (1991), 11 C.B.R. (3d) 71 (N.S.S.C.T.D.); ***Re Northland Properties*** (1989), 73 C.B.R. (N.S.) 195; ***Savage v. Amoco Acquisition Corp.*** (1988), 68 C.B.R. 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 at 626 (Ont. Gen. Div.); ***Re NsC Diesel Power Inc.*** (1990), 79 C.B.R. (N.S.) 1 (N.S.S.C.T.D.); ***Re Wellington Bldg. 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 ***UTI Energy Corp. v. Fracmaster Ltd.*** (2000), 244 A.R. 93 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, 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.S.C.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.) 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 HEARD on May 18, 2000

MEMORANDUM FILED at Calgary, Alberta
this 29th day of May, 2000

WITTMANN J.A.

ERRATUM OF THE MEMORANDUM OF DECISION

In the Style of Cause, in the lines “Application for Leave to Appeal . . . Dated the 18th day of May, 2000" the date has been changed to read “Dated the 12th day of May, 2000".

COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2017 ONCA 99
DATE: 20170208
DOCKET: M46908 and M46916

Strathy C.J.O., Weiler and Benotto JJ.A.

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

And in the Matter of a proposed plan of compromise or arrangement
with respect to U.S. Steel Canada Inc.

Ken Rosenberg, Lily Harmer, Karen Jones and Robert Healey, for the moving party, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

Sharon L.C. White, for the moving party, USW Local 1005

Andrew J. Hatnay, Barbara Walancik and Amy Tang, for the moving party, Representative Counsel to the non-union active employees and retirees of U.S. Steel Canada Inc.

James Gage and Paul Steep, for the responding party, U.S. Steel Canada Inc.

Robert Staley, Kevin Zych, and William A. Bortolin, for the responding party, the Monitor, Ernst & Young Inc.

Heard: In writing

ENDORSEMENT

[1] These motions for leave to appeal arise in the context of the ongoing proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, involving U.S. Steel Canada Inc. ("USSC").

[2] In 2015, an order was made suspending the payment of certain benefits, referred to as “OPEBs” (other post-employment benefits, for example, prescription, dental and vision benefits) to retirees. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”), together with its local unions and representative counsel to the non-USW active and retired members, jointly brought a motion. They sought to have the payment of OPEBs reinstated on the basis that USSC’s financial position had improved since the 2015 order was made.

[3] The *CCAA* judge dismissed the motion on the condition that USSC make a one-time payment of $2.7 million towards the benefits. The moving parties now seek leave to appeal from that decision.

[4] There is no dispute about the applicable test. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In assessing whether leave should be granted, the court must consider:

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

See: *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 36 C.B.R. (6th) 1, at para. 34; *Nortel Networks Corporation (Re)*, 2016 ONCA 749, at para. 6; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24.

[5] In this case, the *CCAA* judge had broad discretion under s. 11. The test governing the exercise of that discretion is whether the order furthers the remedial objectives of the statute, namely, to permit the debtor to carry on business and avoid the social and economic consequences of liquidation: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70.

[6] It is rare that this court will interfere with a discretionary decision of a *CCAA* judge. In our view, there is no *prima facie* merit to the moving parties' submission that this court should do so in this case. The *CCAA* judge, who has extensive familiarity with the circumstances of the debtor, considered the evidence before him, the submissions of the parties and their respective "with prejudice" settlement discussions. He carefully balanced competing considerations, including the goal of a successful reorganization, which would benefit all interested parties, including the moving parties. In the final analysis, while he refused to reinstate the payment of benefits to the end of 2016, he ordered that USSC make a one-time payment of $2.7 million towards benefits. We are not satisfied that an appeal from that order has any real prospect of success.

[7] Given the fact-specific nature of the exercise of discretion in this case, the issue is not of significance to the insolvency practice.

[8] In the circumstances, it is unnecessary to consider the other aspects of the leave test.

[9] For these reasons, leave to appeal is denied. The motion is dismissed with costs to the respondent USSC, fixed at $2,500, inclusive of disbursements and all applicable taxes.

"G.R. Strathy C.J.O."
"K.M. Weiler J.A."
"M.L. Benotto J.A."

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 October 31, 2023

Last amended on April 27, 2023

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damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124; 2007, c. 36, s. 67.

immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124; 2007, ch. 36, art. 67.

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Divulgation de renseignements financiers

11.9 (1) Sur demande de tout intéressé sous le régime de la présente loi à l'égard d'une compagnie débitrice et sur préavis de la demande à tout intéressé qui sera vraisemblablement touché par l'ordonnance rendue au titre du présent article, le tribunal peut ordonner à cet intéressé de divulguer tout intérêt économique qu'il a dans la compagnie débitrice, aux conditions que le tribunal estime indiquées.

Factors to be considered

(2) In deciding whether to make an order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Facteurs à prendre en considération

(2) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, notamment, les facteurs suivants :

a) la question de savoir si le contrôleur acquiesce à la divulgation proposée;

b) la question de savoir si la divulgation proposée favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie débitrice;

c) la question de savoir si la divulgation proposée causera un préjudice sérieux à tout intéressé.

Meaning of *economic interest*

(3) In this section, ***economic interest*** includes

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(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.

Définition de *intérêt économique*

(3) Au présent article, ***intérêt économique*** s'entend notamment :

a) d'une réclamation, d'un contrat financier admissible, d'une option ou d'une hypothèque, d'un gage, d'une charge, d'un nantissement, d'un privilège ou d'un autre droit qui grève le bien;

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

Permission d'en appeler

13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la

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.

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 highest court of final resort in or for the province or territory in which the proceeding originated.

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 province ou du territoire où la procédure a pris naissance.

Jurisdiction of Supreme Court of Canada

(2) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1) and to award costs.

Juridiction de la Cour suprême du Canada

(2) La Cour suprême du Canada a juridiction pour entendre et décider, selon sa procédure ordinaire, tout appel ainsi permis et pour adjuger des frais.

Stay of proceedings

(3) No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by that Court.

Suspension de procédures

(3) Un tel appel à la Cour suprême du Canada n'a pas pour effet de suspendre les procédures, à moins que ce tribunal ne l'ordonne et dans la mesure où il l'ordonne.

Security for costs

(4) The appellant in an appeal under subsection (1) shall not be required to provide any security for costs, but, unless he provides security for costs in an amount to be fixed by the Supreme Court of Canada, he shall not be awarded costs in the event of his success on the appeal.

Cautionnement pour les frais

(4) L'appelant n'est pas tenu de fournir un cautionnement pour les frais; toutefois, à moins qu'il ne fournisse un cautionnement pour les frais au montant que fixe la Cour suprême du Canada, il ne lui est pas adjugé de frais en cas de réussite dans son appel.