2026 Hfx No.

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF:	**The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA")**
AND IN THE MATTER OF:	**An Application by CFFI Ventures Inc. (the "Applicant") for creditor protection under s. 11 of the CCAA, and other relief**

BOOK OF AUTHORITIES

APPLICATION FOR INITIAL ORDER

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TO: The Service List

LIST OF AUTHORITIES

1. *Boreal Capital Partners Ltd et al. (Re),* 2021 ONSC 7802
2. *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222
3. *Cinram International (Re)*, 2012 ONSC 3767
4. *Just Energy Corp. (Re)*, 2021 ONSC 1793
5. *Laurentian University of Sudbury (Re)*, 2021 ONSC 659
6. *Lydian International Limited (Re)*, 2019 ONSC 7473
7. *Montréal (City) v. Deloitte Restructuring Inc*., 2021 SCC 53
8. *Nordstrom Canada Retail, Inc. (Re),* 2023 ONSC 1422
9. *Pride Group Holdings Inc. et al*. *(Re)*, 2024 ONSC 2026
10. *Stelco Inc. (Re)*, 2004 CanLII 24933
11. *Target Canada Co. (Re)*, 2015 ONSC 303
12. *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014

CITATION: *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802
COURT FILE NO.: CV-21-00672654-00CL
DATE: 2021-11-29

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

-AND-

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BOREAL CAPITAL PARTNERS LTD., JRB-331 SHEDDON HOLDINGS LTD., 2123068 ONTARIO LIMITED, JRB-109 REYNOLDS HOLDINGS LTD., JRB-339 CHURCH HOLDINGS LTD., JRB-147 CHURCH HOLDINGS LTD, Applicants

BEFORE: Penny J.

COUNSEL: Rebecca L. Kennedy, Rachel Nicholson and Puya Fesharaki, for the Applicants

Peter J. Osborne, Alex Morrison and Greg Adams, for the proposed Monitor, Ernst & Young Inc.

Daniel Shapira and Jessica Sorbara, for the DIP Lender, Halmont Properties Corporation

James MacLellan and Bevan Brooksbank, for Trisura Guarantee Insurance Company

HEARD (by videoconference in Toronto): November 25, 2021

ENDORSEMENT

Overview

[1] This is an application for an initial order and other related relief under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36.

[2] This matter came before me at 2:00 PM on Thursday, November 25, 2021. After reviewing the application record and at the conclusion of oral submissions, I issued the initial order sought, with reasons to follow. These are the reasons.

[3] The principal issues on the application are whether:

(a) the applicants meet the criteria to obtain relief under the CCAA;

(b) the court should grant a stay of proceedings, and whether this court should extend the stay of proceedings to the partnership entities involved in the enterprise;

(c) the court should authorize the payment of certain pre-filing amounts to critical suppliers;

(d) the court should approve the proposed interim debtor in possession financing;

(e) the court should appoint Ernst & Young Inc. as the monitor of the applicants in these proceedings;

(f) the court should approve the administration charge; and

(g) the court should appoint Kesmark as the chief restructuring officer in these proceedings.

Background

[4] In 2016, Roppongi Investments Ltd. (owned by Timothy Price) entered into a 50:50 property development partnership with JRB Capital Group Ltd. (owned by Jonathan Bowman) with the objective of developing residential real estate projects in Oakville, Ontario through Boreal Capital Partners Ltd. which would act as the general partner of Boreal Capital Partners LP, (collectively Boreal).

[5] For each project, Boreal established a general partner and limited partner structure. There are five projects:

(1) the 331 Sheddon Avenue project is a 20-unit residential condominium development project. The project's completion has been delayed but it is currently at an advanced stage of construction;

(2) the 159 Trafalgar Road project is a potential commercial office development project. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site;

(3) the 109 Reynolds Street project is a 23-unit residential condominium development. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site;

(4) the 339 Church Street project is a 24-unit residential condominium development. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site; and

(5) the 147 Church Street project is currently in the land assembly stage. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site.

[6] In August 2020, these Boreal entities faced financial and operational difficulty. Boreal required additional financing on an urgent basis to complete 331 Sheddon because the major secured creditor, Meridian Credit Union Limited, refused to provide additional

financing. Roppongi also identified various alleged deficiencies in JRB's management of the Boreal entities.

[7] As a result, Roppongi arranged for Halmont Properties Corporation to provide subordinated financing to complete 331 Sheddon. In addition, Mr. Randal Froebelius, a nominee of Roppongi and Halmont, took over the management role of the Boreal entities from JRB. Shortly thereafter, Kesmark Estates Ltd., a company managed by Mr. Froebelius, was appointed as general partner of Boreal LP. The general partner of each of the project partnerships remained but were subject to review, oversight and approval of all decisions by Mr. Froebelius.

[8] Relations between Roppongi and JRB continued to deteriorate, which ultimately led to a resolution by Boreal LP in September 2021 to replace all the project partnerships' general partner with Kesmark and to terminate various construction and design management contracts with JRB.

[9] In May 2021, in order to avoid immediate enforcement action by Meridian, Halmont took an assignment of the obligations owing to Meridian and advanced additional funds to ensure that the Boreal entities could continue operating.

[10] However, on November 5, 2021 Halmont gave notice of various breaches by the Boreal entities of their obligations and stipulated that any further advances to the Boreal entities would be on a day to day basis and at Halmont's sole discretion. Ultimately, Halmont advised that it would not make any further advances to the Boreal entities outside of a formal restructuring process.

[11] In sum, the principal assets of the Boreal entities are the real property relating to the various projects (all in various stages of active development). Halmont is the principal secured creditor, with separate charges registered against most of the real property owned by the Boreal entities. As of November 24, 2021, the Boreal entities' aggregate indebtedness to Halmont was $44,820,666 (which includes a small unsecured portion of less than $100,000).

[12] The applicants are insolvent and are currently operating at a financial deficit of approximately $8.9 million on a consolidated basis. They have relied on Halmont as the lender of last resort since October 2020, as no other lender would provide financing to the Boreal entities given their imperiled financial state. The applicants are in default of their obligations owing to Halmont.

[13] Other secured creditors of the Boreal entities include Trisura Guarantee Insurance Company, Roppongi Investments Ltd. and Canadian Western Bank, with charges registered against real properties owned by various Boreal entities. This application was made on notice to Halmont, Trisura and Roppongi, all of which support the relief being sought.

Analysis

Do the applicants meet the criteria to obtain relief under the CCAA?

[14] The applicants are insolvent. Both the test under the BIA and the expanded *Stelco* test are satisfied in this case. The applicants' liabilities materially exceed their assets and they are experiencing an operational deficit: the applicants are unable to pay liabilities that are currently due and those coming due. In addition, the applicants are exposed to significant financial risk arising from claims of unsecured creditors and other stakeholders that the applicants will be unable to pay without interim financing. This includes a host of potential claims relating to delay or frustration of the development of the projects, such as by contractors and potential end users of the condominium units. The statutory financial threshold is not in issue.

Should the court grant the stay of proceedings and should the court extend the stay of proceedings to the partnership entities involved in the enterprise?

[15] Section 11.02(1) permits the court to grant an initial stay of up to 10 days on an application for an initial order, provided the stay is appropriate and the applicants have acted with due diligence and in good faith. Under s. 11.001, other relief granted under s. 11 of the CCAA at the same time as an initial order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."

[16] Absent exceptional circumstances, the relief granted during the initial stay period should be limited and where possible, the status quo should be maintained during that period. The initial stay period allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing. Whether particular relief is necessary to stabilize a debtor company's operations during the initial stay period is a factual determination, based on all of the circumstances of the particular debtor. There are no "hard and fast" rules: *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List].

[17] Here, the applicants are experiencing a liquidity crisis and are unable to meet their obligations generally as they become due. The applicants intend to continue operations and consult with their stakeholders in good faith if they are granted protection. Therefore, it is appropriate for this Court to grant the requested stay of proceedings in favour of the applicants.

[18] The CCAA applies to debtor companies, not partnerships. Nevertheless, where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved.

[19] The individual project partnerships are not applicants in this proceeding. The business and operations of the applicants are, however, deeply integrated with the partnerships at all

levels. Omitting the partnerships from relief would frustrate the objective of seeking respite for the applicants under the CCAA.

Should the court authorize the payment of certain pre-filing amounts to critical suppliers?

[20] The applicants seek authority, with the consent of the Monitor, to make payments, including pre-filing amounts owing and in arrears, to certain third parties that provide services that are integral to the Boreal entities' ability to operate. This is a measure designed to ensure that the Boreal entities can continue regular business operations during the post-filing period and efficiently complete certain projects.

[21] The court has jurisdiction to make any orders that it thinks appropriate under s. 11 of the CCAA. Payment to critical suppliers, including provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor, is necessary to achieve the purposes for which the initial order is being granted.

[22] A supplier is "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services. I agree that in the circumstances, the Monitor is best suited determine when any supplier of the Boreal entities is "critical" such that pre-filing payments should be permitted.

Should the court approve the proposed interim debtor in possession financing?

[23] Section 11.2 of the CCAA gives the court authority to approve debtor-in-possession ("DIP") financing. The court may also make an order granting a priority charge to the DIP provider over the debtor's property. The security or charge may not secure pre-filing obligations.

[24] As noted above, under the recent CCAA amendments, when an application for interim financing is made at the same time as an initial application, the applicant must satisfy the court 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" [i.e. the initial stay period].

[25] In this case, the DIP facility and related DIP lender's charge are essential elements of the measures required during the initial stay period to ensure the survival of the Boreal entities' businesses and operations until the comeback hearing.

[26] The Boreal entities urgently require interim financing to provide stability, continue operations, and restructure their business. The only potential financier is their existing lender of last resort, Halmont, which has agreed to provide the DIP facility. It is appropriate for the DIP lender's charge to be secured on the Boreal entities' property given that all of the Boreal entities will derive benefit from the DIP facility proceeds. The amount sought for the initial charge is exactly calibrated to the anticipated cash needs for the next ten days. The initial draw of $2.6 million is required to allow the Boreal entities to pay specified

amounts that are expected to be due during the initial stay period - amounts specified in the Cash Flow Forecast.

[27] Finally, no viable compromise or arrangement is possible without the DIP facility. Without the immediate liquidity provided by the initial DIP facility draw, the applicants' business is in serious jeopardy and will not survive beyond the initial stay period.

Should the court appoint Ernst & Young Inc. as the monitor of the applicants in these proceedings?

[28] Ernst & Young has consented to act as monitor in these CCAA proceedings. It is a trustee within the meaning of subsection 2(1) of the BIA. E&Y is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA.

Should the court approve the administration charge?

[29] Section 11.52 of the CCAA gives the court jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts. In determining whether to approve an administration charge, the Court must consider: (a) the size and complexity of the businesses under CCAA protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor. These factors have been applied in numerous proceedings.

[30] The Monitor, its counsel, the applicant's counsel and the DIP lender's counsel are essential to the operation of these CCAA proceedings. It is unlikely that these advisors will participate in the CCAA proceedings without the administration charge. Furthermore, the quantum of the proposed administration charge in the initial order is limited to what is "reasonably necessary" for the initial stay period, given the demands on the advisors leading up to the filing together with likely further demands prior to the comeback hearing.

Should the court appoint Kesmark as the chief restructuring officer in these proceedings and grant the requested protections?

[31] The court has the statutory authority to make an order appointing a CRO under s. 11 of the CCAA. These appointments may be made where the proposed CRO has expertise which will assist the applicants (and the Monitor) in achieving the objectives of the CCAA.

[32] Kesmark's expertise and continued participation are critical to achieving the objectives of the CCAA in the circumstances by permitting the Boreal entities to continue their operations and plan a restructuring. Kesmark is not an "insider" of management and has the existing institutional knowledge, expertise and proven track-record to fulfill the obligations of a CRO. This appointment is supported by the Monitor.

[33] CROs may also be granted certain protections from liability in the execution of their duties in a similar manner to court-appointed monitors. Providing protections in the proposed initial order to Kesmark as CRO will ensure Kesmark can: (i) continue acting as the general

partner of the partnerships, (ii) continue the business normalization efforts it has undertaken since its appointment; and, (iii) manage and oversee the projects and conduct the day-to-day business of the Boreal entities.

Conclusion

[34] For all these reasons, the initial order is granted.

Penny J.

Date: 2021-11-29

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

Companies' Creditors Arrangement Act[1] ("CCAA") proceeding on October 6, 2009.[2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

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[1] R.S.C. 1985, c. C. 36, as amended.

[2] On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75

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[3] Subject to certain assumptions and qualifications.

[4] Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

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[5] 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*[6]and *Re Lehndorff General Partners Ltd*[7].

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

[6] 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

[7] (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.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 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, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.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.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*[8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

[8] 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."[9] Similarly, in *Re Anvil Range Mining Corp.*[10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[11]

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

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[9] Ibid at para. 16.

[10] (2002),34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003).

[11] Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*[12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

[12] Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[13] This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*[14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

[14] Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*[15], I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*[16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

[15] Supra note 7.

[16] [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*[18]. In that case, Iacobucci J. stated that an

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[17] R.S.O. 1990, c. C.43, as amended.

[18] [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) 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.

[65] In *Re Canwest*[19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

[19] Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A", Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants**

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

HEARD &
ENDORSED: **JUNE 25, 2012**

REASONS: **JUNE 26, 2012**

ENDORSEMENT

[1] Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

[2] Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

[3] The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

[4] Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

[5] Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

(i) to ensure the ongoing operations of the Cinram Group;

(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

[6] Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

[7] The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

[8] Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

[9] Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

[10] The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

[11] Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

[12] Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

[13] Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

[14] Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms

part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

[15] Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

[16] The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

[17] All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

[18] As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

[19] Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

[20] Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

[21] The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their

Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

[27] Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

[28] Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

[29] Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

[30] Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

[31] The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

> Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

[32] Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

[33] The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

[34] Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

[35] The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

[36] In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

[37] As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

[38] The Applicants have also requested that the confidential supplement – which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules – be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) 2 S.C.R. 522, I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

[39] Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

[40] In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally

integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;

(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;

(j) new business development initiatives are centralized and managed from Toronto, Ontario; and

(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

[41] Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

[42] The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court – in this case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

[43] In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

MORAWETZ J.

Date: June 26, 2012

SCHEDULE "A"

ADDITIONAL APPLICANTS

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

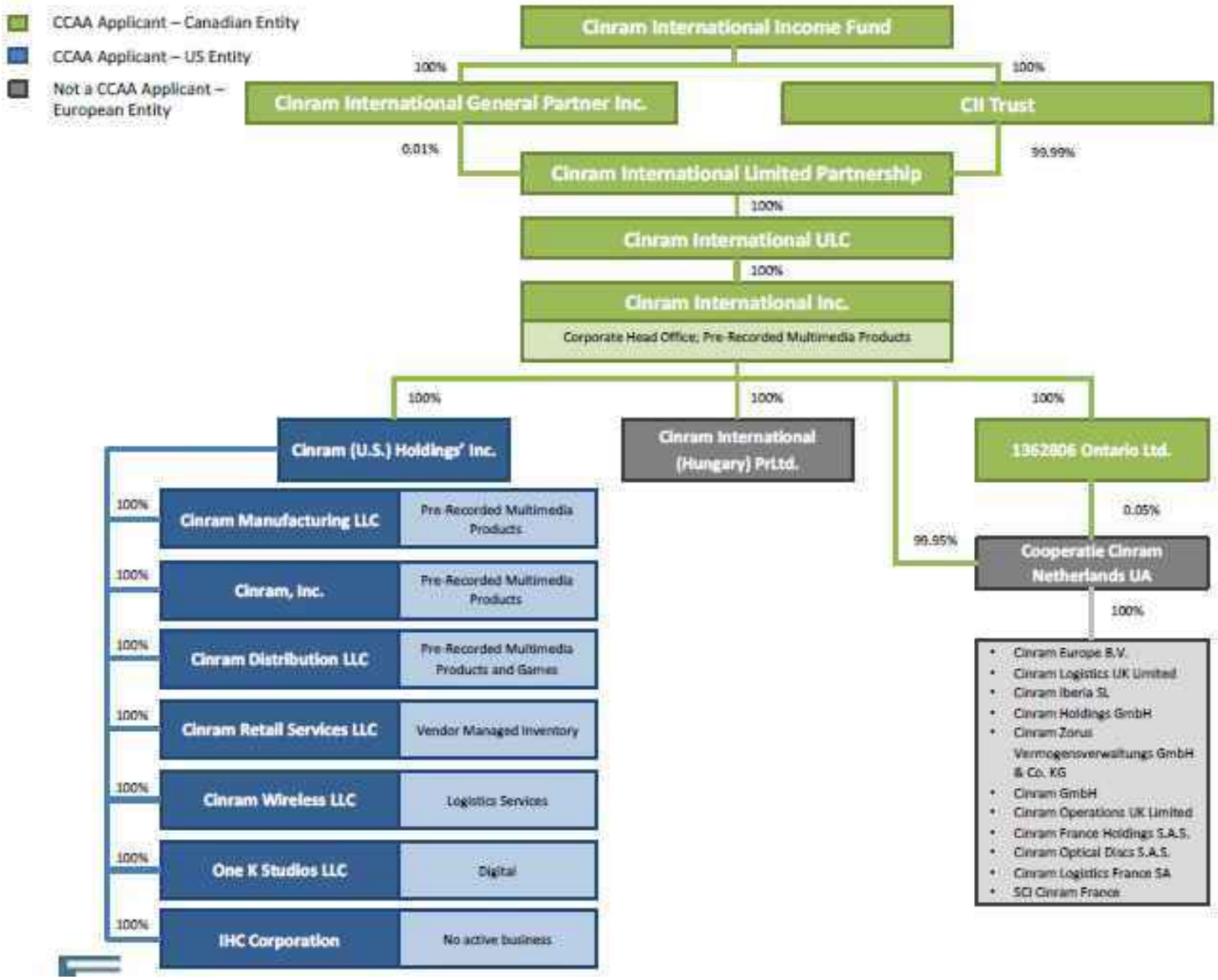
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

SCHEDULE "B"



SCHEDULE "C"

A. THE APPLICANTS ARE "DEBTOR COMPANIES" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

> CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.
>
> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("**Book of Authorities**"), Tab 1.
Re Global Light Telecommunications Ltd. (2004), 2 C.B.R. (5th) 210 (B.C.S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

> *Global Light, supra* at para. 17; Book of Authorities, Tab 2.
> *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.
> *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.[Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at para. 4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

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

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

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. THE RELIEF IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corp. v. Comiskey, supra at paras. 22 and 56-60; Book of Authorities, Tab 4.
Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Gen. Div. [Commercial List]); Book of Authorities, Tab 6.
Re Chef Ready Foods Ltd; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall

objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

> *Re Sulphur Corporation of Canada Ltd.* (2002), 35 C.B.R. (4th) 304 (Alta Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

> Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

> In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> *Lehndorff General Partner Ltd., Re, supra* at para. 5; Book of Authorities, Tab 6.
> *Canwest Global, supra* at para. 27; Book of Authorities, Tab 1.
> CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

> *Lehndorff, supra* at paras. 5 and 16; Book of Authorities, Tab 6.
> *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10.
Lehndorff, supra at para. 21; Book of Authorities, Tab 6.
Canwest Global, supra at paras. 28 and 29; Book of Authorities, Tab 1.
Re Sino-Forest Corp. 2012 ONSC 2063 (Commercial List) at paras. 5, 18, and 31; Book of Authorities, Tab 11.
Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's

practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Re Canwest Global*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global supra, at para. 43; Book of Authorities, Tab 1.
Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.
Re Priszm Income Fund (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an

efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

> 11.2(1) *Interim financing* - 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.

> 11.2(2) *Priority* – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Re Timminco Ltd. (2012), 211 A.C.W.S. (3d) 881(Ont. Sup. Ct. J. [Commercial List]) at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) Factors to be considered – 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, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

> *Re Canwest Publishing Inc./Publications Canwest Inc.* (2010), 63 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

> *Re Catalyst Paper Corporation*, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.
> *Angiotech, supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18
> *Re Fraser Papers Inc.*, Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent,

the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

> 11.52(1) *Court may order security or charge to cover certain costs*
> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate – in respect of the fees and expenses of
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco*, *Canwest Global* and *Canwest Publishing*.

> *Canwest Global*, *supra*; Book of Authorities, Tab 1.
> *Canwest Publishing*, *supra*; Book of Authorities, Tab 16.
> *Re Timminco Ltd.*, 2012 ONSC 106 (Commercial List) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification*
> On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority*
> The court may order that the security or charge rank in priority over the claim of any secured creditors of the company
>
> 11.51(3) *Restriction* -- indemnification insurance
> The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault*
> The court shall make an order declaring that the security or charge

> does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global, supra* at paras 46-48; Book of Authorities, Tab 1.
> *Canwest Publishing, supra* at paras. 56-57; Book of Authorities, Tab 16.
> *Timminco, supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.
Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.
Canwest Global supra, at para. 49; Book of Authorities, Tab 1.
Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora

Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate

in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

> *Sino-Forest, supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

> Bell Affidavit, para. 176; Application Record, Tab 2.

CITATION: Re Just Energy Corp., 2021 ONSC 1793
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20210309

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

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

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

Applicants

BEFORE: Koehnen J.

COUNSEL:

Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt and Justine Erickson, for the Applicants

Robert Thornton, Rebecca Kennedy and Rachel Bengino, Puya Fesharaki, for the Proposed Monitor

Scott Bomhof, for the Term Loan Lenders

Heather Meredith and James D. Gage, for the Credit Facility Lenders

Ryan Jacobs, Jane Dietrich and Michael Wunder, for the DIP Lender

Howard Gorman, for Shell

Robert Kennedy and Kenneth Kraft, for BP

Paul Bishop and Jim Robinson, Proposed Monitor

Brian Schartz, and Mary Kogut Brawley, US counsel for the Applicants

Chad Nichols and David Botter, U.S. Counsel to DIP Lender

Kelli Norfleet, U.S. Counsel to BP

Doug McIntosh, Advisor to the Credit Facility Lenders

John Higgins

HEARD: March 9, 2021

ENDORSEMENT

Overview

[1] The applicant, Just Energy Group Inc. ("Just Energy") seeks protection under *the Companies' Creditors Arrangement Act*, (the "*CCAA*")[1] by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

[2] Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

[1] R.C.C. 1985, c. c-36, as amended

[3] Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.

[4] Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the *CCAA* application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.

[5] Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.

[6] The issue before me today is whether to grant *CCAA* protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the "DIP") of $125 million for the initial 10 day period.

[7] For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the *CCAA* is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.

[8] A number of critical parties were given notice of today's hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to "reserve their rights" to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are "reserving their rights" are of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial order when the recipients of those rights will be relying on them to their detriment over the next 10 days and when the parties "reserving their rights" have not opposed the relief I am granting.

I Background to the Liquidity Crisis

[9] Just Energy Group Inc. ("Just Energy") is incorporated under the *Canada Business Corporations Act*. Its shares are publicly traded on the Toronto Stock Exchange and the New York Stock Exchange. Its registered office is in Toronto, Ontario. Just Energy is primarily a holding company that directly or indirectly owns the other companies in the Just Energy Group, including operating subsidiaries.

[10] At the risk of oversimplifying, it sells energy to customers under long-term fixed-price contracts and then purchases energy in the market to fulfil those contracts. It has over 950,000 customers, for the most part in Canada and the United States, approximately 979 full-time employees and debts estimated at $1.25 billion.

[11] In recent years Just Energy has suffered challenges that it has sought to remedy by way of a recapitalization through a plan of arrangement under section 192 of the *CBCA* which was approved by this court on September 2, 2020.

[12] Just Energy's largest market in the United States is in the state of Texas.

[13] Just Energy faces a sudden and unexpected liquidity crisis as a result of an extreme winter storm that hit Texas on February 12, 2021. The storm caused a surge in demand for electrical power. In response, natural gas prices jumped from US $3.00 to over US $150/mmBTU on February 12.

[14] The demand for power was exacerbated by the fact that much of the Texas electrical grid began to shut down because it was not equipped to deal with cold weather. As a result, critical components necessary for the generation and transmission of electricity froze thereby increasing demand even further on the limited resources that remained available. By the early morning hours of February 15, 2021, the stress on the electrical grid was so great that it came within minutes of a catastrophic failure.

[15] In response, the Electric Reliability Council of Texas ("ERCOT") which is responsible for managing the Texas electrical grid ordered transmission operators to implement deep cuts in the form of rotating outages to avoid a complete collapse of the grid.

[16] In an apparent effort to stimulate more power production, ERCOT's regulator, the Texas Public Utility Commission ("PUCT") increased the real-time settlement price of power from approximately US $1,200 per megawatt hour to US $9,000 per megawatt hour. It appears that this price was set by a computer program that was supposed to adjust prices to help match supply and demand. The increase in price to $9,000 per megawatt hour did not, however, increase supply because supply was blocked by frozen equipment. The price remained at $9,000 MWh for four days. The real time settlement price did not reach $9,000 even for a single 15 minute interval in all of 2020.

[17] In addition, Just Energy pays ERCOT a fee referred to as the Reliability Deployment Ancillary Service Imbalance Revenue Neutrality. It ranges between U.S. $0 to U.S.

$23,500 per day. Between June 2015 and February 16, 2021, Just Energy paid approximately $504,000 in respect of this charge. For February 17, 18 and 19, 2021, the aggregate charge was over U.S. $53 million.

[18] ERCOT and PUCT have issued additional invoices of US $55 billion to wholesale energy purchasers as a result of the storm. Just Energy's share of that is approximately $250 million.

[19] These additional fees pose a severe liquidity challenge for Just Energy because it is required to pay them within two days of being imposed. Although Just Energy has a means to dispute ERCOT's invoices, it must pay them before it can initiate the dispute resolution process. ERCOT has already barred two electricity sellers from the Texas power market for failing to make timely payments arising out of the storm.

[20] There is considerable controversy surrounding these fees. PUCT and ERCOT have been subject to severe criticism for their actions. The chair of PUCT and several of ERCOT's board members have resigned. The board of ERCOT terminated the employment of its CEO.

[21] Others in the Texas electrical market have also suffered. The largest power generation and transmission cooperative in Texas, Brazos Electric Power Cooperative, filed for Chapter 11 bankruptcy protection on March 1, 2021.

[22] Although Just Energy hedges for weather risks, its hedging and pricing models did not, however, take into account the extraordinary power demands caused by the storm and the unprecedented fees that ERCOT and PUCT imposed during and after the storm. By way of example, Just Energy's weather hedges contemplate a 50% increase in power usage above average consumption for the month of February. During the storm, usage was 200% above the previous week.

[23] As a result of the additional payments it has had to make to date because of the storm, Just Energy's liquidity facilities are down to approximately $2.9 million. By the end of day on March 9, 2021 it will have to pay ERCOT an additional US $96.24 million.

[24] On March 22, 2021 Just Energy expects to have to pay $250,000,000 to counterparties for purchases at inflated prices during the storm and its aftermath. Sudden and unexpected obligations of that magnitude have a cascading effect on Just Energy's financial stability.

[25] In response to the dramatically increased charges by ERCOT, companies that have issued surety bonds in Just Energy's favour have demanded $30 million in additional collateral of which $10 million remains outstanding. Just Energy was obligated to provide additional collateral because the bonding companies had threatened to cancel their surety bonds if Just Energy did not do so. The cancellation of the bonds may have resulted in the revocation of licenses necessary for the Just Energy group to carry on business in certain jurisdictions.

[26] On March 8, 2021, the Just Energy group received another invoice from ERCOT for US $30.92 million, of which U.S. $23.89 million will be due by March 10, 2021.

[27] While Just Energy had sufficient liquidity to pay the obligations that it expected, it does not have enough liquidity to pay the additional fees charged by ERCOT, PUCT and creditors who have demanded more stringent terms in response to the ERCOT and PUCT fees. If Just Energy does not pay the fees to ERCOT, the latter can simply transfer all of the Just Energy Group's customers in Texas to another service provider. That would be devastating to Just Energy's business.

[28] In addition to the foregoing financial stresses, at least three provincial regulators have expressed concern about Just Energy's viability. Two regulators made inquiries as a result of media reports arising from Just Energy's disclosure about its storm related financial challenges. The third inquiry was prompted by a formal petition by another market participant who seeks to prevent the Just Energy operating entity in Manitoba from selling to new customers.

II. General Principles

[29] At a high level, this is precisely the sort of situation that the *CCAA* is designed for.

[30] The policy underlying the *CCAA* is that the best commercial outcomes are achieved when stays of proceedings provide debtors with breathing space during which solvency is restored or a reorganization of liabilities is explored. The *CCAA* offers a flexible mechanism to make it more responsive to the commercial needs of complex reorganizations. The overriding object is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating the business.[2]

[31] This will be a complex restructuring. It involves balancing the interests of various types of debt including secured debt, unsecured term loans, working capital provided by service providers, trade debt to commodities providers, ongoing obligations to customers, just shy of 1000 employees all overlaid with varying regulatory requirements of several different Canadian provinces and American states.

[32] Today's application invites me to make a number of rulings on a variety of discretionary issues. The Supreme Court of Canada provided guidance about whether and how to exercise that discretionary authority in *Century Services Inc. v. Canada (Attorney General)*.[3] It described the guiding principles as follows:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind

[2] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 14-15.
[3] Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 (CanLII), [2010] 3 SCR 379

> when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[33] Three principles emerge from this passage: good faith, diligence and appropriateness. There is no suggestion that Just Energy is not proceeding in good faith or with diligence. I will return to the issue of appropriateness in my review of the individual forms of relief.

[34] Today I am being asked for a 10 day stay of proceedings, including a stay of proceedings by regulatory authorities. Such relief is appropriate in the circumstances of this case.

[35] To have Just Energy fail would cause severe hardship to 979 employees and their families and cause losses of up to $1.25 billion for creditors all because

(i) Just Energy is being forced to pay unprecedented fees that ERCOT and PUCT imposed,

(ii) which fees Just Energy is challenging,

(iii) which fees are highly controversial,

(iv) and which fees were imposed in circumstances where ERCOT's and PUCT's overall management of the crisis has led to the departure of their CEOs and the resignation of several of their board members.

[36] In granting the relief I ask myself, as the Supreme Court of Canada did in *Century Services* whether granting a stay will usefully further efforts to achieve the remedial purpose of the *CCAA*. If I apply that principle to the circumstances before me today, the question becomes whether a 10 day stay will avoid the social and economic losses resulting from the liquidation of Just Energy and give participants a chance to achieve common ground while treating all stakeholders as advantageously and fairly as the circumstances permit.

[37] I am satisfied that it does. This is precisely the sort of situation that demands breathing space for all actors involved, including regulators, to begin to sort things out in a calmer, more rational, orderly fashion than has been possible to date.

[38] I underscore that in making these comments I am not intending to criticize the Texas regulators. Whether there is anything to be criticized in their conduct or whether their imposition of dramatically higher fees is appropriate will be for another day and another forum. I frame the issue in this way only to demonstrate that there is a genuine issue about the circumstances giving rise to Just Energy's liquidity crisis and a genuine issue about how best to sort out that crisis. Working out those issues in a manner that is as advantageous and fair to all stakeholders as the circumstances permit requires the calm deliberation and reflection that a *CCAA* stay will afford.

III. Specific Issues

[39] This application requires me to address the following specific issues:

A. Is Ontario the Centre of Main Interest?

B. Does Just Energy meet the insolvency requirements of the *CCAA*?

C. Should the DIP be approved?

D. Should the regulatory actions be stayed?

E. Should suppliers' charges and pre-filing payments be authorized?

F. Should set off rights be stayed?

G. Should administrative and directors and officers charges be granted?

H. Should noncorporate entities be captured by the stay?

I. Should third-quarter bonuses be paid?

J. Should a sealing order be granted?

A. Is Ontario the Centre of Main Interest?

[40] Just Energy has operations primarily in Canada and the United States. It has advised that it intends to commence a recognition proceeding under chapter 15 of the *US Bankruptcy Code* in Texas. This will ensure that actions taken in relation to US entities and US property or by US regulators are overseen by the US courts.

[41] The presence of significant business activities in the United States and the intention to commence a chapter 15 proceeding, engages the principle of the Centre of Main Interest or COMI.

[42] Section 45 (2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company's registered office is deemed to be its centre of main interest.

[43] The registered office of Just Energy is located in Toronto.

[44] Other evidentiary factors can displace the presumption of the registered office being the COMI. These include the location of the debtor's headquarters or head office functions, location of the debtor's management and the location that significant creditors recognize as being the centre of the company's operations.[4]

[45] Here, the parent company, Just Energy Group Inc. is a CBCA corporation. Although it has offices in Mississauga and Houston, its registered office is in Toronto. Its common shares are listed on the Toronto Stock Exchange and the New York Stock Exchange. Just Energy is primarily a holding company although it is also the primary debtor or guarantor on substantially all of the obligations of its subsidiaries, including licenses granted by regulators to members of the Just Energy group. Just Energy has a number of subsidiaries throughout Canada, the United States and India. It has 333 Employees in Canada, 381 in the United States and 265 in India.

[46] The following additional factors point to Canada as the COMI:

a. During the recent *CCAA* plan of arrangement which was recognized under Chapter 15 of the US Bankruptcy Code, Canada was recognized as the COMI for the Just Energy group.

b. The operations of the Just Energy group are directed in part from its head office in Toronto. In particular, decisions relating to the Just Energy's primary business (buying, selling and hedging energy) are primarily made in Canada.

c. All other members of the Just Energy group report to Just Energy.

d. Just Energy Corp. (a Canadian subsidiary) acts as a centralized entity providing operational and administrative functions for the Just Energy group as a whole. These functions are performed by Canadian Just Energy employees and include, among other things:

    i. most enterprise-wide IT services;

    ii. enterprise-wide support for finance functions, including working capital management, credit management (including credit checks for customers), payment processing, financial reconciliations, managing business expenses, insurance, and taxation;

[4] *Re Massachusetts Elephant & Castle Group* 2011 ONSC 4201

iii. oversight for the legal, regulatory, and compliance functions across the entire Just Energy Group;

iv. certain enterprise-wide HR functions, such as designing in-house learning and development programs;

v. financial planning and analysis services, including customer enrollment, billing, customer service, and load forecasting;

vi. supply planning services, including creating demand models which predict the amount of energy that each entity needs to purchase from suppliers and determining the proper distributor and pipeline necessary to get the gas to the end-consumer; and

vii. internal audit services.

[47] In the foregoing circumstances I am satisfied Canada is the appropriate COMI.

B. Does Just Energy Meet the Insolvency Requirements?

[48] There is no doubt that Just Energy meets the threshold required by s. 3(1) of the *CCAA* that it be a company with liabilities in excess of $5,000,000.

[49] A company must be "insolvent" to obtain protection under the *CCAA*.[5] Although the *CCAA* does not define "insolvent," the definition of insolvent under the *Bankruptcy and Insolvency Act* ("*BIA*")[6] is usually referred to meet this criteria.[7] Section 2 of the BIA defines "insolvent person" as meaning (i) one who is unable to meet his obligations as they generally become due, (ii) who has ceased paying current obligations in the ordinary course or

> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[5] *CCAA* s. 2(1)(a) definition of a debtor company.
[6] R. S. C. 1985,c. B- 3
[7] *Laurentian University of Sudbury* 2021 ONSC 659

[50] In addition, Ontario courts have also held that a financially troubled Corporation that is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring" should also be considered to be insolvent for purposes of seeking *CCAA* protection.[8]

[51] I am satisfied from the affidavit of Michael Carter sworn March 9, 2021 that the liabilities of Just Energy exceed the value of its assets, that it will imminently cease to be able to meet its obligations as they become due, and will run out of liquidity in very short order.

C. Should a Priming DIP be Approved?

[52] Section 11.2(1) of the *CCAA* authorizes the court to approve debtor-in-possession financing (the "DIP") that primes existing debt.

[53] However, section 11.2 (5) provides that, on an initial application:

> (5) …. no order shall be made under subsection (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.

[54] In other words, I have no jurisdiction to authorize a priming DIP except for that amount of debt and on those terms as are required to see the debtor through the next 10 days.

[55] The object is to put those measures in place that are necessary to avoid an immediate liquidation and thereby improve the ability of all players to participate in a more orderly resolution of the company's affairs. [9] The objective is to preserve the status quo the company for those 10 days but to go no further.[10]

[56] As Morawetz J. (as he then was) pointed out in para. 27 of *Lydian International Limited*,[11] a 10 day stay allows a number of other steps to occur including notification of parties who could not be consulted before the initial application as well as further consultations with key stakeholders.

[57] This is a material limitation on the court's jurisdiction on an initial application. It is a recent amendment introduced by Parliament which restricts the powers the court had previously. Before the amendment, initial applications were granted for a period of 30

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[8] *Laurentian University* 2021 ONSC 659 at para. 32; *Stelco Inc., Re*, 2004 CanLII 24933 at para. 26.
[9] *Re Lydian International Limited*, 2019 ONSC 7473 at para. 25.
[10] *Lydian* at para. 26
[11] 2019 ONSC 7473.

days. That length of time often required more substantial DIPS which had the potential to prejudice other creditors without giving those creditors a meaningful opportunity to make submissions to the court. The 10 day rule is designed to correct that issue. I take that as a direct message from Parliament that is meant to be enforced seriously.

[58] Even before the amendment limiting initial orders to 10 days, the policy of courts was to limit DIP financing in initial orders to what was required to meet the company's "urgent needs over the sorting out period."[12] As Farley J. Noted in Re Royal Oak Mines Inc.

> … the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.[13]

[59] Several *CCAA* courts have approved interim financing as part of the initial order since the 10 day rule came into effect.[14]

[60] The distinguishing factor in this case is that even the 10 day DIP that Just Energy requests is large. It seeks a DIP of $125,000,000 almost all of which will be drawn in the initial 10 day period. Interest accrues at 13% annually. There is a 1% commitment fee and 1% origination fee.

[61] Section 11.2(4) of the *CCAA* lists some of the factors the Court should consider when deciding whether to approve DIP financing. These include:

(a) The period during which the Applicants are expected to be subject to the *CCAA* proceeding;

(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;

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[12] *Re Royal Oak Mines Inc*. (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.

[13] *Re Royal Oak Mines Inc.* (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)) at para 24.

[14] *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at para. 21; *Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234, at para. 90; *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586, at para. 2.

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

(f) Whether any creditor would be materially prejudiced as a result of the DIP charge; and

(g) The Monitor's pre-filing report (if any).

[62] In *Re AbitibiBowater Inc*,[15] Gascon J.S.C., as he then was, described the analysis as having the court satisfy itself that the benefits of DIP financing to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

[63] Although the amount of the DIP for the initial 10 day stay is high, it is nevertheless necessary to "keep the lights on." Just Energy is required to pay ERCOT US $96.24 million by the end of today (March 9, 2021) or risk losing its licences. It will have to pay a further $54 million by March 14, 2021. Texas represents approximately 47% of Just Energy's margin. Without its Texas licenses, Just Energy would likely collapse.

[64] Just Energy's secured creditors do not oppose the DIP. Although they wish to "reserve their rights" on the comeback hearing, I take that to mean that they may wish to make arguments about the existence or the terms of the DIP from the comeback hearing onward. As noted earlier, they would be hard-pressed to challenge any priority given to the DIP for advances during the 10 day period the absence of any opposition today.

[65] The DIP lender is a consortium of Just Energy's largest unsecured lenders. For unsecured lenders to offer a DIP of that size to cover a 10 day stay suggests that they believe their prospects for recovery on their unsecured loan are better with a significant 10 day DIP than without.

[66] The loan clearly enhances the prospects of a viable compromise or arrangement. Without the loan, Just Energy cannot continue. Regulators will quickly take steps to suspended licenses. Even with the stay of regulatory proceedings, it would be difficult to allow Just Energy to continue to operate if it has no working capital and no means of purchasing power to sell to customers.

[67] Just Energy's business is capital-intensive. It requires the expenditure of large amounts of money to buy power and the subsequent receipt of large amounts from the sale of power. That requires substantial liquidity.

[68] In addition, the regulated nature of Just Energy's business can lead to unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern. The added charges by PUCT and ERCOT are prime examples of that. Those charges must be paid within as short a period as 2 business days. While those charges may

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[15] *Re AbitibiBowater Inc*, 2009 QCCS 6453 at para 16.

ultimately be reversed through the dispute resolution process and while additional collateral that has been required may ultimately be released, those steps will take time to work out. Even if the charges are not reversed, it may well be possible to absorb those price shocks if given the time. Financing Just Energy at least through an interim period allows for greater insight into those possibilities.

[69] I am also mindful of the need to keep essential suppliers and regulators comfortable. Even though I am staying provincial regulatory proceedings, I do that knowing that I am treading on public policy territory that Parliament and provincial legislatures have chosen to ascribe to specialized bodies with specialized knowledge. A larger 10 day DIP decreases the risk that I am harming the public policy objectives they have been mandated to pursue than would a smaller DIP.

[70] The Monitor points out that, after netting out cash receipts and expenditures, approximately $33,000,000 of the DIP will remain at the end of day 10. One could see that as grounds to pare back the DIP by an equivalent amount I do not think it would be appropriate to do. As noted, the Just Energy business is unpredictable. It requires large amount of liquidity and liquidity buffers to take into account unexpected charges from regulators. The regulators who impose those charges do so to protect other interests. As a result, they cannot simply be dismissed. It strikes me that providing a business of this sort with a buffer is appropriate. The Monitor recommends allowing the buffer to continue. None of the other stakeholders object.

[71] In the foregoing circumstances, I am satisfied that the DIP should be approved as requested.

D. Should Regulatory Actions be Stayed?

[72] Just Energy is subject to a wide variety of provincial and state regulators in Canada and the United States. By way of example, in Canada five different provincial regulators have issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity. Power cannot be sold to new customers or delivered to existing customers without these licenses.

[73] Concerns about a licensee's solvency can lead provincial regulators to suspend or cancel licenses or impose more onerous terms on license holders. Such steps can include prohibitions on sales to new customers, termination of the ability to sell to existing customers and the forced transfer of customers to other suppliers. This would cause a licensee to instantly lose revenue streams and threaten their long-term viability. Regulators have the power to impose such terms in extremely short order.

[74] The filing of this *CCAA* application could lead to such adverse steps by regulators.

[75] As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

[76] With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

[77] In my view it is appropriate to stay the conduct of provincial regulators in Canada.

[78] Section 11.1 of the *CCAA* provides:

> 11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

[79] More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

[80] In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.

[81] As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.

[82] It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.

[83] One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.

[84] Section 11.1 (3) of the *CCAA* allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.

[85] Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.

[86] Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.

[87] In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

[88] I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.

[89] A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the *CCAA*. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction.[16]

[90] This result is consistent with the language of the model CCAA order which stays, among other things, all rights and remedies of any "governmental body or agency"

[91] Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

E. Should Supplier Charges and Prefiling Payments be Authorized?

[92] Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended

[16] *Nortel Networks Corp., Re*, 2010 ONSC 1304 at para. 41 and 42.

time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

[93] Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*.[17] Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

[94] Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

[95] No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

[96] I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

[97] This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate.[18]

[98] The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

[99] Certain prefiling obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make prefiling payments

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[17] *CCAA* s. 34 (1), (7), (8) and (9).
[18] Re CanWest Publishing Inc., 2010 ONSC 222 at para. 50.

with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

F. Should Set off Rights to Be Stayed?

[100] As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any "sweep" remedies under their arrangements with Just Energy.

[101] The concern is that the financial institutions would empty Just Energy's accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.

[102] Although s. 21 of the *CCAA* preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the *CCAA*, which provide that certain rights are immune from the stay.[19] As Savage J.A. of the British Columbia Court of Appeal observed, the broad discretion accorded to the *CCAA* Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off.[20]

[103] Allowing banks to exercise a self-help remedy of sweeping the accounts by claiming set-off would in effect give them a preferred position over other creditors and deprive Just Energy of working capital. That would be contrary to the remedial purpose of the *CCAA* because it would ultimately shut down Just Energy and allow the banks to advantage themselves to the detriment of others in the process.

[104] Just Energy had consulted widely with various stakeholder groups had before today's hearing. Those included the banks with sweep rights, at least some of home were represented at today's hearing and did not object.

[105] In the foregoing circumstances it is appropriate to at least temporarily stay the exercise of any rights of set-off by the banks.

G. Should Administrative and D & O Charges be Granted?

[106] The Applicants propose that an Administration Charge for the first ten days be set at $2.2 million.

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[19] *North American Tungsten Corp. (Re)*, 2015 BCSC 1382 at para. 28; leave to appeal to BCCA refused, 2015 BCCA 390 [*Tungsten* (Leave)], leave to appeal decision affirmed by Review Panel of the BCCA.
[20] *Tungsten* (Leave), above at para. 12-16**;** see also *Air Canada (Re)*, 2003 CarswellOnt 4016 at para. 25.

[107] The largest expenditures in the administration charge involve the retainer of counsel in Canada and the United States for Just Energy and the retainer of the Monitor and its counsel.

[108] In addition, the company seeks a financial advisor charge of $1.8 million to retain BMO Nesbitt Burns as a financial advisor to assist in exploring potential alternative transactions.

[109] The directors and officers charge sought is in the amount of $30 million.

[110] The Monitor estimates that director liabilities in the United States for sales taxes, wages, source deductions and accrued vacation come to approximately $13.1 million. Director and officer exposure in Canada may be as high as $5.8 million.

[111] While insurance with an aggregate limit of $38.5 million is in place, the complexity of the overall enterprise creates the risk that it might not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this *CCAA* proceeding.

[112] In determining whether to approve administration charges, the Court will consider: (a) the size and complexity of the businesses under *CCAA* protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.[21]

[113] The Just Energy business is large and complex. The proposed beneficiaries are essential to the success of the *CCAA*. No *CCAA* proceeding can advance without a Monitor or counsel. The addition of a financial advisor would appear to be a prudent step given the complexity of the business. Monetizing or restructuring all or portions of the Just Energy business is substantially more complicated than a sale of hard assets. It would appear to make good sense to have a financial advisor involved. The Monitor agrees to the appointment of a financial advisor. I infer from the Monitor's agreement that Nesbitt Burns will bring to the table a skill set or attributes that the Monitor either does not have or cannot exercise given its role as Monitor.

H. Should Noncorporate Entities Be Captured by The Stay?

[114] Many of the gas and electricity licences pursuant to which the Just Energy group conducts business in Canada are granted to limited partnerships.

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[21] *Canwest* 2010, , at para 54. *Target*, , at paras 74 and 75; *Lydian*, , paras 43 to 54; *Laurentian*, at paras. 48 to 59.

[115] On its face, the *CCAA* applies to corporations, not partnerships.[22]

[116] Where, however, the operations of partnerships are integral and closely related to the operations of the *CCAA* debtor, it is well-established that the Court has jurisdiction to extend the protection of the stay to partnerships in order to ensure that the purposes of the *CCAA* can be achieved. Relief of that sort has been granted on several occasions.[23]

[117] Here, it would be illusory to grant a stay in favour of the Just Energy corporate entities but not extend its benefit to the partnership entities. That would defeat the entire purpose of the exercise. As a result, is appropriate to extend *CCAA* protection to the Just Energy partnership entities.

I. Should Third Quarter Bonuses be Paid?

[118] The applicant seeks approval from the initial order for payment of third Quarter bonuses for fiscal 2021 on April 2, 2021. The bonuses were approved by the Compensation Committee on February 9, 2021 after it was reported that the third quarter base EBITDA result was $55.785 million compared to a target of $42 million.

[119] The Compensation Committee approved and asked the Board to approve a third-quarter bonus pool in the amount of $3.23 million. The Board approved the bonus on February 10, 2021.

[120] I am disinclined to approve the bonus payment on an initial order. The relief on the initial order is limited to the amount to keep the company afloat for 10 days. The bonus does not fit into that category. Even on the applicant's view of events, the bonuses are not payable until April 2, 2021. That is well after the comeback date.

[121] In addition, the Monitor has not yet had an opportunity to review and comment on the employee bonus and intends to do so in a further report to the court.

[122] Whether bonuses should or should not be paid will depend on a variety of factors that are not in the evidence before me. By way of example, I would want a better understanding of whether the beneficiaries of the bonuses are also intended beneficiaries of the key employee retention plan that Just Energy will be asking for on the comeback date. In addition, I will want a better sense of who the recipients of the bonuses are. If they are relatively modest income earners for whom the bonus is a key source of income, such as, for example, retail sales people, I would probably be inclined to pay the bonuses without question. If, however, they are high income earners, the intended beneficiaries of the

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[22] *CCAA*, s. 2, definition of "Debtor company."

[23] See, for example, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 21; *Re Target Canada Co.*, 2015 ONSC 303 at paras 42 and 43; *4519922 Canada Inc., Re,* 2015 ONSC 124 at para. 37.

KERP, or if they are executives who make decisions about risk allocation, what Just Energy should insure against, to what extent it should hedge against weather risks and so on, I would want a more granular understanding about why the bonuses should be paid.

J. Should a Sealing order be Granted?

[123] Just Energy requests a sealing order in relation to the BMO Engagement Letter and the summary of the KERP**,** both of which are attached as confidential exhibits to the affidavit of Michael Carter sworn March 9, 2021.

[124] I am satisfied that the applicants have met the test established by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance).*[24] The materials contain commercially sensitive information and/or personal information (in the case of the KERP). The order is necessary to prevent a serious risk to an important personal or commercial interest and the benefits of a sealing order outweigh the rights of others to a fair determination of the issues. No one advanced any need to see the information that is proposed to be sealed nor can I see any need for anyone to access such information in order to assert their rights fully within this proceeding.

Disposition

[125] In view of the foregoing, I granted an initial order in the form requested with the exception of authorization for bonus payments which will be addressed at the comeback hearing.

[126] The order will in effect provide that:

(a) Ontario is the Centre of Main Interest for the *CCAA* proceeding.

(b) Just Energy meets the insolvency requirements of the *CCAA.*

(c) The proposed DIP financing is approved.

(d) Any regulatory actions should be stayed.

(e) Commodity suppliers and ISO Service Providers who sign qualified service agreements will benefit from a charge.

(f) Set off rights of banks which may allow them to sweep accounts will be stayed.

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[24] Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41 at para 53; see also Target above at paras 28-30; Laurentian University, above at paras. 60 to 64.

(g) The administrative, financial advisor and directors and officers charges are granted.

(h) Noncorporate entities will be captured by the stay.

(i) A sealing order will be granted.

[127] The comeback date for the continuation of any CCAA relief is set for 10 AM on Friday, March 19, 2021.

Koehnen J.

Date: March 9, 2021

CITATION: Laurentian University of Sudbury, 2021 ONSC 659
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-01

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan* and *Derek Harland*, for the Applicant

Ashley John Taylor and *Elizabeth Pillon*, for the Monitor

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel to the Applicant

Pamela L.J. Huff and *Aryo Shalviri*, for Royal Bank of Canada

Stuart Brotman and *Dylan Chochla*, for Toronto Dominion Bank

Martin R. Kaplan and *Vern W. DaRe*, for Firm Capital Mortgage Fund Inc., DIP Lender

Michael Kennedy, Labour Counsel for the Applicant

George Benchetrit, for Bank of Montreal

HEARD: February 1, 2021

ENDORSEMENT

Introduction

[1] Laurentian University of Sudbury ("LU" or the "Applicant") seeks certain relief pursuant to an order (the "Initial Order") under the *Companies' Creditors Arrangement Act* (the "CCAA").[1]

[2] LU is a publicly funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, LU has provided higher education to the community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.

[3] As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding LU's recent efforts to improve its financial stability, LU is experiencing a liquidity crisis and is insolvent.

[4] LU submits that it requires the protection of the Court and the relief available under the CCAA so that it can financially and operationally restructure itself in order to emerge as a financially sustainable university for the benefit of all its stakeholders.

[5] The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 30, 2021, filed in support of this application (the "Haché Affidavit").[2]

[6] For the following reasons, the Interim Order is granted.

Overview of the Applicant

[7] LU is a non-share capital corporation that was incorporated pursuant to *An Act to Incorporate Laurentian University of Sudbury,* S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154 (the "LU Act") and is a registered charity pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[8] The governance structure of LU is bicameral. The Board of Governors (the "Board"), the President, and the Vice-Chancellor generally have powers over the operational and financial management of LU, whereas the Senate of LU (the "Senate") is responsible for the academic policy of LU.

[9] LU primarily focuses on undergraduate programming, with approximately 8,200 total domestic and international undergraduate students (approximately 6,250 full-time equivalents) enrolled in the 2020-21 academic year. LU has five undergraduate faculties, each of which offer

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

[2] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.

programs in both English and French, and students can choose from 132 undergraduate programs to enroll in.

[10] LU also has a graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year. LU offers 43 Masters and PhD programs in a variety of disciplines.

[11] LU has a federated school structure whereby it has formal affiliations with several independent universities under the overall LU umbrella: the University of Sudbury, the University of Thorneloe, and Huntington University. The Federated Universities are integrated into LU, however, each of the Federated Universities are separate legal entities and are governed by Boards that are independent of LU.

[12] LU is one of the largest employers in the Greater Sudbury area. As at December 30, 2020, LU employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent the single largest expense item for LU on an annual basis (approximately $134 million of $201 million in total expenses during fiscal year 2019-20).

[13] Approximately 612 LU employees are represented by the Laurentian University Faculty Association ("LUFA"). Approximately 268 non-faculty staff are represented by the Laurentian University Staff Union ("LUSU").

[14] LUFA and the Board of LU are parties to a Collective Agreement (the "LUFA CA"), with a three-year term that expired on June 30, 2020.

[15] Since April 2020, LU and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement.

[16] On July 1, 2018, LUSU and LU entered into a Collective Agreement that was set to expire on June 30, 2021 (the "LUSU CA").

Assets and Liabilities

[17] LU does not prepare interim financial statements. The most recent audited statements for the year ended April 30, 2020, are attached to the Haché Affidavit.

[18] As at April 30, 2020, LU had assets with a book value totaling approximately $358 million, of which approximately $33 million is comprised of current assets such as cash and short-term investments, accounts receivable, and other current assets. The remaining assets of LU consist primarily of investments in LU's segregated endowment fund ($53 million) and capital assets ($272 million), comprising LU's land and buildings.

[19] As at April 30, 2020, LU had liabilities with a book value totaling approximately $322 million, comprised of: (i) approximately $43 million of current liabilities; (ii) approximately $168 million of deferred contributions; and (iii) approximately $110 million in long-term liabilities.

LU's Liquidity Crisis and Insolvency

[20] LU has experienced recurring operational deficits in the millions of dollars each year for a significant period of time. These operational deficits have led to the accumulated deficit in the operational fund of LU of approximately $20 million at the end of 2019-20 fiscal year. In the current 2020-21 fiscal year, LU projects a further operational deficit of $5.6 million.

[21] LU takes the position that it is insolvent and absent the relief sought in the Initial Order, will run out of cash to meet payroll in February.

[22] LU advises that it has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including:

(a) The terms of the LUFA CA are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between LU and LUFA;

(b) Operationally, the structure of the academic programming offered by LU and the distribution of enrollment among the programs offered is flawed and must be addressed; and

(c) With its current cost structure, it costs more for LU and the Federated Universities to educate each student than the average for all Ontario universities by approximately $2,000 per student, per year.

[23] LU submits that the financial challenges that LU faces are significant and, absent fundamental change, LU's short-term and long-term financial and operational sustainability are at risk.

Objective of CCAA Filing

[24] As part of its restructuring strategy, LU intends to implement long-term financial stability initiatives including, among other things:

(a) A review of the breadth of academic programs offered at LU and their enrollment levels;

(b) A re-evaluation of the Federated Universities model;

(c) Negotiations with LU's unions regarding what LU must look like in the future and ensuring that a restructured LU can be aligned with collective agreements that will facilitate its future sustainability;

(d) Identification of opportunities for future revenue generation;

(e) Refinement of the student experience at LU to continue providing a top-notch education; and

(f) Consideration of options for addressing current and long-term indebtedness.

Law and Analysis

[25] The CCAA applies to a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[3]

[26] The CCAA defines "company" to include, among other things, a company incorporated by or under an Act of the legislature of a province.[4]

[27] The Applicant is incorporated under an act of the legislature of the Province of Ontario, the LU Act, and therefore is a "company" for the purposes of the CCAA.[5] Further, as a not-for-profit, non-share capital corporation, the Applicant falls under the *Corporations Act* (Ontario).[6]

[28] There have been several CCAA proceedings commenced in respect of not-for-profit corporations, such as *Canadian Red Cross Society*[7] and *The Land Conservancy of British Columbia*.[8]

[29] I am satisfied that the Applicant's status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant.

Insolvency

[30] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.[9] The BIA defines "insolvent person" as follows:[10]

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,

[3] R.S.C. 1985, c. B-3 ("BIA").
[4] CCAA, s. 2(1).
[5] S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154.
[6] R.S.O. 1990, c. C.38.
[7] *Canadian Red Cross Society*, 2000 CarswellOnt 3269 (S.C.).
[8] *TLC, The Land Conservancy of British Columbia, Re*, 2014 BCSC 97 at paras. 14-18.
[9] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C.) at paras. 21-22 [*Stelco*].
[10] BIA, s. 2.

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[31] The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[11]

[32] In addition to the foregoing tests, in *Stelco*, Farley J. held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[12]

[33] Based on the evidence set out in the Haché Affidavit and as summarized in the Report of Ernst & Young Inc., the Proposed Monitor, I find that the Applicant is plainly insolvent and faces a severe liquidity crisis.

[34] I also find that the Applicant is a "debtor company" to which the CCAA applies.

Stay of Proceedings

[35] Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

[36] The Applicant submits that it is just and appropriate to grant a stay of proceedings. The Applicant submits that it requires a stay of proceedings in order to provide it with the breathing room necessary to financially and operationally restructure itself in order to emerge as a sustainable and long-term financially viable university to continue providing quality post-secondary education in Northern Ontario.

[37] The Proposed Initial Order provides for a stay of proceedings in favour of the Applicant's current and future directors and officers who may subsequently be appointed. The Applicant submits that the stay in favour of the current and future directors and officers is critical to retain the involvement of the Board and key officers who have knowledge that will assist the Applicant in negotiating with stakeholders and implementing a restructuring plan. I accept this submission.

[38] The Applicant also seeks a limited stay in respect of the Laurentian University Students General Association (the "Non-Applicant Stay Party" or "the SGA"). The stay in respect of the

[11] *Stelco, supra* note 9 at para. 28.
[12] *Stelco, supra* note 9 at para. 26.

Non-Applicant Stay Party is limited to preventing any person from: (i) commencing proceedings against the Non-Applicant Stay Party, (ii) terminating, repudiating, making any demand or otherwise altering any contractual relationships with the Non-Applicant Stay Party or enforcing any rights or remedies, or (iii) discontinuing or ceasing to perform any obligations under any contractual agreements with the Non-Applicant Stay Party, resulting from the commencement of this CCAA proceeding by the Applicant, the stay of proceedings granted to the Applicant and any default or cross-default arising due to the foregoing.

[39] CCAA courts have, on numerous occasions, extended the initial stay of proceedings to non-applicants.[13] The Court's authority to grant such an order is derived from its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose." It is well-established that it is appropriate for the Court to extend the protection of the stay of proceedings to third party entities where such parties are integrally and closely interrelated to the debtor companies' business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company.[14]

[40] In particular, where the business operations of a group of entities are inextricably intertwined, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems, courts have found it necessary and appropriate to extend a stay in respect of non-applicant parties.[15]

[41] In the present circumstances, the Applicant has provided a written guarantee in respect of a credit facility obtained by the Non-Applicant Stay Party. If counterparties were to exercise remedies due to the Applicant's insolvency, it would disrupt the Non-Applicant Stay Party and have financial implications for the Applicant.

[42] In my view, it is desirable to avoid disruption to the Non-Applicant Stay Party which is particularly critical given the Applicant's status as an operating university and its overarching aim in this CCAA proceeding to avoid or minimize any disruption to students resulting from the commencement of this proceeding. In furtherance of this objective, the Non-Applicant Stay Party will be essential to ensuring students are given all of the information and resources they need to stay informed. The Non-Applicant Stay Party will play a crucial role in maintaining an open dialogue between the Applicant and the interests/concerns of all students.

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[13] For example, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063; *Canwest Global Communications Corp, Re*, 2009 CarswellOnt 6184 (S.C.) [*Canwest*]; *Cinram International Inc (Re*), 2012 ONSC 3767 [*Cinram*].
[14] *Cinram, ibid* at paras. 61-65.
[15] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at paras. 20-21; *Cinram, ibid* at paras. 61-65.

[43] I am satisfied that extending a limited stay of proceedings to the Non-Applicant Stay Party will allow it to continue fulfilling its intended role and providing the myriad of other key services it provides to the Applicant's students.

Pre-Filing and Post-Filing Payments

[44] The Proposed Initial Order allows the Applicant to continue to make certain pre-filing and post-filing payments, including express authorization to:

(a) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts owing in respect of rebates, refunds or other amounts that are owing or may be owed to students (directly, or to the student associations of the Applicant on behalf of students), in each case, subject to the policies and procedures of the Applicant; and

(b) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts payable to students in respect of student scholarship, bursary or grants.

[45] The Applicant intends on operating in the ordinary course during this CCAA proceeding and minimizing the disruption to students as much as possible. To facilitate this, the Applicant must be able to process certain rebates owing to students and continue to provide students with scholarship and bursary money that is critical to their ongoing studies. Some students must pay tuition prior to the receipt of funding from the Ontario Student Assistance Program (OSAP). Upon receipt of OSAP funding, the Applicant reimburses the students who receive such funding. In many instances, scholarship, bursary and grant money has been committed and is critical to students in need of financial aid to fund their education.

[46] If the Applicant is unable to continue to process such payments, vulnerable students may be irreparably harmed. Many of these students are younger than 19 years of age, and therefore particularly vulnerable. In addition, a change to the manner in which these financial aspects are addressed by the Applicant with their students could create immediate emergencies and disruption to their ability to continue their studies.

[47] The proposed Monitor supports the inclusion of this provision and I am satisfied that it is reasonable in the circumstances.

The Administration Charge

[48] The Applicant requests that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Proposed Monitor, counsel to the Proposed Monitor, the Applicant's counsel and advisors, and independent counsel to the Board. At the initial hearing the Administration Charge was requested in the amount of $400,000, and the Applicant will seek to increase it to $1.25 million pursuant to a proposed Amended and Restated Initial Order on the Comeback Hearing. Section 11.52 of the CCAA provides the Court with statutory jurisdiction to grant the Administration Charge.

[49] In *Canwest Publishing*, Pepall, J. (as she then was) considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[16]

[50] The Applicant submits that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the DIP Charge and the Directors' Charge; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

[51] Further, the Applicant has limited the quantum of the Administration Charge that it seeks approval of to what is reasonably necessary for the first ten days of the CCAA proceedings.

[52] The proposed Monitor supports the requested relief.

[53] I am satisfied that the Administrative Charge is reasonable in the circumstances.

The Directors' Charge

[54] The Applicant requests that this Court also grant a priority charge in favour of the Applicant's current and future directors and officers in the amount of $2 million (the "Directors' Charge"). The Applicant will seek to increase the Directors' Charge at the comeback hearing to

[16] *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para. 58.

$5 million, $3 million of which will rank subordinate to the DIP Charge. The Directors' Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of the Applicant after the commencement of the CCAA proceedings, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[55] The Applicant has certain insurance policies in place (as defined in the Haché Affidavit); however, the Applicant is concerned that the directors and officers may be unwilling to continue in their roles with the Applicant absent the Court granting the Directors' Charge. The Directors' Charge will only be available to the extent that any claim or liability is not covered by any applicable D&O insurance and in the event that the Applicant's D&O insurance does not respond to claims against the directors and officers.

[56] Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[17]

[57] In approving a similar charge in *Canwest*, Pepall J. applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[18]

[58] The proposed Monitor supports the relief requested.

[59] I am satisfied that the Directors' Charge is reasonable in the circumstances because: (i) the Applicant will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring, (ii) the Applicant cannot be certain whether the existing insurance will be applicable or respond to any claims made, and the Applicant does not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities, (iii) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct, and (iv) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

[17] CCAA, section 11.51.
[18] *Canwest*, *supra* note 17 at paras. 46 and 48.

Sealing Provision

[60] Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record."[19]

[61] In *Sierra Club of Canada v. Canada (Minister of Finance)*, Iacobucci J. set out that a sealing order should only be granted when:

> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternatives 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 the 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.[20]

[62] The Applicant requests that, in the Initial Order, this Court seal Confidential Exhibits "FFF" and "GGG" to the Haché Affidavit. These documents relate to correspondence between the Applicant and the Ministry of Colleges and Universities (the "Ministry"). The documents contain information with respect to the Applicant and certain stakeholders of the Applicant, including various rights or positions that stakeholders of the Applicant may take either inside or outside of a CCAA proceeding, which could jeopardize the Applicant's efforts to restructure.

[63] If the Confidential Exhibits are not sealed, the Applicant submits that stakeholders may react in such a way that jeopardizes the viability of the Applicant's restructuring. As such, the salutary effects of the sealing order, which provides the Applicant with the best possible chance to effect a restructuring, far outweigh the deleterious effects of not disclosing the correspondence between the Applicant and the Ministry.

[64] I have reviewed the Confidential Exhibits and I accept the submissions of the Applicant and grant the sealing request.

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[19] *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp (Re)*, 2015 ONSC 1487 at paras. 28 – 30.

[20] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at para. 53.

The Requested Relief Sought is Reasonably Necessary

[65] Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.[21]

[66] The stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[22]

[67] For the purposes of relief sought on this initial hearing, I accept the facts as stated in the Haché affidavit.

[68] The financial information required pursuant to s. 10(2) of the CCAA has been provided.

[69] I am satisfied the Ernst & Young Inc. is qualified to act as Monitor.

Disposition

[70] The requested relief complies with s. 11.001 of the CCAA in that it is limited to relief that is reasonably necessary for the continued operation of the applicant in the ordinary course of business. The Initial Order is granted in the form presented and it has been signed by me.

[71] The comeback hearing is to be held by Zoom on Wednesday, February 10, 2021 at 9:00 a.m.

Court-Appointed Mediator

[72] Finally, LU is also seeking an Order for the appointment of a mediator by the Court (the "Court-Appointed Mediator") to oversee negotiations with respect to the various restructuring initiatives necessary for the Applicant to achieve a successful restructuring.

[73] If appointed, the Applicant expects the Court-Appointed Mediator to assist with (i) negotiations related to the review and restructuring of the academic programs and (ii) the collective agreement between the Applicant and LUFA.

[74] The Applicant is of the view that the need for the appointment of a mediator by the court is urgent and a high priority item.

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[21] CCAA, s. 11.001, 11.02(1) and (3).
[22] *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26.

[75] The proposed Monitor is of the view that the appointment of a Court-Appointed Mediator is critical to ensure that LU, LUFA and the other negotiating parties have the best possible opportunity to succeed.

[76] It is the Proposed Monitor's view that it is necessary that the Court-Appointed Mediator be someone who is independent and objective, has experience in both insolvency matters as well as collective agreements and labour negotiations, someone who will appreciate the urgency with which the mediation must be conducted and have the time available to dedicate to it. Finally, in the Proposed Monitor's view, a sitting or recently retired judge meeting these characteristics would be preferable. The Proposed Monitor asks that the appointment be made by the court on an urgent basis.

[77] I appreciate and acknowledge the points put forth by counsel to both the Applicant and the Proposed Monitor. However, prior to determining this issue, in my view it is necessary to provide LUFA with an opportunity to make submissions.

[78] In recognition of the compressed timeline in these proceedings, it is desirable to determine this issue at the earliest opportunity and, in any event, not later than the comeback hearing on February 10, 2021.

[79] If LU, LUFA and the Proposed Monitor wish to address this matter prior to February 10, 2021, a case conference can be scheduled with me through the Commercial List Office.

CHIEF JUSTICE G.B. MORAWETZ

Date: February 1, 2021

CITATION: Lydian International Limited (Re), 2019 ONSC 7473
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2019-12-24

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

Applicants

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Elizabeth Pillon, Sanja Sopic,* and *Nicholas Avis*, for the Applicants

Pamela Huff, for Resource Capital Fund VI L.P.

Alan Merskey, for OSISKO Bermuda Limited

D.J. Miller, for Alvarez & Marsal Canada Inc. proposed Monitor

David Bish, for ORION Capital Management

Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

HEARD and DETERMINED: December 23, 2019

REASONS RELEASED: December 24, 2019

ENDORSEMENT

Introduction

[1] Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

[2] The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

[3] As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

[4] Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

[5] The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

[6] The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

[7] The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

The Applicants

[8] Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the *Business Corporations Act*, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

[9] Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

[10] Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

[11] Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

[12] Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

[13] Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

[14] The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

[15] The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

[16] The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

[17] Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

[18] Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

[19] The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

[20] The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

Issues

[21] The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

[22] Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

[23] Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

[24] Section 11.001 provides:

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

[25] The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

[26] In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that

period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

[27] Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representativecounsel is required; and

(l) consultation and negotiation with key suppliers.

[28] This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

[29] Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

[30] The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

[31] In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

[32] It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

[33] For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

[34] I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

[35] I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

[36] In *Cinram International Inc., (Re)*, 2012 ONSC 3767, 91 C.B.R. (5th) 46, I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

[37] In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

[38] In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

[39] The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, at paras. 5, 18, and 31; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.); and *Target Canada Co. (Re)*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 49-50.

[40] I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

[41] With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK

have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

[42] I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

[43] The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

[44] Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

[45] The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

[46] In *Canwest Publishing Inc.*, (Re), 2010 ONSC 222, 63 C.B.R.(5th) 115, Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[47] It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

[48] I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

[49] The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

[50] The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

[51] The D & O Insurance is set to expire on December 31, 2019.

[52] Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

[53] In *Jaguar Mining Inc., (Re),* 2014 ONSC 494, 12 C.B.R. (6th) 290, I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

> (a) whether notice has been given to the secured creditors likely to be affected by the charge;
>
> (b) whether the amount is appropriate;
>
> (c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and
>
> (d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

[54] Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

[55] The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

[56] The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company (Re)*, 2019 ONSC 6966 and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV–19–00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

[57] I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

[58] However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

[59] As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

[60] It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

[61] However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

Disposition

[62] The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

[63] If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

Chief Justice Geoffrey B. Morawetz

Date: December 24, 2019

Ville de Montréal *Appellant*

v.

Deloitte Restructuring Inc. *Respondent*

and

Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval and
Union des municipalités du Québec
Interveners

Indexed as: Montréal (City) *v.* Deloitte Restructuring Inc.

2021 SCC 53

File No.: 39186.

2021: May 20; 2021: December 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR,

Ville de Montréal *Appelante*

c.

Restructuration Deloitte Inc. *Intimée*

et

Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval et
Union des municipalités du Québec
Intervenantes

Répertorié : Montréal (Ville) *c.* Restructuration Deloitte Inc.

2021 CSC 53

N° du greffe : 39186.

2021 : 20 mai; 2021 : 10 décembre.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Suspension des droits et recours des créanciers — Réclamations considérées dans le cadre des transactions ou arrangements — Compensation entre une dette née avant et une dette née après l'ordonnance initiale — Programme québécois de remboursement volontaire — Une créance découlant d'une entente conclue dans le cadre du Programme québécois de remboursement volontaire constitue-t-elle nécessairement une réclamation se rapportant à une dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d) de la Loi sur les arrangements avec les créanciers des compagnies? — Le pouvoir discrétionnaire dont dispose le juge surveillant dans le contexte d'une restructuration lui permet-il de suspendre le droit d'opérer compensation entre une dette née avant et une dette née après l'émission d'une ordonnance initiale qu'invoque un créancier? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.02,

c. R-2.2.0.0.3 — Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.

In August 2018, the Superior Court made an initial order by which SM Group, a consulting engineering firm, became subject to proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The order stayed the rights and remedies of creditors, among other things, and appointed a monitor. Following that order, SM Group continued to perform work for Ville de Montréal ("City"). However, the City refused to pay for that work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group that arose before the initial order. Those claims are related to the application of the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* ("Bill 26") and, according to the City, result from fraud on SM Group's part. The first claim arises from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") that resulted from Bill 26 ("VRP claim"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract.

In response to the City's refusal to pay for the work done by SM Group after the initial order, the monitor applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion as the supervising judge: that the compensation invoked by the City could not be effected. It found that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is not an exception to the rule stated in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, whereby compensation between debts arising before and after an initial order ("pre-post compensation") is prohibited. It was also of the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, the Court of Appeal agreed with the supervising judge that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

19(2)d), 21 — Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics, RLRQ, c. R-2.2.0.0.3 — Programme de remboursement volontaire, RLRQ, c. R-2.2.0.0.3, r. 1.

En août 2018, la Cour supérieure rend une ordonnance initiale assujettissant Groupe SM, une firme de génie-conseil, à des procédures déposées en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). L'ordonnance suspend notamment les droits et recours des créanciers et nomme un contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville de Montréal. La Ville refuse toutefois de payer ces travaux et invoque son droit d'opérer compensation entre ce qu'elle doit à Groupe SM et deux créances, nées avant l'ordonnance initiale, qu'elle prétend détenir contre celui-ci. Ces créances sont liées à l'application de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics* (« Loi 26 ») et, selon la Ville, résulteraient de fraude de Groupe SM. La première créance découle d'une entente de règlement intervenue dans le cadre du Programme de remboursement volontaire (« PRV ») issu de la Loi 26 (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM dans lequel elle lui réclame de l'argent au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau.

En réponse au refus de la Ville de payer les travaux effectués par Groupe SM après l'émission de l'ordonnance initiale, le contrôleur demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville ne peuvent faire l'objet de compensation. La juge surveillante accueille la demande. À l'instar de cette dernière, la Cour d'appel conclut que la compensation invoquée par la Ville ne peut s'opérer. Elle estime qu'une créance relative à la fraude visée par l'al. 19(2)d) de la *LACC* ne constitue pas une exception à la règle énoncée dans l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, selon laquelle la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale (« compensation pré-post ») est interdite. Elle est également d'avis que la Ville n'a pas prouvé que ses créances sont visées par l'al. 19(2)d). Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, la Cour d'appel, tout comme la juge surveillante, estime que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

Held (Brown J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.: First, a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. In this case, the City has not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. Second, with regard to pre-post compensation, a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. In the case at bar, the initial order stayed the City's right to pre-post compensation, and it would not be appropriate to lift the stay in relation to the claims in issue.

To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*.

The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(2) provides, by way of exception, that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud. To prove that its claim relates to a debt resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d), a creditor has the burden of establishing, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service.

In this case, the City did not try to prove or even allege any of these elements. The content of the VRP agreement, Bill 26 and the regulation made under it ("VRP

Arrêt (le juge Brown est dissident) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Rowe et Martin : Premièrement, une créance découlant d'une entente conclue dans le cadre du PRV n'est pas nécessairement une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En l'occurrence, la Ville n'a pas démontré que la créance PRV se rapporte à une dette qui résulte de fraude au sens de cette disposition. Deuxièmement, en ce qui concerne la compensation pré-post, le juge surveillant possède le pouvoir discrétionnaire de suspendre l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law. Toutefois, le juge surveillant peut refuser de suspendre ou lever la suspension du droit à la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, l'ordonnance initiale a suspendu le droit de la Ville à la compensation pré-post, et il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, la Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*.

Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(2) prévoit exceptionnellement que certaines réclamations ne peuvent être compromises dans le cadre d'une transaction ou d'un arrangement, notamment celles découlant de fraude. Afin de démontrer que sa créance est une réclamation qui se rapporte à une dette résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d), le créancier intéressé a le fardeau d'établir, par prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service.

En l'espèce, la Ville n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments. Il est donc nécessaire d'interpréter le contenu de l'entente PRV, la

Regulation") must therefore be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. This interpretation exercise confirms that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

First, it is clearly stipulated in the VRP agreement entered into by the parties that the amount fixed in the agreement can in no way be considered to constitute an admission of liability. As a result, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

Second, Bill 26 and the VRP Regulation do not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations to a public body. The use of the words "may have been" in s. 3 of Bill 26 and in s. 1 of the VRP Regulation to describe the purpose of the VRP indicates that fraud is a possibility rather than a certainty. Section 7 of the VRP Regulation supports this point, since it states that the fact that a natural person or an enterprise participates in the VRP does not constitute an admission of liability or of a fault committed by the natural person or enterprise. The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8.

The City is wrong to say that reading ss. 1, 3 and 10 of Bill 26 together leads to the conclusion that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. Although s. 1 of Bill 26 does not refer to fraud as being hypothetical, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. Finally, the two schemes created by Bill 26 must not be confused. Section 10 states that fraud was committed, but this section is part of the scheme introduced by Chapter III (ss. 10 to 17), which applies to judicial proceedings brought against a natural person or enterprise that allegedly participated in fraud in relation to a public contract, and not part of the VRP scheme introduced by Chapter II (ss. 3 to 9). It is up to the courts to conclude that fraud has been committed, and the existence of fraud will be recognized by a court only under the Chapter III scheme, which did not take effect until the VRP scheme introduced by Chapter II ended. The reference to s. 10 in s. 3 merely serves to specify the natural persons

Loi 26 ainsi que son règlement d'application (« règlement PRV ») pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement. Cet exercice d'interprétation confirme que la créance PRV n'est pas visée par l'al. 19(2)d) de la *LACC*.

En premier lieu, il est clairement stipulé dans l'entente PRV intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité. On ne saurait donc présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la *LACC*.

En deuxième lieu, la Loi 26, tout comme le règlement PRV, ne créent pas une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur à l'endroit d'un organisme public. L'emploi du conditionnel à l'art. 3 de la Loi 26 et à l'art. 1 du règlement PRV pour décrire l'objet du PRV signale que la fraude est une éventualité, par opposition à quelque chose de certain. L'article 7 du règlement PRV appuie ce constat puisqu'il précise que le fait pour une personne physique ou une entreprise de se prévaloir du PRV ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute. La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation.

La Ville a tort de dire qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une conclusion que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Bien que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. Enfin, il ne faut pas confondre les deux régimes créés par la Loi 26. L'article 10 énonce qu'une fraude a été commise, mais celui-ci fait partie du régime introduit par le chapitre III (art. 10 à 17) qui est applicable aux recours judiciaires intentés contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public, et non du régime du PRV, introduit par le chapitre II (art. 3 à 9). Il appartient aux tribunaux de conclure qu'une fraude a été commise, et la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III, lequel entre en vigueur seulement lorsque le régime du

to whom the VRP applies. Accordingly, the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*. Neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act.

Furthermore, a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law can be stayed by a court under ss. 11 and 11.02 of the *CCAA*. Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. While at first glance the language of this provision limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order. A court has the power to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation. Such an interpretation advances the *CCAA*'s remedial objectives and is consistent with its scheme.

In the vast majority of cases, an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. However, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. The absolute prohibition against pre-post compensation imposed by the Quebec Court of Appeal in *Kitco* must therefore be tempered. However, a court must be cautious before allowing such a form of compensation, given its high disruptive potential.

Moreover, s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is limited to authorizing compensation between debts that arise before an initial order is made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. It follows that a supervising judge

PRV, introduit par le chapitre II, prend fin. Le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV. En conséquence, la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la *LACC*. Ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux.

Par ailleurs, le droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law peut être suspendu par un tribunal en application des art. 11 et 11.02 de la *LACC*. L'article 11.02 de la *LACC* permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Bien que le texte de cette disposition limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension. Le tribunal est habilité à suspendre des droits reconnus aux créanciers mais dont l'exercice serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post. Une telle interprétation favorise les objectifs réparateurs de la *LACC*, en plus d'être cohérente avec l'économie de cette loi.

Dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice la compensation pré-post. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. L'interdiction absolue énoncée par la Cour d'appel du Québec dans l'arrêt *Kitco* à l'égard de la compensation pré-post doit donc être tempérée. Cependant, le tribunal doit faire preuve de prudence avant de permettre une telle forme de compensation, considérant son fort potentiel perturbateur.

En outre, l'art. 21 de la *LACC* ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la *LACC*. Lu à la lumière de son contexte, de son objet et de l'esprit de la *LACC*, l'art. 21 se limite à autoriser la compensation entre des dettes nées avant le prononcé de l'ordonnance initiale (« compensation pré-pré ») aux fins de quantification des réclamations des créanciers au jour de l'ouverture. Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Il

retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. The first consideration relates both to the order itself and to the means that are employed. It is assessed in light of the *CCAA*'s remedial objectives, which include protecting the public interest. In very specific circumstances, a court could conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*. However, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors. The second consideration is also important because it discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage.

In the case at bar, the words of the stay order made by the Superior Court are broad enough to stay pre-post compensation, and it would not be appropriate to lift the stay in relation to the VRP claim. Because the City has not proved the alleged fraud and has not relied, in support of its position, on any of the *CCAA*'s remedial objectives other than protecting the public interest, it has not discharged its burden of proving that the order being sought is appropriate. In addition, the City did not act with the diligence expected in *CCAA* proceedings.

With regard to the water meter contract claim, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in that case. That order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of that case would not be appropriate for the same reasons as those relating to the VRP claim.

s'ensuit que le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. La première considération vise tout autant l'ordonnance elle-même que les moyens utilisés et s'évalue au regard des objectifs réparateurs de la *LACC*, dont la protection de l'intérêt public. Dans des circonstances bien particulières, le tribunal pourrait conclure que la protection de l'intérêt public, de même que les autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*. Par contre, le tribunal doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier. La deuxième considération est également importante étant donné qu'elle 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.

Dans la présente affaire, les termes de l'ordonnance de suspension rendue par la Cour supérieure sont suffisamment larges pour suspendre la compensation pré-post et il n'est pas indiqué de lever cette suspension en ce qui concerne la créance PRV. Puisque la Ville n'a pas apporté la preuve de la fraude alléguée et n'a pas invoqué un objectif réparateur de la *LACC* autre que la protection de l'intérêt public au soutien de sa position, elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. Au surplus, la Ville n'a pas fait montre de la diligence attendue dans le cadre d'une procédure fondée sur la *LACC*.

Pour ce qui est de la créance relative au contrat des compteurs d'eau, la Cour supérieure a accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans ce dossier. Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV.

Per Brown J. (dissenting): The appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect pre-post compensation for the VRP claim and whether compensation is available in respect of the water meter claim. There is agreement with the majority that a supervising judge has a discretion under s. 11 of the *CCAA* as to whether to allow a creditor to effect pre-post compensation, or set-off. However, this discretion is not limited solely to the exceptional circumstances the majority describes. The scope of s. 21 of the *CCAA* is not limited to pre-pre compensation; pre-post compensation is permitted, but must be subject to the exercise of a supervising judge's discretion. Moreover, nothing in s. 21 of the *CCAA* prohibits judicial compensation.

The approach taken by the Quebec Court of Appeal in *Kitco*, according to which pre-post compensation will never be authorized under the *CCAA*, involves several errors and must be rejected. To begin with, the Court of Appeal erred in relying on a judgment rendered by the Court in the context of a bankruptcy under the *Bankruptcy and Insolvency Act* ("*BIA*"). Although the scheme established by the *CCAA* and the one established by the *BIA* must be viewed as an integrated body of insolvency law, there remain many differences between them, including two that are fundamental. First, when an insolvent company has recourse to the *CCAA*, it continues its business activities and is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee. There is thus no loss of mutuality under the *CCAA*. This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. Secondly, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective of restructuring a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules. The *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved. Because of these objectives, a broad discretion is also conferred on supervising judges by s. 11 of the *CCAA*. This discretion has no equivalent in the *BIA*.

Next, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having

Le juge Brown (dissident) : L'appel devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé, d'une part, si la Ville peut opérer compensation pré-post à l'égard de la créance PRV et, d'autre part, si la réclamation à l'égard des compteurs d'eau donne ouverture à compensation. Il y a accord avec l'avis de la majorité portant que le juge surveillant possède, en vertu de l'art. 11 de la *LACC*, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation pré-post. Cependant, ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. Le champ d'application de l'art. 21 de la *LACC* n'est pas restreint à la compensation pré-pré; la compensation pré-post est permise, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. De plus, rien dans l'art. 21 de la *LACC* n'interdit la compensation judiciaire.

L'approche établie par la Cour d'appel du Québec dans l'arrêt *Kitco*, selon laquelle la compensation pré-post ne sera jamais autorisée en vertu de la *LACC*, contient plusieurs erreurs et doit être rejetée. Tout d'abord, la Cour d'appel s'appuie erronément sur un arrêt de la Cour rendu dans un contexte de faillite sous le régime de la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Or, bien que le régime établi par la *LACC* et celui établi par la *LFI* doivent être perçus comme un ensemble intégré de règles du droit de l'insolvabilité, de nombreuses différences persistent entre ceux-ci, dont deux distinctions fondamentales. Premièrement, lorsque l'entreprise insolvable a recours à la *LACC*, elle continue ses opérations commerciales et n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la saisine des biens du failli. Il n'y a donc pas de perte de réciprocité sous le régime de la *LACC*. Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la *LACC*, par opposition à la *LFI*. Deuxièmement, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif de restructuration d'une entreprise en difficultés financières, par contraste avec la *LFI*, qui prévoit un ensemble de règles préétablies. Les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, en raison desquels un vaste pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC*. Ce pouvoir n'a pas d'équivalent dans la *LFI*.

Ensuite, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge

regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*. The approach proposed in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces, which is contrary to the principle of homogenous interpretation of federal statutes.

Lastly, staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance. However, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process in this situation.

In the instant case, there is no need to decide whether the VRP claim must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. Section 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). It is true that proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit pre-post compensation; however, whether the City's VRP claim results from fraud is a question to be decided by the supervising judge, not by the Court.

Given that the supervising judge did not exercise her discretion under s. 11 of the *CCAA*, believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, it is not for the Court to exercise that discretion in order to determine whether to permit pre-post compensation. Supervising judges are in the best position to decide whether to exercise their discretion in a particular case. In cases involving an exercise of discretion by a court of first

surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*. L'approche avancée dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes, qui va à l'encontre du principe de l'interprétation uniforme des lois fédérales.

Enfin, la suspension, en vertu de la *LACC*, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale. Par contre, lorsqu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant alors inexistant.

En l'espèce, il n'est pas nécessaire de trancher la question de savoir si la créance PRV doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la *LACC*. L'article 21 de la *LACC* doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Certes, la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre la compensation pré-post; cependant, la question de savoir si la créance PRV de la Ville résulte d'une fraude est une question à laquelle il appartient à la juge surveillante de répondre, et non à la Cour.

Étant donné que, s'estimant liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation pré-post. Les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée.

instance, it is not in the interests of justice for the Court to step into that court's shoes and decide these matters.

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Dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, il n'est pas dans l'intérêt de la justice que la Cour se mette à la place de ce tribunal et tranche ces questions.

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POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Rochette, Healy et Ruel), 2020 QCCA 438, [2020] J.Q. nº 1852 (QL), 2020 CarswellQue 1987 (WL Can.), qui a confirmé une décision de la juge Corriveau, 2019 QCCS 2316, [2019] J.Q. nº 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Pourvoi rejeté, le juge Brown est dissident.

Raphaël Lescop et *Eleni Yiannakis*, pour l'appelante.

Guy P. Martel et *Danny Duy Vu*, pour l'intimée.

Alain Tardif, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP.

Luc Béliveau, for the intervener Thornhill Investments Inc.

Elizabeth Ferland, for the intervener Ville de Laval.

Marc Duchesne, for the intervener Union des municipalités du Québec.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. delivered by

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LE JUGE EN CHEF ET LA JUGE CÔTÉ —

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I. Introduction

[1] This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The question is whether compensation is permitted for debts between the same parties: on the one hand, a debt resulting from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3 ("Bill 26"), that predates an initial order made under the *CCAA* and, on the other hand, a debt between the same parties that postdates that order. In these reasons, we will use the expression "pre-post compensation" to refer generally to compensation between debts arising before and after an initial order.

[2] This question thus affords the Court an occasion to interpret, for the first time, certain provisions of Bill 26 as well as the regulation made under it, the *Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1 ("VRP Regulation"). In doing so, we will clarify for public bodies the burden of proof that rests on them in seeking to establish that a claim arising from an agreement entered into under the Voluntary Reimbursement Program ("VRP") is fraudulent.

[3] Bill 26 was passed by the Quebec National Assembly in March 2015 in response to a commission

I. Introduction

[1] Le présent pourvoi soulève un problème de compensation entre deux dettes dans le contexte de procédures engagées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Il s'agit de savoir si la compensation est permise entre des dettes entre les mêmes parties, d'une part, une dette résultant de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 (« Loi 26 »), antérieure à une ordonnance initiale émise en vertu de la *LACC*, et, d'autre part, une dette postérieure à cette ordonnance encourue entre les mêmes parties. Dans les présents motifs, nous utiliserons l'expression « compensation pré-post » pour désigner de manière générale la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale.

[2] Cette question fournit ainsi à notre Cour l'occasion d'interpréter pour la première fois certaines dispositions de la Loi 26, ainsi que son règlement d'application, le *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1 (« règlement PRV »). Ce faisant, nous clarifions, à l'intention des organismes publics, le fardeau de preuve qui leur incombe lorsqu'ils tentent d'établir le caractère frauduleux d'une créance résultant d'une entente conclue en vertu du Programme de remboursement volontaire (« PRV »).

[3] La Loi 26 a été adoptée par l'Assemblée nationale du Québec en mars 2015 à la suite d'une

of inquiry that had brought to light the existence of schemes involving collusion and corruption in the awarding and management of public contracts in the construction industry ("Charbonneau Commission"), and the VRP Regulation was made a few months later. The program resulting from this legislation, which was in effect for two years, allowed enterprises to "reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics" (s. 3 of Bill 26).

[4] To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*. We would answer this question in the negative. It cannot be presumed that a claim arising from the VRP falls within that provision where no evidence to this effect has been tendered. We also conclude that a court should generally exercise its discretion to stay pre-post compensation, although it may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases. In the case at bar, however, we conclude that the initial order stayed the right of the appellant, Ville de Montréal ("City"), to pre-post compensation and that it would not be appropriate to lift the stay in relation to the claims in issue.

[5] The appeal should therefore be dismissed.

II. Facts

[6] SM Group, which at the relevant time was a consulting engineering firm, performed a variety of contracts for the City over a period of several years. The Charbonneau Commission's work uncovered a

commission d'enquête qui a mis en lumière l'existence de stratagèmes de collusion et de corruption dans l'octroi et la gestion de contrats publics dans l'industrie de la construction (« Commission Charbonneau »), et le règlement PRV a été pris quelques mois plus tard. Mis en vigueur pour une période de deux ans, le programme issu de cette loi a permis à des entreprises de « rembourser certaines sommes payées injustement dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive » (art. 3 de la Loi 26).

[4] Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, notre Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*. Nous sommes d'avis de répondre à cette question par la négative. On ne peut présumer qu'une créance issue du PRV est visée par cette disposition lorsqu'aucune preuve n'a été administrée à cet effet. Nous concluons par ailleurs que le tribunal devrait généralement exercer son pouvoir discrétionnaire afin de suspendre la compensation pré-post, bien qu'il puisse, dans de rares cas, refuser de la suspendre. De même, le tribunal peut, par la suite, lever la suspension du droit à la compensation pré-post dans les cas qui s'y prêtent. En l'espèce, toutefois, nous concluons que l'ordonnance initiale a suspendu le droit de l'appelante Ville de Montréal (« Ville ») à la compensation pré-post et qu'il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

[5] En conséquence, l'appel doit être rejeté.

II. Faits

[6] Groupe SM, qui était au moment des faits une firme de génie-conseil, a exécuté divers contrats pour la Ville sur une période de plusieurs années. Les travaux de la Commission Charbonneau ont

link between SM Group and certain central players in the collusion schemes. Two of its former officers were in fact charged with criminal offences. SM Group subsequently became insolvent.

[7] On August 24, 2018, the Quebec Superior Court made an initial order by which SM Group became subject to proceedings under the *CCAA* and the rights and remedies of creditors were stayed. The respondent, Deloitte Restructuring Inc. ("Deloitte"), was appointed as monitor. Following that order, SM Group continued to perform work for the City, including the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[8] The City refused to pay for that work. On November 7, 2018, it invoked its right to effect compensation between its debt to SM Group for the work done after the initial order and two claims against SM Group that, according to the City, arose before the order and resulted from fraud on SM Group's part.

[9] On November 12, 2018, the Superior Court approved the sale of some of SM Group's assets to Thornhill Investments Inc. ("Thornhill"). One week later, SM Group's contracts were assigned to Thornhill.

[10] The two claims raised by the City are related to the application of Bill 26. The purpose of that statute, read in conjunction with the *Integrity in Public Contracts Act*, S.Q. 2012, c. 25, enacted in 2012, and the *Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18, enacted in 2016, is to strengthen public confidence in government institutions by addressing the revelations made by the Charbonneau Commission. Bill 26 has been described as [TRANSLATION] "a statutory benchmark for establishing a lack of ethics and lax (if not criminal) morals in a number of enterprises in relation to the awarding of public contracts in Quebec" (*R. v. Fedele*, 2018 QCCA 1901, at para. 44 (CanLII)).

révélé l'existence d'un lien entre Groupe SM et des acteurs au cœur des stratagèmes de collusion. Deux de ses anciens dirigeants ont d'ailleurs fait l'objet d'accusations criminelles. Par la suite, Groupe SM est devenu insolvable.

[7] Le 24 août 2018, la Cour supérieure du Québec (« Tribunal ») rend une ordonnance initiale assujettissant Groupe SM à des procédures déposées en vertu de la *LACC* et suspendant les droits et recours des créanciers. L'intimée Restructuration Deloitte Inc. (« Deloitte ») est nommée à titre de contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville, notamment la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[8] La Ville refuse de payer ces travaux. Le 7 novembre 2018, elle invoque son droit d'opérer compensation entre sa dette envers Groupe SM résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances de Groupe SM qui, soutient-elle, sont nées avant l'ordonnance et résulteraient de fraude de ce dernier.

[9] Le 12 novembre 2018, le Tribunal approuve la vente partielle des actifs de Groupe SM à Thornhill Investments Inc. (« Thornhill »). Une semaine plus tard, les contrats de Groupe SM sont cédés à Thornhill.

[10] Les deux créances invoquées par la Ville sont liées à l'application de la Loi 26. Lue avec la *Loi sur l'intégrité en matière de contrats publics*, L.Q. 2012, c. 25, adoptée en 2012, et la *Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique*, L.Q. 2016, c. 18, adoptée en 2016, la Loi 26 a pour objectif de renforcer la confiance du public dans les institutions publiques en donnant suite aux révélations émanant de la Commission Charbonneau. Elle a été décrite comme « un repère législatif permettant de conclure au manque d'éthique et à la morale laxiste (sinon criminelle) dans plusieurs entreprises en lien avec l'octroi de contrats publics au Québec » (*R. c. Fedele*, 2018 QCCA 1901, par. 44 (CanLII)).

[11] The first claim the City alleges it has against SM Group arises from a settlement agreement entered into in November 2017 by SM Group and the Minister of Justice, acting on the City's behalf, under the VRP ("VRP claim"). The second is based on a proceeding brought by the City against SM Group in September 2018, in which it claimed more than $14 million from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim").

[12] Because SM Group had failed to repay the VRP claim and because the sale of certain assets to Thornhill was imminent, the City advised SM Group that it intended to effect compensation between what it owed SM Group and the above-mentioned claims, noting that those claims could not be discharged or dealt with by a compromise or arrangement in the planned restructuring process given that they resulted from fraud and from a misappropriation of public funds.

[13] In response, Deloitte applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group for work performed for the City.

III. Judicial History

A. *Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)*

[14] The supervising judge granted Deloitte's application for a declaratory judgment and held that pre-post compensation could not be effected in favour of the City. Even though, in her view, the VRP claim was linked to an allegation of fraud that had not been refuted by SM Group, she concluded that, according to the principles laid down in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation.

[11] La première créance que la Ville prétend détenir contre Groupe SM résulte d'une entente de règlement intervenue en novembre 2017 entre Groupe SM et la ministre de la Justice, agissant pour le compte de la Ville, dans le cadre du PRV (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM, en septembre 2018, dans lequel elle lui réclame plus de 14 millions de dollars au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »).

[12] Vu le défaut de Groupe SM de rembourser la créance PRV et l'imminence de la vente de certains actifs à Thornhill, la Ville informe Groupe SM de son intention d'opérer compensation entre ce qu'elle lui doit et les créances ci-haut mentionnées, tout en précisant que ces créances ne peuvent être purgées ou compromises par la restructuration envisagée puisqu'elles découlent de la fraude et d'un détournement de fonds du Trésor public.

[13] En réponse, Deloitte demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville pour des travaux exécutés pour son bénéfice ne peuvent faire l'objet de compensation.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2019 QCCS 2316 (la juge Corriveau)*

[14] La juge surveillante accueille la demande en jugement déclaratoire de Deloitte et décide que la compensation pré-post ne peut s'opérer en faveur de la Ville. Même si, selon elle, la créance PRV est liée à une allégation de fraude non réfutée par Groupe SM, la juge surveillante conclut que, selon les enseignements de l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, la compensation pré-post n'est pas possible. Elle statue par ailleurs que la créance relative au contrat des compteurs d'eau n'est ni liquide ni exigible, de sorte que la compensation ne peut être opérée.

B. *Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy JJ.A., Ruel J.A. Dissenting in Part)*

[15] Rochette J.A., writing for the majority, rejected the City's argument regarding the VRP claim. Relying on *Kitco*, he reached the same conclusion as the supervising judge: that pre-post compensation could not be effected in this case. He also rejected the City's argument that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is an exception to the rule stated in that case. In any event, he expressed the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, Rochette J.A. added that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

[16] Ruel J.A., dissenting in part, agreed with his colleagues on the nature of the water meter contract claim. However, he was of the view that the VRP claim had to be presumed to fall within s. 19(2)(d) of the *CCAA* and that *Kitco* had to be distinguished on the basis that it had been rendered in a different context. In the final analysis, Ruel J.A. found that s. 19(2)(d) of the *CCAA* represents an exception to the principle established in that case and that it therefore allowed pre-post compensation between the two parties' respective debts.

IV. Issues

[17] This appeal raises the following three questions:

1. Is the VRP claim a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*?
2. Does the *CCAA* permit compensation between a debt that arises before an initial order and one that arises after that order?
3. If compensation is permitted, should the City be authorized to withhold the payments owed

B. *Cour d'appel du Québec, 2020 QCCA 438 (les juges Rochette et Healy, le juge Ruel, dissident en partie)*

[15] Rédigeant pour la majorité, le juge Rochette rejette la prétention de la Ville relativement à la créance PRV. S'appuyant sur l'arrêt *Kitco*, il conclut, à l'instar de la juge surveillante, que la compensation pré-post ne peut s'opérer en l'espèce. En outre, il rejette l'argument de la Ville selon lequel une créance relative à la fraude visée par l'al. 19(2)d) de la *LACC* constitue une exception à la règle énoncée dans cet arrêt. Quoi qu'il en soit, il se dit d'avis que la Ville n'a pas prouvé que ses créances sont visées par cette disposition. Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, le juge Rochette ajoute que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

[16] Dissident en partie, le juge Ruel partage l'avis de ses collègues sur la nature de la créance relative au contrat des compteurs d'eau. Cependant, il est plutôt d'avis qu'il faut présumer que la créance PRV est visée par l'al. 19(2)d) de la *LACC* et que l'arrêt *Kitco* doit être distingué étant donné qu'il a été rendu dans un contexte différent. En dernière analyse, le juge Ruel estime que l'al. 19(2)d) de la *LACC* fait exception au principe établi dans cet arrêt et permet donc la compensation pré-post entre les dettes respectives des deux parties.

IV. Questions en litige

[17] Le présent pourvoi soulève les trois questions suivantes :

1. La créance PRV est-elle une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*?
2. La *LACC* autorise-t-elle la compensation entre une dette née avant une ordonnance initiale et une dette née après cette ordonnance?
3. Si la compensation est permise, la Ville devrait-elle être autorisée à retenir les paiements dus

to SM Group until judgment is rendered in the case relating to the water meter contract?

[18] We will deal with these questions by considering each of the City's claims separately.

V. Analysis

[19] In essence, the City argues that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. According to the City, such a claim falls outside the absolute prohibition against pre-post compensation imposed by *Kitco*. The City also argues that the absolute nature of the *Kitco* rule is inconsistent with the broad discretion conferred on supervising judges by the *CCAA*. It submits that supervising judges can, in exercising their discretion, authorize pre-post compensation in appropriate circumstances. The exercise of this discretion is particularly appropriate where fraud is involved.

[20] For the reasons that follow, we are of the view that the VRP claim in this case is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. We also conclude that a right to pre-post compensation, or set-off, invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the *CCAA*. In our opinion, however, a supervising judge has the discretion to authorize pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. In this regard, the fact that the debt underlying a VRP claim is fraudulent, where this is shown, is a relevant factor in the exercise of the supervising judge's discretion. In this case, we find that it would not be appropriate to allow the City to effect compensation with respect to the VRP claim. Nor would it be appropriate to authorize the City to withhold the payments owed to SM Group pending the outcome of the case relating to the water meter contract.

à Groupe SM en attendant que jugement soit rendu dans le dossier relatif au contrat des compteurs d'eau?

[18] Nous traiterons de ces questions en abordant séparément chacune des créances invoquées par la Ville.

V. Analyse

[19] Essentiellement, la Ville soutient que la créance PRV est une réclamation qui ne peut être considérée dans le cadre d'une transaction ou d'un arrangement, puisqu'elle se rapporte à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. Selon la Ville, une telle réclamation échappe à l'interdiction absolue énoncée dans l'arrêt *Kitco* à l'égard de la compensation pré-post. La Ville plaide également que le caractère absolu de la règle de l'arrêt *Kitco* est incompatible avec le large pouvoir discrétionnaire conféré au juge surveillant par la *LACC*. La Ville estime que le juge surveillant peut, dans l'exercice de son pouvoir discrétionnaire, autoriser la compensation pré-post dans des circonstances appropriées. L'exercice de ce pouvoir est d'autant plus indiqué en présence de fraude.

[20] Pour les motifs qui suivent, nous sommes d'avis que la créance PRV visée en l'espèce n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. Nous concluons par ailleurs que le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la *LACC*. Toutefois, nous somme d'avis que le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. À cet égard, le caractère frauduleux de la dette à l'origine d'une créance PRV, lorsque démontré, constitue un facteur pertinent dans l'exercice de la discrétion du juge surveillant. En l'espèce, nous estimons qu'il ne serait pas indiqué de permettre à la Ville d'opérer compensation en ce qui concerne la créance PRV. Il ne serait pas non plus approprié d'autoriser la Ville à retenir les paiements dus à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau.

A. *Voluntary Reimbursement Program Claim*

(1) Characterization of the Voluntary Reimbursement Program Claim

[21] We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the *CCAA* is inapplicable in this case because there is no plan providing for a compromise or arrangement.

[22] The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(1) of the *CCAA* sets out the general scheme governing claims that may be dealt with by a compromise or arrangement:

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of

A. *Créance du Programme de remboursement volontaire*

(1) Qualification de la créance du Programme de remboursement volontaire

[21] Il nous incombe de déterminer, d'entrée de jeu, si la créance PRV est une réclamation se rapportant à une dette frauduleuse, puisque cette prémisse explique le raisonnement de la Ville. Pour les motifs qui suivent, nous concluons que cette prémisse fondamentale n'est pas fondée : la créance PRV n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En effet, la seule participation au PRV par une société débitrice n'est pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. Considérant cette conclusion, il n'est pas nécessaire de nous prononcer sur l'argument subsidiaire de Deloitte selon lequel l'art. 19 de la *LACC* serait inapplicable en l'espèce, en raison de l'absence de plan prévoyant une transaction ou un arrangement.

[22] Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(1) de cette loi énonce le régime général encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement :

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le

the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[23] As an exception to this scheme, s. 19(2) of the *CCAA* provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud:

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

. . .

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; . . .

[24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which is analogous in every respect to s. 19(2)(d) of the *CCAA*. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes "for[m] part of an integrated body of insolvency law" (para. 78; see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 74).

[25] To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the

consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

[23] À titre d'exception à ce régime, le par. 19(2) de la *LACC* prévoit que certaines réclamations ne peuvent être compromises, notamment celles découlant de fraude :

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

. . .

d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

[24] Pour déterminer le fardeau de preuve applicable à ce régime, il convient de se référer à la jurisprudence et à la doctrine portant sur l'al. 178(1)e) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), lequel s'apparente en tous points à l'al. 19(2)d) de la *LACC*. Comme notre Cour l'a souligné dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, ces deux lois « [font] partie d'un ensemble intégré de règles du droit de l'insolvabilité » (par. 78; voir aussi *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 74).

[25] Afin de satisfaire au fardeau qui lui incombe, c'est-à-dire démontrer que sa créance est une réclamation qui se rapporte à une dette « résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits », le créancier intéressé devra établir, par

creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the *CCAA* applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the *CCAA* must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

[26] The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.

[27] As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the

prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service (*Léger c. Ouellet*, 2011 QCCA 1858, par. 30 (CanLII); *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376, par. 37 (CanLII); voir aussi L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. rév. (feuilles mobiles)), vol. 3, H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, par. 28; J. P. Sarra, G. B. Morawetz et L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), p. 1001 et 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5e éd. 2016), p. 502-503). Une fois ces éléments prouvés, le créancier d'une réclamation visée par l'al. 19(2)d) de la *LACC* bénéficie d'une position plus avantageuse que les autres créanciers ordinaires, dans la mesure où cette réclamation ne peut être compromise dans le cadre d'une transaction ou d'un arrangement, quoiqu'elle ne confère pas le statut de créancier garanti (voir Houlden, Morawetz et Sarra, H§63). Cette exception au régime général institué par le par. 19(1) de la *LACC* doit être interprétée restrictivement (voir notamment, par analogie, *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.), par. 96; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, par. 24).

[26] Le fardeau qui incombait à la Ville n'était certes pas négligeable. En effet, elle devait prouver que Groupe SM avait sciemment fait une fausse représentation ayant mené à la créance PRV. Toutefois, la Ville a estimé, aux fins de cette démonstration, qu'il suffisait de mentionner l'existence de cette créance, et n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments, présumant ou tenant pour acquis que la créance PRV découlait de représentations frauduleuses.

[27] En conséquence, pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement, il est nécessaire d'interpréter le contenu de l'entente PRV, la Loi 26 ainsi que le règlement PRV. À cet égard, et pour les raisons

majority of the Court of Appeal that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

[28] First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*. The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service.

[29] In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the *BIA* that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB

que nous expliquons ci-dessous, nous partageons les conclusions des juges majoritaires de la Cour d'appel : la créance PRV n'est pas visée par l'al. 19(2)d) de la *LACC*.

[28] En premier lieu, le contenu même de l'entente PRV constitue un obstacle dirimant à la prétention de la Ville selon laquelle le seul fait de la participation à ce programme suffit pour conclure que sa créance résulte des activités frauduleuses de Groupe SM. En effet, comme il est clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la *LACC*. En conséquence, il incombait à la Ville de prouver, conformément aux dispositions de cette loi, que Groupe SM lui avait faussement et sciemment fait une représentation afin d'obtenir un bien ou un service.

[29] D'ailleurs, en cette matière, une règle jurisprudentielle bien établie veut qu'un tribunal tire généralement ses propres conclusions factuelles aux fins d'application de l'al. 19(2)d) (voir Houlden, Morawetz et Sarra, H§63). Il en est ainsi, notamment, malgré la présence de conclusions liées possiblement à la fraude prononcées dans le cadre d'un procès antérieur, ou encore lorsqu'un jugement par défaut ou un acquiescement à jugement contiendrait de telles conclusions. La jurisprudence portant sur l'al. 178(1)e) de la *LFI* permet d'inférer, par analogie, que les tribunaux se montrent particulièrement constants et rigoureux dans l'appréciation de la preuve qui leur est présentée à cet égard (voir notamment *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417, par. 2 (CanLII); *Dupuis*, par. 36-40; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164, par. 13-19 (CanLII); *Tavan c. Rostami*, 2014 QCCA 304, par. 3-6 (CanLII); *Léger*, par. 30-40; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, par. 20-25; *Sharma c. Sandhu*, 2019 MBQB 160, par. 38-45 (CanLII); *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719, par. 90-92 (CanLII); *Berger*, par. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (H.C.J. Ont.), p. 106-107, conf. par (1985), 53 C.B.R. (N.S.) 275 (C.A.);

183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII); *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58).

[30] Second, Bill 26 and the VRP Regulation published in the *Gazette officielle du Québec* pursuant to ss. 3 and 4 of that statute do not provide any greater support for the City's position. We agree with the majority of the Court of Appeal, who rejected the idea of a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. That scheme, which was in effect from November 2015 to December 2017, created no such presumption.

[31] The purpose of the VRP as defined in s. 3 of Bill 26 — in Chapter II, entitled "Reimbursement Program" — supports this conclusion:

3. The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics.

[32] The use of the words "may have been" in the phrase "there may have been fraud or fraudulent tactics" clearly contradicts the City's argument. Moreover, the same words are also used in s. 1 of the VRP Regulation in describing the purpose of that program:

1. The Voluntary Reimbursement Program makes it possible for every natural person and every enterprise to reimburse certain amounts improperly paid by a public body in the course of the tendering, awarding or management of a public contract entered into after 1 October 1996 in relation to which there may have been fraud or fraudulent tactics.

Agriculture Financial Services Corp. c. Zaborski, 2009 ABQB 183, 58 C.B.R. (5th) 301, par. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, par. 37-63; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261, par. 30-48 (CanLII); *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, par. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, par. 53-58).

[30] En deuxième lieu, la Loi 26, tout comme le règlement PRV publié dans la *Gazette officielle du Québec* en vertu des art. 3 et 4 de cette loi, n'appuient pas davantage la thèse de la Ville. Nous partageons l'avis des juges majoritaires de la Cour d'appel, qui rejettent l'idée d'une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur du seul fait de sa participation au PRV. Ce régime, qui a été en vigueur de novembre 2015 à décembre 2017, n'a pas créé une telle présomption.

[31] En effet, l'objet du PRV tel qu'il est défini à l'art. 3 de la Loi 26, au chapitre II intitulé « Programme de remboursement », étaye cette conclusion :

3. Le ministre publie à la *Gazette officielle du Québec* un programme de remboursement volontaire à durée déterminée afin qu'une entreprise ou une personne physique mentionnée à l'article 10 puisse rembourser certaines sommes payées injustement dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive.

[32] L'emploi du conditionnel dans l'expression « il aurait pu y avoir fraude ou manœuvre dolosive » contredit clairement la thèse avancée par la Ville. De plus, le conditionnel est également utilisé à l'art. 1 du règlement PRV pour décrire l'objet de ce programme :

1. Le Programme de remboursement volontaire permet à toute personne physique et à toute entreprise de rembourser certaines sommes payées injustement par un organisme public dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public, conclu après le 1er octobre 1996, et pour lequel il aurait pu y avoir fraude ou ma[n]œuvre dolosive.

[33] The fact that fraud is characterized as a possibility rather than a certainty is by no means surprising. Given the VRP's purpose of recovering amounts paid improperly by public bodies, it stands to reason that Bill 26 does not provide for any mechanism to determine whether amounts agreed to under the VRP are in fact related, in whole or in part, to fraud. Section 7 of the VRP Regulation supports this point, since it states the following:

7. The fact that a natural person or an enterprise participates in the Program does not constitute an admission of liability or of a fault committed by the natural person or enterprise.

[34] The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8:

8. Every natural person or enterprise participating in the Program acknowledges that revealing information or sending documents within the Program framework does not restrict in any manner whatever a public body's capacity to bring civil proceedings against the natural person or enterprise in relation to public contracts for which a settlement has not been reached under the Program or to which the Act does not apply.

Every natural person or enterprise acknowledges that participation in the Program and the conclusion of an agreement under it in no manner protects the natural person or enterprise, or its officers, against any penal or criminal proceedings that have been or may be brought in connection with public contracts entered into by the natural person or enterprise.

[35] Evidence that a natural person or enterprise participated in the VRP therefore cannot on its own justify characterizing a claim as being related to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*.

[33] Que la fraude soit caractérisée comme une éventualité, par opposition à quelque chose de certain, n'a rien de surprenant. En effet, comme l'objectif du PRV consiste à récupérer des sommes payées injustement par des organismes publics, il va de soi que la Loi 26 ne prévoit aucun mécanisme pour déterminer si, dans les faits, les sommes convenues dans le cadre du PRV sont reliées, en partie ou en totalité, à une fraude. L'article 7 du règlement PRV appuie ce constat, puisqu'il précise ce qui suit :

7. Le fait pour une personne physique ou une entreprise de se prévaloir du Programme ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute.

[34] La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation :

8. Toute personne physique ou entreprise qui se prévaut du Programme reconnaît que le fait qu'elle révèle des informations ou transmette des documents dans ce cadre n'a pas pour effet de limiter, de quelque façon que ce soit, la capacité d'un organisme public d'entreprendre contre elle tout recours civil concernant des contrats publics qui n'auront pas fait l'objet d'un règlement dans le cadre du Programme ou qui ne sont pas visés par la Loi.

De plus, toute personne physique ou entreprise reconnaît que sa participation au Programme, et la conclusion d'une entente en vertu de celui-ci, ne la protège, ni ses dirigeants, d'aucune façon de poursuites pénales et/ou criminelles qui ont été ou pourraient être intentées contre elle à l'égard de contrats publics qu'elle a conclus.

[35] En conséquence, la seule preuve qu'une personne physique ou une entreprise a participé au PRV ne saurait à elle seule permettre de qualifier une créance de réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*.

[36] However, the City submits that reading ss. 1, 3 and 10 of Bill 26 together leads to an entirely different conclusion, namely that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. In our view, the City is wrong.

[37] It is true that s. 1 of Bill 26 does not refer to fraud as being hypothetical:

1. This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

As we saw above, however, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: there is no question that, unlike s. 1 of Bill 26, which sets out the purpose of that statute generally, the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. In addition, the City's interpretation cannot be reconciled with ss. 7 and 8 of the VRP Regulation, which are reproduced above.

[38] That being said, the City points out that s. 3 of Bill 26 refers to s. 10, which specifically states that fraud was committed:

10. Any enterprise or natural person who has, in any capacity, participated in fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.

In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

The directors of the enterprise in office at the time the fraud or fraudulent tactics occurred are also held liable if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned, unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

[36] Cependant, la Ville soutient qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une toute autre conclusion, à savoir que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Nous sommes d'avis qu'elle a tort.

[37] Il est vrai que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique :

1. La présente loi prévoit des mesures exceptionnelles adaptées au remboursement et au recouvrement de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de l'adjudication, de l'attribution ou de la gestion de contrats publics.

Toutefois, comme nous l'avons vu précédemment, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : il est acquis que, contrairement à l'art. 1 de la Loi 26, qui énonce l'objet de cette loi de manière générale, les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. L'interprétation de la Ville est également inconciliable avec les art. 7 et 8 du règlement PRV, qui sont reproduits plus haut.

[38] Cela dit, la Ville fait remarquer que l'art. 3 de la Loi 26 renvoie à l'art. 10 lequel énonce explicitement qu'une fraude a été commise :

10. Toute entreprise ou toute personne physique qui, à quelque titre que ce soit, a participé à une fraude ou à une manœuvre dolosive dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public est présumée avoir causé un préjudice à l'organisme public concerné.

Le cas échéant, la responsabilité de ses dirigeants en fonction au moment de la fraude ou de la manœuvre dolosive est engagée, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La responsabilité des administrateurs de l'entreprise en fonction au moment de la fraude ou de la manœuvre dolosive est également engagée s'il est établi qu'ils savaient ou qu'ils auraient dû savoir qu'une fraude ou une manœuvre dolosive a été commise relativement au contrat visé, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

[39] We do not agree with the City's interpretation on this point. It is up to the courts to conclude that fraud of this kind has been committed. More precisely, we are of the view that the City is confusing two schemes created by Bill 26: one — the VRP (ss. 3 to 9) — introduced by Chapter II and the other by Chapter III, which is entitled "Special Rules Applicable to Judicial Proceedings" (ss. 10 to 17). The first scheme was designed to encourage — for a two-year period — natural persons or enterprises fearing that a public body would bring civil proceedings against them to participate in the VRP with a view to entering into an agreement through a completely confidential process (s. 7 of Bill 26; s. 4 of the VRP Regulation). It was only once the first scheme ended that the second, one of an entirely different nature, took effect.

[40] The scheme provided for in ss. 10 to 17 of Bill 26 is one that deviates from the general law. It applies to judicial proceedings brought by a public body, or by the Minister of Justice on behalf of a public body, against a natural person or enterprise that allegedly participated in fraud in relation to a public contract. When a court allows such an action, not only can it assume that the defendant caused injury to the public body through its fraudulent act (s. 10 para. 1), but in addition, "[t]he injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 20% of the total amount paid for that contract" (s. 11 para. 1). The enterprises and natural persons contemplated by the statute are solidarily liable for such injury (s. 10 para. 4). An amount granted "bears interest from the date the work is accepted by the public body concerned for the contract concerned" (s. 11 para. 3). As well, the court "must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of th[e] Act" (s. 14).

Les entreprises et les personnes physiques visées au présent article sont solidairement responsables du préjudice causé, à moins que l'organisme public n'y renonce.

[39] Nous ne partageons pas cette interprétation de la Ville. Il appartient aux tribunaux de conclure qu'une fraude de cette nature a été commise. Plus précisément, nous estimons que la Ville confond deux régimes créés par la Loi 26 : l'un introduit par le chapitre II — le PRV — (art. 3 à 9), l'autre par le chapitre III intitulé « Règles particulières applicables aux recours judiciaires » (art. 10 à 17). Le premier régime a été conçu afin d'inciter, pendant une période de deux ans, les personnes physiques ou les entreprises craignant qu'un organisme public introduise contre elles une poursuite civile à participer au PRV dans le but de conclure une entente en toute confidentialité (art. 7 de la Loi 26; art. 4 du règlement PRV). Or, ce n'est qu'une fois que le premier régime prend fin que le second entre en vigueur, lequel est d'une toute autre nature.

[40] Le régime prévu aux art. 10 à 17 de la Loi 26 est un régime exorbitant du droit commun, applicable aux recours judiciaires intentés par un organisme public ou le ministre de la Justice, pour le compte d'un organisme public, contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public. Lorsqu'un tel recours est accueilli, non seulement le tribunal peut-il tenir pour acquis que le défendeur a causé par son acte frauduleux un préjudice à l'organisme public (art. 10 al. 1), mais aussi que « [c]le préjudice est présumé correspondre à la somme réclamée par l'organisme public concerné pour le contrat visé lorsque cette somme ne représente pas plus de 20 % du montant total payé pour le contrat visé » (art. 11 al. 1), préjudice pour lequel les entreprises et les personnes physiques visées par la loi sont solidairement responsables (art. 10 al. 4). La somme accordée « porte intérêt à compter de la réception de l'ouvrage par l'organisme public concerné pour le contrat visé » (art. 11 al. 3). De même, le tribunal « doit ajouter à la somme qu'il accorde en réparation du préjudice un montant forfaitaire égal à 20 % de cette somme à titre de frais engagés pour l'application de la [. . .] loi » (art. 14).

[41] In other words, these provisions are designed to make it easier to prove causation and injury when such a proceeding is brought, but it should be noted that they are of no effect if a court finds that the evidence of fraud is insufficient; as well, and most importantly, they in no way make it easier to prove such a fault. Section 10 of Bill 26 is therefore of no assistance to the City, which in any event has not sought to show, on any basis other than the mere existence of the VRP agreement, that SM Group took part in fraud in connection with a contract the City awarded to it. The schemes created by Bill 26 suggest that a court will recognize the existence of fraud only under the Chapter III scheme. Moreover, it appears that the reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies, namely directors and officers of enterprises.

[41] Autrement dit, ces dispositions visent à faciliter la preuve du lien de causalité et du préjudice lorsqu'un tel recours est intenté, mais, faut-il le souligner, elles demeurent sans effet dans l'éventualité où un tribunal judiciaire conclut que la preuve relative à la fraude s'avère insuffisante; aussi, et surtout, elles ne facilitent en aucun cas la preuve d'une telle faute. Partant, l'art. 10 de la Loi 26 n'est d'aucun secours pour la Ville, qui, de toute manière, n'a pas cherché à démontrer, autrement qu'en invoquant la seule existence de l'entente PRV, que Groupe SM a participé à une fraude dans le cadre d'un contrat qu'elle lui a octroyé. À en juger par les régimes mis en œuvre par cette loi, la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III de celle-ci. De plus, il appert que le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV, en l'occurrence les administrateurs et dirigeants des entreprises.

[42] Lastly, it should be mentioned that it can easily be imagined that an enterprise that entered into a potentially contentious public contract with a public body would make the strategic choice to participate in the VRP out of fear of bad publicity or to avoid exposing itself to the exceptional scheme of Chapter III of Bill 26, the result of which, if the proceeding were decided in the public body's favour, would likely be significant additional financial liability for the enterprise on top of the legal fees it would have to pay.

[42] En dernier lieu, il convient de souligner qu'il est facile d'imaginer qu'une entreprise ayant conclu un contrat public possiblement litigieux avec un organisme public fasse le choix stratégique de participer au PRV par crainte de mauvaise publicité ou encore pour éviter de s'exposer au régime exorbitant prévu au chapitre III de la Loi 26, lequel serait susceptible d'emporter pour elle, si le recours était accueilli en faveur de l'organisme, une responsabilité financière additionnelle non négligeable, en sus des frais juridiques qu'elle aurait à débourser.

[43] In sum, neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act; nor does the VRP agreement constitute a serious, precise and concordant presumption of fact (art. 2849 of the *Civil Code of Québec*). It follows that the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*.

[43] En somme, ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux, pas plus que l'entente PRV ne constitue une présomption de fait grave, précise et concordante (art. 2849 du *Code civil du Québec*). Il s'ensuit que la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la *LACC*.

(2) Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)

(2) Compensation entre des dettes nées avant et après le prononcé de l'ordonnance initiale (compensation pré-post)

[44] The bankruptcy of large companies often resulted in "the entire disruption of the corporation,

[44] La mise en faillite des grandes compagnies a fréquemment mené à [TRADUCTION] « la

loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[45] Initially, restructuring under the *CCAA* was done through a plan of arrangement or compromise negotiated between the debtor company and its creditors that averted the company's bankruptcy by allowing it to adjust its debts and reorganize its business (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at pp. 588-90 and 592). Later, liquidation under the *CCAA* emerged as a practice. Liquidation can also serve as a tool for restructuring a struggling business "by allowing the business to survive, albeit under a different corporate form or ownership" (*Callidus*, at para. 45; see also Sarra, at p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311).

[46] The primary tool that allows the *CCAA* to achieve its restructuring objective is a stay of proceedings and of creditors' rights (Sarra, at pp. 17 and 52; McElcheran, at p. 5). The direct effect of a stay is that it creates a status quo period that stabilizes the debtor company's situation by shielding it from its creditors while the restructuring process is under way (*Century Services*, at para. 60; see also *Kitco*, at para. 43 (CanLII)). Without such a period, there would be a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company's survival or the maximization of its liquidation value (*Century Services*, at para. 22).

[47] During the status quo period, the debtor company can therefore continue operating without fear of being driven into bankruptcy by its creditors. This

perturbation complète des activités de l'entreprise, à la perte de sa clientèle et à la vente à rabais de son actif » (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 22-23; voir aussi *Century Services*, par. 16). Le législateur, soucieux de protéger la capacité de survie de ces compagnies essentielles à la prospérité économique et à un taux d'emploi élevé, a donc mis en place dans la *LACC* un processus de restructuration destiné à éviter leur démantèlement et la liquidation à rabais de leurs actifs (*Century Services*, par. 17-18 et 70; *Callidus*, par. 41-42).

[45] Initialement, la restructuration sous le régime de la *LACC* se faisait au moyen d'un plan d'arrangement ou de transaction négocié entre la compagnie débitrice et ses créanciers qui évitait sa mise en faillite en lui permettant de rajuster ses dettes et de réorganiser ses affaires (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 588-590 et 592). Puis a émergé, en application de la *LACC*, une pratique de liquidation qui peut elle aussi constituer un outil de restructuration de l'entreprise en difficulté « en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents » (*Callidus*, par. 45; voir aussi Sarra, p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311).

[46] L'instrument principal qui permet à la *LACC* de réaliser son objectif de restructuration est la suspension des procédures et des droits des créanciers (Sarra, p. 17 et 52; McElcheran, p. 5). L'effet direct de la suspension est qu'elle instaure une période de statu quo qui stabilise la situation de la compagnie débitrice en la mettant à l'abri de ses créanciers pendant que la restructuration suit son cours (*Century Services*, par. 60; voir aussi *Kitco*, par. 43). L'absence d'une telle période entraînerait une situation anarchique où chaque créancier se battrait pour faire valoir ses droits, sans égard à la survie de l'entreprise ou à la maximisation de sa valeur de liquidation (*Century Services*, par. 22).

[47] Durant cette période, la compagnie débitrice peut donc poursuivre ses activités sans craindre d'être poussée à la faillite par ses créanciers. Ce

temporary respite creates an environment conducive to fair negotiations between the various stakeholders and gives the debtor the necessary time to prepare a plan of compromise or arrangement ensuring its survival, or to take steps to maximize the value of the business it operates with a view to its liquidation under the *CCAA* (*Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (Q.B.), at para. 15; *Kitco*, at para. 43; *Callidus*, at paras. 40 and 46).

[48] The fundamental feature of the *CCAA* is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the *CCAA*'s objectives are achieved (*Century Services*, at para. 19). The true "engine" driving the statutory scheme (*Callidus*, at para. 48, citing *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36), this judicial discretion also plays a prominent part in stays of proceedings.

[49] In principle, a court may deny a stay application. Such applications are rarely denied, however, to the point where the terms "initial order" and "stay order" have, in practice, become interchangeable (Sarra, at p. 51). Stays are in fact requested and granted systematically, other than in certain exceptional cases (p. 51).

[50] A stay is a temporary measure, however; once it has been lifted, creditors regain their ability to fully exercise their rights and remedies (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, at paras. 9 and 14). On an initial application in respect of a debtor company, a court may include in its initial order a first stay period of no more than 10 days (s. 11.02(1) of the *CCAA*). After that, the court may renew the stay for any period it considers necessary (s. 11.02(2) of the *CCAA*). When a stay is renewed, or at any other time in the course of the proceedings, an interested creditor may, in accordance with the procedure set out in the initial order, apply to the court to lift a stay affecting any of its rights or remedies (Sarra, at pp. 58-60 and 88; see also *Muscletech Research & Development Inc., Re*

moment de répit crée un environnement propice à une négociation équitable entre les différentes parties prenantes, en plus d'offrir à la débitrice le temps nécessaire pour préparer un plan de transaction ou d'arrangement assurant sa survie ou pour prendre des mesures maximisant la valeur de l'entreprise qu'elle exploite en vue de sa liquidation en vertu de la *LACC* (*Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (B.R.), par. 15; *Kitco*, par. 43; *Callidus*, par. 40 et 46).

[48] La caractéristique fondamentale de la *LACC* est l'attribution au tribunal chargé de son application d'un vaste pouvoir discrétionnaire lui permettant de rendre les ordonnances nécessaires pour mener à bon port la restructuration et atteindre les objectifs de la *LACC* (*Century Services*, par. 19). Véritable « moteur » du régime législatif (*Callidus*, par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36), ce pouvoir discrétionnaire du tribunal joue également un rôle de premier plan dans le cadre de la suspension des procédures.

[49] En principe, le tribunal peut refuser une demande de suspension. Ces demandes sont toutefois rarement refusées, à tel point que les termes « ordonnance initiale » et « ordonnance de suspension » sont devenus, en pratique, interchangeables (Sarra, p. 51). La suspension est en effet demandée et accordée systématiquement, si ce n'est dans certains cas exceptionnels (p. 51).

[50] La suspension est cependant une mesure temporaire; une fois levée, les créanciers retrouvent la capacité d'exercer pleinement leurs droits et recours (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, par. 9 et 14). Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut assortir son ordonnance initiale d'une première période de suspension d'une durée maximale de 10 jours (par. 11.02(1) de la *LACC*). Par la suite, la suspension peut être renouvelée par le tribunal pour la période qu'il estime nécessaire (par. 11.02(2) de la *LACC*). Au moment du renouvellement de la suspension, ou à tout autre moment au cours des procédures, un créancier intéressé peut, conformément à la procédure prévue à cet effet dans l'ordonnance initiale, demander au tribunal de lever

(2006), 19 C.B.R. (5th) 54 (Ont. S.C.J.), at para. 5; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, at paras. 7-8 and 14-15).

[51] While it is true that the *BIA* and the *CCAA* form part of an integrated body of insolvency law, there are nonetheless some fundamental differences between the two schemes (*Century Services*, at para. 78). Unlike the *BIA*, the *CCAA* gives courts a broad discretion to decide whether a stay is appropriate, to determine how long it should last and to adjust its scope depending on what is needed to restructure the debtor company and to achieve the objectives of the *CCAA*. In this regard, the *CCAA* has been described as a "skeletal" statute that does not contain "a comprehensive code that lays out all that is permitted or barred" (*Century Services*, at para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44).

[52] To fully understand the rights and restrictions applicable in a given case, it is therefore not enough to read the legislation; it is also important to consider the court's exercise of its discretion, which is reflected in all of the many orders made throughout the proceedings.

[53] The question raised by this appeal is therefore whether a court's discretion allows it to stay a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law and, by extension, to authorize pre-post compensation in appropriate cases.

(a) *Power to Grant and Lift a Stay of the Right to Pre-post Compensation*

[54] In our view, the broad discretion conferred on a court by ss. 11 and 11.02 of the *CCAA* allows it to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process.

la suspension affectant l'un de ses droits ou recours (Sarra, p. 58-60 et 88; voir aussi *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (C.S.J. Ont.), par. 5; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, par. 7-8 et 14-15).

[51] Bien que la *LFI* et la *LACC* fassent partie d'un ensemble intégré de règles du droit de l'insolvabilité, il existe tout de même des différences fondamentales entre les deux régimes (*Century Services*, par. 78). En effet, contrairement à ce qui prévaut sous la *LFI*, la *LACC* confère au tribunal un large pouvoir discrétionnaire lui permettant de décider de l'opportunité d'une suspension, de déterminer la durée de celle-ci et d'en ajuster la portée selon les besoins de la restructuration et selon ce qui est nécessaire pour réaliser les objectifs de la *LACC*. En ce sens, la *LACC* a été décrite comme une loi [TRADUCTION] « schématique » ne contenant « pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Century Services*, par. 57, citant *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44).

[52] Pour bien saisir les droits et restrictions applicables dans un cas donné, il ne suffit donc pas de lire la loi; il faut également se pencher sur l'exercice par le tribunal de son pouvoir discrétionnaire, lequel se manifeste dans toute la multitude d'ordonnances rendues tout au long des procédures.

[53] La question que soulève le présent pourvoi consiste donc à déterminer si le pouvoir discrétionnaire dont dispose le tribunal lui permet de suspendre le droit d'opérer compensation pré-post qu'invoque un créancier en vertu du droit civil ou de la common law et, corollairement, d'autoriser la compensation pré-post dans les cas qui s'y prêtent.

a) *Pouvoir d'accorder et de lever une suspension du droit à la compensation pré-post*

[54] Nous sommes d'avis que le vaste pouvoir discrétionnaire conféré au tribunal par les art. 11 et 11.02 de la *LACC* permet à celui-ci de suspendre des droits reconnus aux créanciers mais dont l'exercice

This includes a creditor's right to effect pre-post compensation.

[55] Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. Despite the language of s. 11.02, which at first glance limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order (see *Meridian*, at para. 26; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, at paras. 31-33; McElcheran, at pp. 135 and 245-46; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 363). For example, in *Quintette Coal*, the British Columbia Court of Appeal concluded that a creditor's right to pre-post set-off can be stayed just like any other enforcement measure with a high disruptive potential (see also *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), at paras. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116, at paras. 28-30). In our view, this interpretation is the correct one, as it advances the *CCAA*'s remedial objectives and is consistent with its scheme.

[56] It can also be seen from the various model initial orders adopted by the country's superior courts that prohibitions against setting off debts are standard practice, and in the vast majority of cases take effect as soon as an initial order is made (see Court of Queen's Bench of Alberta, *Alberta Template CCAA Initial Order*, January 2019 (online), at paras. 14 and 16; Supreme Court of British Columbia, *Model CCAA Initial Order*, August 1, 2015 (online), at paras. 16 and 18; Ontario Superior Court of Justice, Commercial List, *Initial Order*, January 21, 2014 (online), at paras. 15-16; Superior Court of Quebec, Commercial Division, *Initial Order*, May 2014 (online), at paras. 10 and 12; Court of Queen's Bench for

serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post.

[55] L'article 11.02 de la *LACC* permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Malgré le texte de l'art. 11.02, qui limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension (voir *Meridian*, par. 26; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), p. 113-114; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, par. 31-33; McElcheran, p. 135 et 245-246; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 363). À titre d'exemple, dans l'arrêt *Quintette Coal*, la Cour d'appel de la Colombie-Britannique a conclu que le droit d'un créancier d'opérer compensation pré-post pouvait être suspendu au même titre que toute autre mesure d'exécution possédant un fort potentiel perturbateur (voir aussi *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), par. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 13-16, conf. par 2015 BCCA 426, 378 B.C.A.C. 116, par. 28-30). Selon nous, cette interprétation est la bonne, puisqu'elle favorise les objectifs réparateurs de la *LACC*, en plus d'être cohérente avec l'économie de cette loi.

[56] À la lumière des divers modèles d'ordonnances initiales adoptés par les cours supérieures du pays, on constate d'ailleurs que l'interdiction d'opérer compensation entre des dettes est pratique courante et que, dans la très vaste majorité des cas, une telle interdiction entre en vigueur dès le prononcé de l'ordonnance initiale (voir Cour du Banc de la Reine de l'Alberta, *Alberta Template CCAA Initial Order*, janvier 2019 (en ligne), par. 14 et 16; Cour suprême de la Colombie-Britannique, *Model CCAA Initial Order*, 1er août 2015 (en ligne), par. 16 et 18; Cour supérieure de justice de l'Ontario, rôle des affaires commerciales, *Ordonnance initiale*, 21 janvier 2014 (en ligne), par. 15-16; Cour supérieure du Québec,

Saskatchewan, *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online), at paras. 15-16).

[57] A court's discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in *Kitco*, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

[58] The instances in which a court should not stay the right to effect pre-post compensation in an initial order will be rare, however. It must be borne in mind that a supervising judge's discretion, although broad, is not boundless. It must be exercised in furtherance of the *CCAA*'s remedial objectives (*Callidus*, at para. 49).

[59] The status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint (see *Kitco*, at paras. 20 and 43). *Tungsten*, in which the court stayed pre-post set-off, provides a good example of the disruptive potential of this form of set-off (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten* (S.C.)"), at para. 32, aff'd 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116, at para. 29). If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed. The debtor would have a disincentive to provide its creditors with goods and services because it would fear not being paid for them; it would then be deprived of the funds needed to continue

Chambre commerciale, *Ordonnance initiale*, mai 2014 (en ligne), par. 10 et 12; Cour du Banc de la Reine de la Saskatchewan, *Saskatchewan Template CCAA Initial Order*, 6 décembre 2017 (en ligne), par. 15-16).

[57] Le pouvoir discrétionnaire dont dispose le tribunal est donc suffisamment large pour lui permettre de suspendre le droit des créanciers d'opérer compensation pré-post. Dans un tel cas, l'interdiction d'opérer compensation pré-post découle directement de l'ordonnance de suspension. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. Sur ce point, nous écartons l'interdiction absolue proposée par la Cour d'appel du Québec dans l'arrêt *Kitco*, puisque nous concluons que le tribunal possède le pouvoir discrétionnaire de permettre la compensation pré-post dans les cas qui s'y prêtent.

[58] Rares seront toutefois les occasions où un tribunal ne devrait pas suspendre le droit d'opérer compensation pré-post dans l'ordonnance initiale. Faut-il le rappeler, le pouvoir discrétionnaire du juge surveillant, quoique vaste, n'est pas sans limites. Il doit tendre à la réalisation des objectifs réparateurs de la *LACC* (*Callidus*, par. 49).

[59] En effet, la période de statu quo pourrait devenir lettre morte si l'on permettait aux créanciers d'opérer sans retenue la compensation pré-post (voir *Kitco*, par. 20 et 43). L'affaire *Tungsten*, dans laquelle le tribunal avait suspendu l'exercice de la compensation pré-post constitue un bon exemple du potentiel perturbateur de cette forme de compensation (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten* (C.S.) »), par. 32, conf. par 2015 BCCA 390, 377 B.C.A.C. 6, par. 16, 20 et 25, et par 2015 BCCA 426, 378 B.C.A.C. 116, par. 29). Si le créancier pouvait, en invoquant la compensation, refuser de payer le prix pour les biens ou services fournis par la débitrice pendant la période de statu quo, la restructuration risquerait d'être torpillée. La débitrice serait incitée à ne fournir ni biens ni services à ses créanciers par

operating (see *Kitco*, at paras. 46-48). Section 32 of the *CCAA* in fact gives the debtor a right — subject to the limits and formal requirements provided for in that provision — to disclaim or resiliate any agreement to which it is a party on the day on which the restructuring proceedings commence. In addition, an interim lender would most likely refuse to continue to finance the debtor's operations during this period if the loaned funds were destined to enrich another creditor at its expense. Lastly, the rampart set up by a stay to protect against attacks from all sides by creditors would also crumble, thereby increasing the risk of the debtor's collapse and bankruptcy (see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 22 and 29).

[60] The inevitable interruption of the business relationship between the debtor and those who are at once creditors and customers could not come at a worse time. Without these contracts and without the payment of accounts receivable and interim financing to replenish the debtor's working capital, the resale value of its business would melt away, thus setting up roadblocks for restructuring it by way of liquidation. And such a situation could also be unfavourable to creditors that wish to effect compensation. If the debtor terminates a contract and refuses to perform it, the creditor concerned will be deprived of the benefit of the contract and will have to find a new contracting party in place of the debtor, with no guarantee that the price will remain the same.

[61] Furthermore, where pre-post compensation has been stayed, the court retains the discretion to lift the stay based on the specific facts of each case. However, it must be cautious in doing so, given the high disruptive potential of such compensation.

[62] In conclusion, we are of the view that ss. 11 and 11.02 of the *CCAA* authorize a court to stay pre-post compensation. Although we would temper the rule from *Kitco*, which involves an absolute prohibition against pre-post compensation, it is our view

crainte de ne pas être payée en retour; elle serait alors privée des fonds nécessaires pour poursuivre ses opérations (voir *Kitco*, par. 46-48). L'article 32 de la *LACC* lui donne justement le droit de résilier tout contrat auquel elle est partie à la date à laquelle les procédures de restructuration ont été intentées, sous réserve des limites et formalités qui sont prévues par cette disposition. De plus, le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice durant cette période, si les sommes prêtées sont destinées à enrichir un autre créancier à son détriment. Enfin, le rempart érigé par la suspension contre les attaques tous azimuts des créanciers s'effriterait lui aussi, augmentant ainsi les risques de déconfiture et de faillite de la débitrice (voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 22 et 29).

[60] L'inévitable interruption de la relation d'affaires entre la débitrice et ceux qui sont à la fois créanciers et clients ne pourrait intervenir à un pire moment. Sans ces contrats et sans un fonds de roulement regarni par le paiement des comptes à recevoir et le financement intérimaire, la valeur de revente de l'entreprise exploitée par la débitrice s'atrophierait, dressant alors des écueils à sa restructuration par voie de liquidation. Par ailleurs, une telle situation peut également être défavorable pour le créancier qui désire opérer compensation. Si la débitrice met fin au contrat et refuse de s'exécuter, le créancier concerné sera privé du bénéfice du contrat et devra trouver un nouveau cocontractant à la place de la débitrice, sans garantie que le prix restera le même.

[61] En outre, lorsque la compensation pré-post a été suspendue, le tribunal conserve le pouvoir discrétionnaire de lever la suspension selon les faits particuliers de chaque affaire. Cependant, il doit faire preuve de prudence, considérant le fort potentiel perturbateur d'une telle compensation.

[62] Pour conclure, nous sommes d'avis que les art. 11 et 11.02 de la *LACC* autorisent le tribunal à suspendre l'exercice de la compensation pré-post. Tout en tempérant la règle énoncée dans l'arrêt *Kitco*, qui interdisait de manière absolue la compensation

that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances.

(b) *Scope of Section 21 of the CCAA*

[63] In addition, we note that s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Although s. 21 of the *CCAA* indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, "pre-pre compensation"). The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Our interpretation of s. 21 of the *CCAA* is not based on an inappropriate analogy with the provisions of the *BIA*.

[64] Section 21 does state that it is possible to effect compensation in insolvency proceedings under the *CCAA*, but it does not specifically deal with pre-post compensation. It reads as follows:

Law of set-off or compensation to apply

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.

Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose

pré-post, nous estimons que, dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice une telle forme de compensation. Finalement, lorsque l'ordonnance initiale a suspendu le droit des créanciers à la compensation pré-post, le tribunal conserve le pouvoir discrétionnaire de lever la suspension en fonction des circonstances.

b) *La portée de l'art. 21 de la LACC*

[63] Nous soulignons par ailleurs que l'art. 21 de la *LACC* ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la *LACC*. Bien que l'art. 21 de la *LACC* atteste d'un droit d'opérer compensation dans le cadre des procédures prises sous cette loi, nous sommes d'avis qu'il ne vise que la compensation entre des dettes nées *avant le prononcé de l'ordonnance initiale* (autrement dit, la « compensation pré-pré »). Cette conclusion s'impose suivant la méthode moderne d'interprétation des lois (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87). Notre interprétation de l'art. 21 de la *LACC* ne repose pas sur une analogie inappropriée avec les dispositions de la *LFI*.

[64] En effet, cet article précise qu'il est possible d'opérer compensation dans le cadre de procédures en insolvabilité introduites sous le régime de la *LACC*, mais il ne traite pas expressément de la compensation pré-post. Cette disposition est rédigée ainsi :

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

Lu à la lumière de son contexte, de son objet et de l'esprit de la *LACC*, nous sommes d'avis que l'art. 21 se limite à autoriser la compensation pré-pré aux fins

of quantifying creditors' claims on the date of commencement of proceedings.

[65] With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider s. 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception.

[66] What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts.

[67] Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim.[1]

de quantification des réclamations des créanciers au jour de l'ouverture.

[65] En ce qui concerne le contexte, l'art. 21 fait partie d'une section différente de celle visant le pouvoir discrétionnaire de suspension conféré au tribunal. Le pouvoir de suspension (art. 11 et 11.02) ainsi que la plupart de ses exceptions (voir, p. ex., art. 11.01, 11.08 et 11.1) figurent dans la partie II, intitulée « Juridiction des tribunaux ». Pour sa part, l'art. 21 fait plutôt partie de la section « Réclamations » de la partie III, qui comprend également les art. 19 et 20. Ceci indique que le législateur ne considérait vraisemblablement pas l'art. 21 comme une exception à la période de suspension. Si son intention avait été plutôt d'en faire une exception, il aurait inclus l'art. 21 dans la partie II ou affirmé expressément qu'il s'agit d'une exception.

[66] Au surplus, il ressort d'un examen de l'art. 21 dans le contexte plus large de la section « Réclamations » que cette disposition fait partie d'un ensemble de règles encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement et la quantification des montants qui en découlent.

[67] L'article 19 précise quelles sont les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement (par. (1)) et celles qui demeureront intactes malgré l'acceptation par les créanciers d'une transaction ou d'un arrangement et son homologation par le tribunal (par. (2)). Seules les créances ayant pris naissance avant la date d'ouverture des procédures en faillite ou insolvabilité constituent des « réclamations » visées par l'art. 19 et donnent ainsi aux créanciers le droit de voter sur une transaction ou un arrangement. Quant à l'art. 20, il contient des règles permettant de déterminer le montant des réclamations. Une fois déterminé, ce montant permet ensuite de définir le poids relatif du droit de vote de chaque créancier détenant une réclamation[1].

[1] A plan of compromise or arrangement must be approved by a special majority representing two thirds in value of the creditors or a class of creditors (s. 6(1) of the *CCAA*).

[1] Le plan de transaction ou d'arrangement doit être approuvé par une majorité qualifiée des deux tiers en valeur des créanciers ou d'une catégorie de créanciers (par. 6(1) de la *LACC*).

[68] Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a creditor may have against the debtor on the *date of commencement of proceedings*. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] "the claims must be established" and therefore when the mutuality of debts must be assessed (B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

[68] L'article 21 complète les art. 19 et 20; la compensation autorisée par l'art. 21 vise, entre autres, à déterminer la valeur de la réclamation qu'un créancier peut avoir contre la débitrice au *jour de l'ouverture*. Autrement dit, l'art. 21 vise à donner l'heure juste sur l'intérêt pécuniaire que détient chaque créancier dans la restructuration au jour de l'ouverture et le nombre de votes dont il devrait disposer (voir *Kitco*, par. 83). Cette disposition s'intéresse peu à ce qui pourrait se passer postérieurement à cette date dans les affaires de la débitrice; en effet, c'est au jour de l'ouverture que « doivent être établies les réclamations » et donc que la réciprocité des dettes doit s'apprécier (B. Boucher, « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 70; voir aussi *Kitco*, par. 34).

[69] With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

[69] Avec égards pour l'opinion de notre collègue, à la lumière du contexte de l'art. 21, il est apparent que cette disposition n'a pas pour vocation de légitimer la compensation pré-post.

[70] This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the *CCAA* to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

[70] Cette interprétation contextuelle de l'art. 21, qui limite son champ d'application à la compensation pré-pré, est également confirmée par son objet. Cette disposition a été ajoutée à la *LACC* afin de prévenir l'injustice qui résulterait du fait qu'un créancier serait tenu de payer intégralement sa dette à la compagnie débitrice, mais ne recevrait presque rien de la débitrice en paiement de sa créance aux termes d'un arrangement ou d'une transaction. En raison de l'art. 21, le créancier reçoit paiement de sa créance jusqu'à concurrence de la valeur de la dette qu'il devait à la débitrice (Anderson, Gelbman et Pullen, p. 27; Boucher, nº 70; McElcheran, p. 116).

[71] It is true that compensation "creat[es] a type of security interest in the [insolvent company's] estate" because it "[authorizes] the party claiming set-off [to] 'reorde[r]' . . . his priority" by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 59-60; see *Kitco*, at paras. 63-68). The

[71] Il est vrai que la compensation « crée une sorte de garantie sur l'actif de la [compagnie insolvable] », parce qu'elle « autorise la partie qui invoque la compensation à "modifier" l'ordre de priorité » en réduisant la valeur de sa créance (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 59-60; voir *Kitco*, par. 63-68). Le créancier

creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the *CCAA*, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors" (McElcheran, at p. 78).

se sert de sa dette envers la débitrice comme d'une forme de garantie à l'égard de sa créance, une garantie d'une valeur égale à sa dette envers la compagnie insolvable (*Stein c. Blake*, [1996] 1 A.C. 243 (H.L.), p. 251). Cette portion de sa créance est donc assurée d'être payée en totalité (*Husky Oil*, par. 58). Par ses effets, la compensation déroge ainsi au principe de l'égalité entre les créanciers ordinaires, un principe fondamental du droit de l'insolvabilité qui s'applique avec autant de force dans le cadre de procédures intentées sous le régime de la *LACC*, dont l'un des objectifs réparateurs vise à assurer un traitement juste et équitable des réclamations déposées contre un débiteur (*Callidus*, par. 40). L'exception créée par la compensation doit donc être interprétée de manière restrictive. En règle générale, [TRADUCTION] « [u]ne fois que s'amorce formellement une procédure en matière d'insolvabilité, tous les recours des créanciers non garantis sont suspendus et chaque créancier doit faire la queue derrière les créanciers garantis et les créanciers privilégiés, et partager avec tous les autres créanciers non garantis, au prorata, toute somme qui reste dans le patrimoine » (McElcheran, p. 78).

[72] The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

[72] Le préjudice subi par un créancier désirant opérer compensation pré-post ne justifie pas d'élargir la portée de l'art. 21. Lorsque la dette due par le créancier prend naissance après le prononcé de l'ordonnance de suspension, le préjudice n'est qu'illusoire. Le fait que le créancier ait contracté des obligations envers la compagnie débitrice durant la période de suspension ne le place pas dans une pire situation que celle dans laquelle il aurait été s'il avait plutôt contracté avec un tiers. S'il avait contracté avec un tiers, il aurait de la même façon été contraint de payer intégralement le prix des produits ou services qu'il a obtenus (*Tungsten* (C.S.), par. 27). Le créancier qui contracte avec la compagnie débitrice durant la période de statu quo sait ou devrait savoir qu'il ne recevra probablement que des sous pour chaque dollar de sa créance pré-ordonnance et que le paiement de sa dette post-ordonnance lui bénéficiera, ainsi qu'aux autres créanciers.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the

[73] Puisque le préjudice ne se manifeste réellement qu'en ce qui concerne la compensation pré-pré,

principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil*, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

> The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes $1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for $1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

[74] Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (S.C.), at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.

[75] To repeat, viewing s. 21 as allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival

cette exception au principe de l'égalité ne devrait donc porter que sur un seul des éléments d'actifs de la débitrice au jour de l'ouverture des procédures en insolvabilité, c'est-à-dire la dette du créancier à son endroit (*Kitco*, par. 68; *Husky Oil*, par. 59). Autrement, donner le feu vert à la compensation pré-post équivaudrait à attribuer à certains créanciers une « sorte de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures (par exemple, les sommes reçues à titre de financement intérimaire). Le professeur Wood décrit bien l'injustice qui serait ainsi causée aux autres créanciers ordinaires dont les droits et recours sont suspendus :

> [TRADUCTION] La capacité d'exercer un droit d'opérer compensation lors de procédures de restructuration peut avoir pour effet d'améliorer grandement la position d'un créancier au détriment des autres. Voici un exemple qui illustre cette affirmation. Supposons qu'une compagnie débitrice doit 1 000 $ à un créancier. Cette compagnie entame des procédures de restructuration. Alors que les procédures sont en cours, la compagnie débitrice vend et livre au créancier des biens d'une valeur de 1 000 $. Exerçant son droit d'opérer compensation, ce dernier recouvre entièrement le montant de sa réclamation, au détriment des autres créanciers non garantis, dont les réclamations seront compromises ou autrement affectées par le plan. [p. 400]

[74] Or, l'objectif de la période de suspension est justement d'empêcher un créancier d'être avantagé par rapport aux autres pendant la restructuration de la compagnie débitrice (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (C.S.), par. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), par. 6; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, par. 17). La compensation pré-post ne devrait pas permettre à un créancier de faire indirectement ce qu'il ne peut faire directement. Le législateur ne peut avoir souhaité créer une telle garantie additionnelle pouvant être réalisée pendant la période de suspension du seul fait que le créancier et la compagnie débitrice ont une relation d'affaires qui se poursuit.

[75] Faut-il le rappeler, considérer que l'art. 21 autorise la compensation pré-post minerait l'efficacité de la période de statu quo, mettrait en péril la survie

of the debtor company or the business it operates and could derail the restructuring process. It is clear that Parliament could not have intended that a struggling company, deprived of its only lifeline, be condemned to drown in its debts solely because a single creditor wanted to gain an advantage over the others. Such an outcome is contrary to the fundamental objectives of the *CCAA*.

[76] Before concluding, we will pause to briefly discuss *Kitco*. In that case, the Court of Appeal rejected a literal interpretation of s. 21 as allowing all forms of compensation, including pre-post compensation, without any restrictions. Our colleague is of the view that *Kitco*, which was applied by the majority of the Court of Appeal and by the supervising judge in the instant case, has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. He cites *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.), and *Tungsten* in this regard.

[77] In our view, *Kitco* is not at odds with the jurisprudence of the rest of the country on the interpretation of s. 21. *Air Canada* and *Tungsten* did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors.

[78] First of all, in *Air Canada*, the issues did not relate to the impact of pre-post compensation on the achievement of the *CCAA*'s objectives. Rather, the case concerned the requirements for legal set-off at common law and the interpretation of a provision of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, that was worded differently from s. 18.1 (now s. 21) of the *CCAA*. On the subject of legal set-off, Air Canada argued that the making of an initial order under the *CCAA* results in a loss of mutuality between debts, by analogy with the vesting of a bankrupt's property in a trustee under the *BIA*. This was the context in which the court found that an

de la compagnie débitrice ou de l'entreprise qu'elle exploite et pourrait faire dérailler la restructuration. Il ne fait aucun doute que le législateur ne peut avoir souhaité qu'une compagnie en difficulté, privée de sa seule bouée de sauvetage, soit condamnée à crouler sous le poids de ses dettes, uniquement parce qu'un seul créancier a souhaité s'avantager au détriment des autres. Un tel résultat va à l'encontre des objectifs fondamentaux de la *LACC*.

[76] Avant de conclure, nous ouvrons une parenthèse au sujet de l'arrêt *Kitco*. Dans cette affaire, la Cour d'appel a rejeté l'interprétation littérale de l'art. 21 selon laquelle cette disposition autoriserait sans réserve toute forme de compensation, y compris la compensation pré-post. Notre collègue est d'avis que cet arrêt, appliqué par la majorité de la Cour d'appel et la juge surveillante dans la présente affaire, crée une asymétrie entre l'interprétation par les tribunaux québécois de l'art. 21 de la *LACC* et celle des tribunaux des autres provinces canadiennes. Notre collègue cite à cet égard les affaires *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (C.S.J. Ont.), et *Tungsten*.

[77] À notre avis, l'arrêt *Kitco* ne s'inscrit pas en faux contre la jurisprudence du reste du pays en ce qui concerne l'interprétation de l'art. 21. En effet, les affaires *Air Canada* et *Tungsten* n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers.

[78] D'abord, dans l'affaire *Air Canada*, les questions en litige ne portaient pas sur les répercussions de la compensation pré-post sur la réalisation des objectifs de la *LACC*. Cette affaire portait plutôt sur les critères de la compensation légale en common law, ainsi que sur l'interprétation d'une disposition de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, dont le texte différait de celui de l'art. 18.1 de la *LACC* (maintenant l'art. 21 de la *LACC*). Au chapitre de la compensation légale, Air Canada prétendait que le prononcé d'une ordonnance initiale en vertu de la *LACC* entraînait une perte de réciprocité entre

initial order under the *CCAA* does not alter the status of creditor and debtor of the insolvent company, unlike what happens in a bankruptcy proceeding.

[79] Moreover, in *Tungsten*, the dispute related primarily to the possibility of staying the right to pre-post set-off. The judge who ruled on the applications did not analyze the arguments concerning the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, finding that it was not necessary to do so in the circumstances. Our colleague maintains that the question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted by s. 21 of the *CCAA*. In our view, the fact that the possibility of effecting pre-post set-off was not argued tends more to weaken the authority of that decision than to strengthen it.

[80] Therefore, and with due respect for the contrary view, the state of the law on the interpretation of s. 21 had not been settled elsewhere in Canada. When ruling in *Kitco*, the Court of Appeal was not bound by *Air Canada* and *Tungsten*.

[81] In summary, we conclude, as the Court of Appeal did in *Kitco*, that s. 21 of the *CCAA* allows pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings (*Kitco*, at para. 82). This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. A supervising judge therefore retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

[82] We turn now to the situation in this case.

les dettes, par analogie avec la saisine des biens du failli par un syndic sous le régime de la *LFI*. C'est dans ce contexte que le tribunal a conclu que l'ordonnance initiale rendue en application de la *LACC* ne modifie pas les qualités de créancière et de débitrice de la société insolvable, contrairement à une procédure de faillite.

[79] De plus, dans l'affaire *Tungsten*, le litige portait principalement sur la possibilité de suspendre le droit à la compensation pré-post. En première instance, le juge n'a procédé à aucune analyse des arguments relatifs aux impacts de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, estimant qu'il n'était pas nécessaire de le faire dans les circonstances. Notre collègue soutient que la question de savoir si la compensation pré-post pouvait s'opérer n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise par l'art. 21 de la *LACC*. Selon nous, l'absence de débat sur la possibilité d'opérer compensation pré-post a davantage pour effet d'affaiblir l'autorité de cette décision que de la renforcer.

[80] En conséquence, et avec égards pour l'opinion contraire, l'état du droit n'était pas définitif ailleurs au Canada sur l'interprétation de l'art. 21. Lorsqu'elle s'est prononcée dans l'arrêt *Kitco*, la Cour d'appel n'était pas liée par les affaires *Air Canada* et *Tungsten*.

[81] En somme, à l'instar de la Cour d'appel dans l'arrêt *Kitco*, nous concluons que l'art. 21 de la *LACC* permet la compensation pré-pré aux fins de quantification des réclamations des créanciers au jour de l'ouverture (*Kitco*, par. 82). Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Ainsi, le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

[82] Voyons ce qu'il en est en l'espèce.

(c) *Application*

[83] In the case at bar, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation:

No Exercise of Rights or Remedies

ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

. . .

No Interference with Rights

ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court. [Emphasis added.]

(A.R., vol. I, at p. 75)

[84] Given that the order stayed compensation in respect of pre-post claims, what remains to be determined is whether the Superior Court should have

c) *Application*

[83] Dans la présente affaire, les termes de l'ordonnance de suspension rendue par le Tribunal sont suffisamment larges pour interdire la compensation pré-post :

[TRADUCTION]

Suspension des droits et recours

ORDONNE CE QUI SUIT : Durant la Période de suspension, et sous réserve, entre autres, de l'article 11.1 de la LACC, tous les droits et recours, notamment les modifications aux droits existants et les événements réputés survenir suivant toute entente à laquelle l'un des Débiteurs est partie en raison de l'insolvabilité des Débiteurs étrangers et/ou des présentes procédures fondées sur la LACC, de quelque manquement ou inexécution par les Débiteurs ou de quelque admission ou témoignage dans le cadre de ces procédures fondées sur la LACC, de quelque personne physique, firme, personne morale, société de personnes, société à responsabilité limitée, fiducie, coentreprise, association, organisation, organisme ou agence du gouvernement, ou de toute autre entité (toutes les entités énumérées précédemment étant appelées collectivement « **Personnes** » et individuellement « **Personne** ») visant les Débiteurs ou s'y rapportant, ou touchant l'Entreprise, les Biens ou toute partie de ceux-ci, sont suspendus par les présentes, sauf sur autorisation de la Cour.

. . .

Interdiction de porter atteinte aux droits

ORDONNE CE QUI SUIT : Durant la Période de suspension, il est interdit à toute Personne de supprimer, de refuser d'honorer, de modifier, de violer, de répudier, de résilier ou de cesser d'exécuter, selon le cas, quelque droit, droit de renouvellement, contrat, entente, licence ou permis en faveur des Débiteurs ou détenu par ceux-ci, sauf avec le consentement écrit des Débiteurs, le cas échéant, et du Contrôleur, ou sur autorisation de la Cour. [Nous soulignons.]

(d.a., vol. I, p. 75)

[84] L'ordonnance ayant suspendu la compensation à l'égard des créances pré-post, il reste à déterminer si le Tribunal aurait dû exercer son

exercised its discretion under s. 11 of the *CCAA* and allowed such compensation in respect of the VRP claim. Although we are of the view that the supervising judge erred in finding, in reliance on *Kitco*, that she had no discretion to authorize pre-post compensation, we feel that remanding the case to the court of original jurisdiction would be unhelpful and would not be in the interests of justice. What is more, the delays resulting from this case have prejudiced the rights of third persons in good faith involved in the restructuring of SM Group. In this regard, Thornhill was unable to reimburse, as stipulated, the transition financing granted by the interveners Alaris Royalty Corp. and Integrated Private Debt Fund V LP, which are also creditors of SM Group, largely because of the City's refusal to pay the cost of the work done by SM Group.

pouvoir discrétionnaire en vertu de l'art. 11 de la *LACC* et permettre l'application de cette compensation à l'égard de la créance PRV. Bien que nous soyons d'avis que la juge surveillante a fait erreur en concluant qu'elle ne possédait aucun pouvoir discrétionnaire l'habilitant à autoriser la compensation pré-post en se basant sur l'arrêt *Kitco*, il nous apparaît que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice. Au surplus, les délais occasionnés par le présent dossier causent préjudice aux droits des tiers de bonne foi ayant participé à la restructuration de Groupe SM. À cet égard, Thornhill n'a pas été en mesure de rembourser, selon les termes stipulés, le financement de transition consenti par les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP, également créancières de Groupe SM, notamment en raison du refus de la Ville d'acquitter le coût des travaux effectués par Groupe SM.

[85] In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part (*Callidus*, at para. 49; *Century Services*, at para. 70).

[85] Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur (*Callidus*, par. 49; *Century Services*, par. 70).

[86] The first consideration, the appropriateness of the order being sought, relates both to the order itself and to the means that are employed (*Century Services*, at para. 70). It is assessed in light of the remedial objectives of the *CCAA* (*Callidus*, at para. 49; *Century Services*, at para. 70). These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). In this regard, the context of restructuring by way of liquidation, and the impact of pre-post compensation on its progress, can be weighed by a court in exercising its discretion. In addition, protecting the public interest, although it overlaps a number of the remedial objectives to be considered by the courts, must also be included

[86] La première considération, soit le caractère opportun de l'ordonnance sollicitée, vise tout autant l'ordonnance elle-même que les moyens utilisés (*Century Services*, par. 70). Elle s'évalue au regard des objectifs réparateurs de la *LACC* (*Callidus*, par. 49; *Century Services*, par. 70). Parmi ces objectifs réparateurs, mentionnons les suivants : éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable; maximiser le recouvrement au profit des créanciers; assurer un traitement juste et équitable des réclamations déposées contre la compagnie débitrice; préserver la valeur d'exploitation dans la mesure du possible; protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise; améliorer le système de crédit de manière générale (*Callidus*, par. 40-42). À ce chapitre, le contexte d'une restructuration par voie de liquidation, ainsi que les répercussions de la compensation pré-post sur son bon déroulement, peuvent être soupesés par le tribunal dans l'exercice de son pouvoir discrétionnaire. De

in this list (*Callidus*, at para. 40; *Century Services*, at para. 60).

[87] Here, the City argues that protecting the public interest is a consideration that favours pre-post compensation. It submits that the majority of the Court of Appeal erred in not considering [TRANSLATION] "the public interest in ensuring the recovery of fraudulently misappropriated public funds" (A.F., at para. 2; see also para. 80). We cannot accept this argument, for the following reasons.

[88] In our view, the City is wrongly conflating the public interest with its own interest as a public body with a claim. The objective of protecting the public interest does not mean that public bodies should be placed in a better position than other creditors because their claims relate to public funds. That would be contrary to the principle of equality among creditors. In the context of the *CCAA*, protecting the public interest therefore cannot be reduced to protecting the interests of a particular creditor. It involves taking account of interests beyond those of the debtor company and its creditors, such as the interests of employees whose jobs are threatened or of the community in which the debtor company operates (*Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 102; *Metcalfe*, at paras. 50-52; Sarra, at pp. 162 and 501; Wood, at p. 341; see also, for a clear illustration, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), at para. 50).

[89] Protecting the public interest can also encompass considerations of commercial morality that reflect societal norms, such as considerations related to the fact that no one should profit from fraudulent activities in which they have taken part (A. Keay, "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509, at pp. 513 and 525). In very specific circumstances, a court could therefore conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing

surcroît, bien qu'elle recoupe un certain nombre des objectifs réparateurs dont les tribunaux doivent tenir compte, la protection de l'intérêt public doit elle aussi figurer sur cette liste (*Callidus*, par. 40; *Century Services*, par. 60).

[87] En l'espèce, la Ville prétend que la protection de l'intérêt public milite en faveur de la compensation pré-post. Elle estime que les juges majoritaires de la Cour d'appel ont commis une erreur en ne considérant pas « l'intérêt public de voir à la récupération des deniers publics détournés frauduleusement » (m.a., par. 2; voir aussi par. 80). Nous ne pouvons retenir cette prétention. Voici pourquoi.

[88] Selon nous, la Ville amalgame à tort l'intérêt public avec son propre intérêt en tant qu'organisme public titulaire d'une créance. L'objectif de protection de l'intérêt public ne signifie pas que les entités publiques devraient être placées dans une position plus avantageuse que les autres créanciers parce que leurs créances concernent des deniers publics. Cela contredit le principe de l'égalité entre les créanciers. Dans le contexte de la *LACC*, la protection de l'intérêt public ne saurait donc être réduite à la protection de l'intérêt d'un créancier en particulier. Elle suppose la prise en compte d'intérêts qui dépassent ceux de la compagnie débitrice et de ses créanciers, comme celui des employés dont les emplois sont menacés ou celui de la communauté dans laquelle évolue la compagnie débitrice (*Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 102; *Metcalfe*, par. 50-52; Sarra, p. 162 et 501; Wood, p. 341; voir aussi, pour une illustration éloquente, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (C.J. Ont. (Div. gén.)), par. 50).

[89] La protection de l'intérêt public peut aussi s'étendre à des considérations de moralité commerciale qui reflètent les normes sociales, comme des considérations liées au fait que nul ne devrait bénéficier d'activités frauduleuses auxquelles il a pris part (A. Keay, « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509, p. 513 et 525). Dans des circonstances bien particulières, le tribunal pourrait donc conclure que la protection de l'intérêt public, de même que les

pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*, which explains the relevance of determining whether the VRP claim is a claim resulting from fraud in this case. But while such a conclusion is possible in law, it should not be drawn automatically. In every case, a court should exercise its discretion as indicated in *Callidus* and *Century Services*, and if it so happens that predominant weight must be given to the objective of protecting the public interest, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors.

[90] In the instant case, the City's VRP claim is an ordinary claim because, as we have indicated, the City has not proved the alleged fraud and such proof cannot be inferred solely from the fact that its claim is related to an agreement entered into under the VRP. Its argument that the objective of protecting the public interest favours pre-post compensation must therefore be rejected. The City has not relied on any of the *CCAA*'s other remedial objectives in support of its position. It follows that it has not discharged its burden of proving that the order being sought is appropriate. Moreover, the work performed for the City by SM Group was in the public interest, as it involved continuing to carry out major projects, such as the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[91] The second consideration, due diligence, clearly weighs against pre-post compensation by the City. Under the *CCAA*, this consideration is important because it "discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage" (*Callidus*, at para. 51). The procedure set out in the *CCAA* involves negotiations as well as compromises between the debtor and stakeholders and is overseen by a court and a monitor; it follows that all those who participate must be on an equal footing and must have a clear understanding of their respective obligations and rights (para. 51). This

autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*, d'où la pertinence de déterminer si la créance PRV est une réclamation qui découle de fraude dans le cas qui nous occupe. Mais si une telle conclusion est possible en droit, elle ne devrait pas relever de l'automatisme. Dans chaque cas, le tribunal doit exercer son pouvoir discrétionnaire de la façon indiquée dans les arrêts *Callidus* et *Century Services*, et si d'aventure il est appelé à accorder un poids prépondérant à l'objectif de protection de l'intérêt public, il doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier.

[90] En l'espèce, la créance PRV de la Ville est une créance ordinaire, puisque, comme nous l'avons indiqué, la Ville n'a pas apporté la preuve de la fraude alléguée et cette preuve ne saurait s'inférer du seul fait que sa créance se rattache à une entente conclue en vertu du PRV. En conséquence, sa prétention selon laquelle l'objectif de protection de l'intérêt public milite en faveur de la compensation pré-post doit être rejetée. La Ville n'a pas invoqué d'autre objectif réparateur de la *LACC* au soutien de sa position. Il s'ensuit qu'elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. De plus, les travaux effectués par Groupe SM pour la Ville étaient dans l'intérêt public, puisqu'ils consistaient à poursuivre la réalisation de chantiers majeurs, tels que la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[91] La deuxième considération, soit celle de la diligence, milite clairement à l'encontre de l'exercice de la compensation pré-post par la Ville. Sous le régime de la *LACC*, cette considération est importante étant donné qu'elle « 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 » (*Callidus*, par. 51). La procédure prévue par la *LACC* implique des négociations ainsi que des transactions entre le débiteur et les intéressés et elle est supervisée par le tribunal et le contrôleur; il s'ensuit que tous les acteurs qui y participent doivent

Court accordingly reached the following conclusion in *Callidus*:

> 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). [para. 51]

[92] In this case, it is clear that the City did not act in accordance with the standard of diligence expected in *CCAA* proceedings. On this point, Deloitte submits that the City should have given notice of its intention to effect compensation in the days after the initial order was made on August 24, 2018. The record does not show that the City learned of the initial order on August 24, 2018, but, as indicated in an email to counsel for Deloitte, the City was aware of the existence of that order by at least September 10, 2018. Whatever the case may be, we are of the view that a diligent creditor, after learning of the debtor's insolvency when it is subject to proceedings under the *CCAA*, cannot wait 47 to 58 days to notify the debtor of its intention to effect compensation.

[93] The City justifies the lateness of its application by stating that it was waiting for one of the payments on the VRP claim, which was due on October 31, 2018, before taking any action. Yet the VRP agreement indicates that the payment in question was actually due on October 1, 2018. Furthermore, the City knew or ought to have known that the term had already expired several weeks earlier, as SM Group's insolvency had resulted in the loss of the benefit of the term of the VRP claim.

se trouver sur un pied d'égalité et avoir une compréhension sans équivoque de leurs obligations et droits respectifs (par. 51). En conséquence, dans l'arrêt *Callidus*, notre Cour a conclu :

> 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). [par. 51]

[92] Dans la présente affaire, il appert clairement que la Ville ne s'est pas comportée conformément à la norme de diligence attendue dans le cadre d'une procédure fondée sur la *LACC*. À ce propos, Deloitte soutient que la Ville aurait dû signifier son intention d'opérer compensation dans les jours qui ont suivi le prononcé de l'ordonnance initiale, le 24 août 2018. Le dossier ne révèle pas que la Ville a pris connaissance de l'ordonnance initiale dès le 24 août 2018, mais, tel qu'indiqué dans un courriel adressé au procureur de Deloitte, elle connaissait l'existence de cette ordonnance depuis le 10 septembre 2018 au moins. Quoi qu'il en soit, nous sommes d'avis qu'un créancier diligent, une fois qu'il a pris connaissance de l'insolvabilité du débiteur alors qu'il est l'objet d'une procédure intentée en vertu de la *LACC*, ne peut attendre de 47 à 58 jours pour lui signifier son intention d'opérer compensation.

[93] La Ville justifie la tardiveté de sa demande en affirmant qu'elle attendait un des paiements de la créance PRV dû le 31 octobre 2018, avant de prendre quelque action que ce soit. Or, l'entente PRV indique plutôt que ce paiement était dû le 1er octobre 2018. De plus, la Ville savait ou aurait dû savoir que le terme était échu depuis plusieurs semaines déjà, puisque l'insolvabilité de Groupe SM a entraîné la perte du bénéfice du terme de la créance PRV.

[94] Whether intentional or not, this inaction on the City's part tended to place it in a better position than other ordinary creditors at what, we should point out, was a critical time in the restructuring process. By invoking compensation, the City could obtain services without paying for them. The City had to suspect that if it had indicated its intention to proceed in this manner right from the start, as due diligence requires, SM Group would likely have refused to undertake the work provided for in the contract, knowing that it would not be paid and that this would be a major stumbling block in the interim financing process. What is more, under s. 32 of the *CCAA*, SM Group could even have asked that the contract be resiliated.

[95] In summary, the considerations that guide the exercise of a court's discretion do not justify lifting the stay of the City's right to pre-post compensation. Given our conclusions on the first two considerations, it is not necessary for us to discuss the City's good faith. In our view, remanding the case to the court of original jurisdiction would lead inevitably to the same outcome.

B. *Water Meter Contract Claim*

[96] Here again, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation. However, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in the case relating to the water meter contract. The relevant excerpts from its judgment are as follows:

[TRANSLATION]

THE COURT, seized of the Application of Ville de Montréal dated September 27, 2018 for authorization to lift the stay of proceedings in order to deal with and liquidate a claim in the Civil Division ("**Application**");

. . .

LIFTS, in favour of the Applicant, Ville de Montréal, the stay of proceedings ordered in this case with regard to S.M.

[94] Intentionnelle ou non, cette inaction de la Ville était de nature à la placer dans une position plus avantageuse que celle des autres créanciers ordinaires, et ce, faut-il le souligner, à un moment crucial des procédures de restructuration. En effet, en invoquant compensation, elle pouvait, ce faisant, obtenir des services sans les payer. La Ville devait se douter que si elle avait manifesté son intention de procéder ainsi dès le départ, en toute diligence, Groupe SM aurait vraisemblablement refusé d'entreprendre les travaux prévus au contrat, sachant qu'il ne serait pas payé et qu'il s'agirait là d'un obstacle majeur au processus de financement intérimaire. Qui plus est, suivant l'art. 32 de la *LACC*, Groupe SM aurait même pu demander la résiliation de ce contrat.

[95] En somme, les considérations guidant l'exercice du pouvoir discrétionnaire du tribunal ne justifient pas de lever la suspension du droit à la compensation pré-post de la Ville. Considérant nos conclusions relatives aux deux premières considérations, il n'est pas nécessaire de nous pencher sur la bonne foi de la Ville. Nous sommes d'avis que le renvoi du dossier en première instance mènerait inéluctablement au même résultat.

B. *Créance relative au contrat des compteurs d'eau*

[96] Ici encore, les termes de l'ordonnance de suspension prononcée par le Tribunal sont suffisamment larges pour interdire la compensation pré-post. Le Tribunal a cependant accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans le dossier relatif au contrat des compteurs d'eau. Voici les extraits pertinents de son jugement :

LE TRIBUNAL, saisi de la Demande de la Ville de Montréal datée du 27 septembre 2018 pour être autorisée à lever la suspension des procédures afin de traiter et liquider une réclamation en Chambre civile (la « **Demande** »);

. . .

LÈVE, en faveur de la Requérante Ville de Montréal, la suspension des procédures ordonnée dans ce dossier

Consultants Inc., The S.M. Group Inc., The SMI Group Inc. and The S.M. Group International L.P. ("**Debtors Concerned**") . . . for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned . . . in the proceedings instituted in the Superior Court of Quebec bearing number 500-17-104932-184; [Emphasis added.]

(A.R., vol. IV, at p. 129)

[97] This order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. The City submits that it is entitled to withhold the payments owed to SM Group until judgment is rendered in that case.

[98] In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of the case relating to the water meter contract would not be appropriate. Remanding the case to the court of original jurisdiction for a decision on this question would, once again, be unhelpful and contrary to the interests of justice.

[99] Not only would the order being sought by the City place Thornhill at the mercy of the outcome of lengthy and complex judicial proceedings — which, it must not be forgotten, concern a claim for several million dollars — but it would not be appropriate for the same reasons as those relating to the VRP claim. The City is conflating the public interest with its own interest as a public body with a claim that was never established. In addition, the City did not act diligently. Although its originating application in the case relating to the water meter contract was filed on September 26, 2018, it breached its obligation of diligence by waiting until November 7, 2018 before indicating its intention to effect compensation, even though it had been aware of the initial order since at least September 10, 2018.

à l'égard de Les Consultants S.M. inc., Le Groupe S.M. inc., le Groupe SMI inc. et Le Groupe S.M. International S.E.C. (les « **Débitrices visées** ») [. . .] afin uniquement de permettre à la Requérante, Ville de Montréal, d'établir sa réclamation contre les Débitrices visées [. . .] dans le cadre des procédures initiées devant la Cour supérieure du Québec portant le numéro 500-17-104932-184; [Nous soulignons.]

(d.a., vol. IV, p. 129)

[97] Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. La Ville affirme qu'elle est en droit de retenir les paiements dus à Groupe SM jusqu'à ce qu'un jugement soit rendu dans l'affaire relative au contrat des compteurs d'eau.

[98] Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau n'est pas indiquée. Le renvoi du dossier en première instance pour trancher cette question serait, encore une fois, inutile et contraire aux intérêts de la justice.

[99] En effet, non seulement l'ordonnance recherchée par la Ville placerait Thornhill à la merci du résultat de procédures judiciaires longues et complexes — qui, faut-il le rappeler, concernent une créance de plusieurs millions —, mais elle ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV. La Ville confond ici l'intérêt public et son propre intérêt en tant qu'organisme public titulaire d'une créance qui n'a jamais été établie. Ensuite, la Ville n'a pas fait montre de diligence. Même si sa demande introductive d'instance dans le dossier relatif au contrat des compteurs d'eau a été introduite le 26 septembre 2018, la Ville a manqué à son obligation de diligence en attendant au 7 novembre 2018 pour signaler son intention d'opérer compensation, alors qu'elle avait connaissance de l'ordonnance initiale au moins depuis le 10 septembre 2018.

VI. Conclusion

[100] For these reasons, we would dismiss this appeal with costs.

English version of the reasons delivered by

[101] BROWN J. (dissenting) — I agree with the majority that a supervising judge has a discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), as to whether to allow a creditor to effect compensation, or set-off, between pre-initial order and post-initial order debts ("pre-post compensation"). I find, however, that this discretion is not limited solely to the exceptional circumstances the majority describes. While my colleagues in the majority recognize the broad discretion conferred on a supervising judge by the *CCAA*, in my view they fail to give full effect to it by concluding that pre-post compensation will never be authorized unless there are exceptional circumstances.

[102] Moreover, unlike my colleagues who limit the scope of s. 21 of the *CCAA* to compensation between debts arising before an initial order is made, I conclude that pre-post compensation is permitted under s. 21 of the *CCAA* but that it must be subject to the exercise of a supervising judge's discretion. The majority at the Quebec Court of Appeal (2020 QCCA 438), like the supervising judge (2019 QCCS 2316), erred in relying on the Quebec Court of Appeal's decision in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, to conclude that pre-post compensation will never be authorized. But, for the reasons set out below, this Court must in my view reject the approach taken in *Kitco*.

[103] Given that the supervising judge in this case did not exercise her discretion, believing herself to be bound by *Kitco*, it would be unwise for this Court to exercise that discretion for the first time in order to determine whether Ville de Montréal

VI. Conclusion

[100] Pour ces motifs, nous sommes d'avis de rejeter le présent pourvoi avec dépens.

Les motifs suivants ont été rendus par

[101] LE JUGE BROWN (dissident) — Je partage l'avis de la majorité selon lequel le juge surveillant possède, en vertu de l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale (« compensation pré-post »). Cependant, j'estime que ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. En effet, à mon avis, bien qu'ils reconnaissent le large pouvoir discrétionnaire conféré au juge surveillant par la *LACC*, mes collègues majoritaires échouent à lui donner plein effet en ce qu'ils concluent que la compensation pré-post ne sera jamais autorisée sauf circonstances exceptionnelles.

[102] En outre, contrairement à mes collègues, qui restreignent le champ d'application de l'art. 21 de la *LACC* à la compensation entre des dettes nées avant la délivrance de l'ordonnance initiale, je conclus que la compensation pré-post est permise en vertu de l'art. 21 de la *LACC*, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. Les juges majoritaires de la Cour d'appel du Québec (2020 QCCA 438), ainsi que la juge surveillante (2019 QCCS 2316), s'appuient erronément sur l'arrêt de la Cour d'appel du Québec dans *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, pour conclure que la compensation pré-post ne sera jamais autorisée. Mais, pour les raisons exprimées ci-dessous, l'approche établie dans l'arrêt *Kitco* doit à mon avis être rejetée par la Cour.

[103] Étant donné que la juge surveillante n'a pas exercé son pouvoir discrétionnaire dans la présente affaire, se croyant liée par l'arrêt *Kitco*, il serait mal avisé pour la Cour d'exercer pour la première fois ce pouvoir afin de déterminer si la Ville de Montréal peut

(the "City") may effect compensation here. I would therefore allow the appeal solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect compensation between the debts incurred by SM Group before the initial order and the amounts owed by the City to SM Group for work performed by the latter after the initial order. I would also allow the appeal so that it can be determined whether compensation is available in respect of the City's water meter claim against SM Group, as nothing in s. 21 of the *CCAA* prohibits judicial compensation.

[104] Furthermore, and again unlike my colleagues, I find that there is no need in this appeal to decide whether the City's claim against SM Group, which derives from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. In my view, s. 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). I nonetheless agree with my colleagues that proof by a creditor that it was a victim of fraud within the meaning of s. 19(2)(d) is a factor favouring pre-post compensation that must be weighed by a supervising judge along with the other relevant considerations.

[105] My colleagues consider it necessary to characterize the City's claim arising from the Voluntary Reimbursement Program ("VRP") because proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit or to deny pre-post compensation (para. 20). As they acknowledge, this is a relevant factor in the exercise of *a supervising judge's* discretion. As I will explain in greater detail below, whether the City's VRP claim results from fraud is a question to be decided *by the supervising judge* in

opérer compensation en l'espèce. Par conséquent, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM antérieures à l'ordonnance initiale et les sommes dues par la Ville à Groupe SM pour des travaux réalisés par ce dernier après l'ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la réclamation de la Ville à l'encontre de Groupe SM à l'égard des compteurs d'eau donne ouverture à compensation, puisque rien dans l'art. 21 de la *LACC* n'interdit la compensation judiciaire.

[104] Au surplus, et contrairement à mes collègues, j'estime qu'il n'est pas nécessaire dans le présent pourvoi de trancher la question de savoir si la réclamation de la Ville de Montréal à l'encontre de Groupe SM, laquelle s'appuie sur la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3, doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la *LACC*. À mon avis, l'art. 21 de la *LACC* doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Je conviens néanmoins avec mes collègues que le fait pour un créancier de démontrer qu'il a été victime d'une fraude au sens de l'al. 19(2)d) est un facteur favorable à la compensation pré-post qui doit être soupesé par le juge surveillant avec les autres considérations pertinentes.

[105] Mes collègues estiment qu'il est nécessaire de qualifier la créance de la Ville de Montréal issue du Programme de remboursement volontaire (« PRV »), parce que la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre ou non la compensation pré-post (par. 20). Tel qu'ils le reconnaissent, il s'agit d'un facteur pertinent dans l'exercice du pouvoir discrétionnaire *du juge surveillant*. Comme je l'explique

the exercise of her discretion, not by *my colleagues* or this Court.

I. Decision of the Quebec Court of Appeal in *Kitco*

[106] Kitco Metals Inc. specialized in buying scrap gold and extracting fine gold from it for resale. It was subject to special tax rules: it paid the goods and services tax and the Quebec sales tax on the purchase of scrap gold ("inputs"), but the sale of fine gold was not subject to these taxes. Under these special rules, Kitco paid the taxes to its gold suppliers, which were required to remit them to the Agence du revenu du Québec ("Agency"). When the fine gold was sold, Kitco was then entitled to a refund of the taxes paid. The Agency, however, became aware of a fraudulent scheme by which the gold suppliers were not remitting to it the taxes they collected, even though it was refunding Kitco for them.

[107] The Agency, suspecting that Kitco was involved in this fraudulent scheme, sent it a notice of assessment for more than $300 million (the pre-order debt). On June 7, 2011, the Agency proceeded with compulsory execution on that notice to recover the amounts it considered it was owed. The next day, Kitco filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), thereby staying its creditors' remedies (s. 69). One month later, it instead obtained an initial order under the *CCAA* that continued the stay of remedies (stay still in effect at the time of judgment). Meanwhile, Kitco had been continuing its business activities since June 8, 2011: it was paying taxes on inputs and claiming tax refunds from the Agency in accordance with the applicable tax rules. The Agency owed it more than $1.7 million in refunds (the post-order debt) but applied this amount as compensation against the tax assessments it was claiming from Kitco. Kitco successfully brought a

plus amplement ci-après, la question de savoir si la créance PRV de la Ville de Montréal résulte d'une fraude est une question à laquelle il appartient *à la juge surveillante* de répondre dans le cadre de l'exercice de son pouvoir discrétionnaire, et non à *mes collègues* ou à la Cour.

I. L'arrêt *Kitco* de la Cour d'appel du Québec

[106] Métaux Kitco inc. est une entreprise qui se spécialise dans l'achat de ferraille d'or, dont elle extrait l'or fin afin de pouvoir le revendre. En vertu des règles fiscales, elle est soumise à un régime spécial, c'est-à-dire qu'elle paie la taxe sur les produits et services et la taxe de vente du Québec à l'achat de ferraille d'or (« intrants »), mais la vente d'or fin n'est pas assujettie à ces taxes. Conformément à ce régime spécial, Kitco paie les taxes à ses fournisseurs d'or, lesquels doivent remettre ces taxes à l'Agence du revenu du Québec. Par la suite, lors de la vente d'or fin, Kitco a droit à un remboursement des taxes payées. Cependant, l'Agence constate l'existence d'un stratagème frauduleux suivant lequel les fournisseurs d'or ne lui versent pas les taxes perçues, alors qu'elle rembourse Kitco pour celles-ci.

[107] L'Agence suspecte Kitco d'être impliquée dans ce stratagème frauduleux et lui envoie un avis de cotisation de plus de 300 millions de dollars (soit la dette pré-ordonnance). Le 7 juin 2011, elle entreprend l'exécution forcée de cet avis pour récupérer les sommes qu'elle estime dues. Dès le lendemain, Kitco dépose un avis d'intention de faire une proposition sous le régime de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), suspendant les recours de ses créanciers (art. 69). Un mois plus tard, elle obtient plutôt, en vertu de la *LACC*, une ordonnance initiale qui continue la suspension des recours (suspension toujours en vigueur au moment de l'arrêt). Parallèlement, Kitco continue ses activités commerciales depuis le 8 juin 2011 : elle paie des taxes sur les intrants et en réclame le remboursement à l'Agence, conformément au régime fiscal en place. L'Agence lui doit plus de 1,7 million de dollars en remboursement (soit la dette post-ordonnance), mais impute par compensation cette somme sur les

motion in the Superior Court to force the Agency to refund it $1.7 million on the basis that this compensation was unlawful.

[108] Vézina J.A., writing for the Court of Appeal in *Kitco*, began by explaining that June 8, 2011 was the date of commencement of insolvency proceedings and therefore the date on which the creditors' remedies were stayed and their claims had to be established (para. 34 (CanLII)). He also took the view that the compensation effected by the Agency was unlawful. In his opinion, although s. 21 of the *CCAA* does not expressly state that compensation can be effected only in respect of debts that arose prior to insolvency proceedings, a literal interpretation of the section must be rejected because it would be incompatible with, among other things, the principle that ordinary creditors must be treated equally (para. 20). Such an interpretation would also undermine the status quo period that companies in financial difficulty need in order to develop a plan of arrangement (para. 43). Vézina J.A. therefore concluded that a literal interpretation would ultimately be contrary to the *CCAA*'s restructuring objective (para. 45).

[109] This conclusion was based in large part on Vézina J.A.'s observation that the schemes of the *BIA* and the *CCAA* have [TRANSLATION] "close links" and are two "integrated" schemes, which means that "case law and scholarly opinion can be applied to both equally" (paras. 51-52). Relying on para. 56 of *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, he considered that "[t]he general principles of the *BIA* preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy" (*Kitco*, at para. 61). On this point, he found that the principles laid down in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which the Court stated that set-off is like a form of security, cannot readily be transposed into the civil law, in which compensation is automatic and is effected by operation of law once two debts coexist and are certain, liquid and exigible (para. 65). Lastly, he was of the view that s. 21 of the

cotisations fiscales qu'elle réclame à Kitco. Cette dernière présente avec succès une requête devant la Cour supérieure pour forcer l'Agence à lui rembourser 1,7 million de dollars au motif qu'il s'agit d'une compensation illégale.

[108] Dans l'arrêt *Kitco*, le juge Vézina, qui rédige les motifs de la Cour d'appel, explique d'abord que le 8 juin 2011 constitue la date d'ouverture de la procédure en insolvabilité, et donc la date à laquelle les recours des créanciers sont suspendus et leurs réclamations doivent être établies (par. 34). Il se dit aussi d'avis que la compensation opérée par l'Agence est illégale. Selon lui, bien que l'art. 21 de la *LACC* ne dise pas expressément que seules les dettes nées avant les procédures en insolvabilité sont susceptibles de compensation, il faut rejeter l'interprétation littérale de cet article, puisqu'elle serait contraire notamment au principe voulant qu'il faille traiter les créanciers ordinaires sur un pied d'égalité (par. 20). Elle fait également échec à la période de statu quo, laquelle est nécessaire aux entreprises en difficultés financières pour leur permettre d'élaborer un plan d'arrangement (par. 43). Il conclut donc qu'une interprétation littérale serait au final contraire à l'objectif de restructuration de la *LACC* (par. 45).

[109] Cette conclusion s'appuie en grande partie sur le constat du juge Vézina que les régimes de la *LFI* et de la *LACC* entretiennent des « liens étroits » et constituent « deux régimes intégrés », de telle sorte que « les enseignements de la jurisprudence et les avis des auteurs sont transposables de l'[un] à l'autre » (par. 51-52). Il s'appuie sur le par. 56 de l'arrêt *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564, et en retient que « [l]es principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite » (*Kitco*, par. 61). À cet égard, il estime que les enseignements de l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, qui a précisé que la compensation s'apparentait à une forme de garantie, sont difficilement transposables en droit civil où la compensation est automatique et s'opère de plein droit dès que deux dettes coexistent et sont

CCAA and s. 97(3) of the *BIA* identify the point in time when compensation may be effected, that is, on the date on which the creditors' "provable claims" must be established, which is the date of commencement of insolvency proceedings:

[TRANSLATION] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims. . .", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of [commencement of proceedings] that temporal reciprocity is established. [para. 82]

[110] Vézina J.A. found, at para. 78, that the question of what constitutes a "provable claim" is answered by s. 121(1) of the *BIA*, which refers to "[a]ll 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".

[111] With respect, I am of the view that several errors were made in *Kitco*. First, Vézina J.A. erred in relying on this Court's judgment in *D.I.M.S. Construction* to reach the conclusion that pre-post compensation can never be allowed under the *CCAA*, even though that judgment was rendered in the context of a bankruptcy under the *BIA*. Despite the similarities between the insolvency schemes established by the *CCAA* and the *BIA*, these are two different statutes, and their differences are significant in the case at bar. Secondly, *Kitco* was based on an inappropriate narrow interpretation of s. 21 of the *CCAA* that disregarded the "flexible" nature the *CCAA* is recognized as having (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 337) as well as the broad discretion conferred on supervising judges, whereas courts of other Canadian provinces have held that pre-post set-off can be permitted. Thirdly, *Kitco* was decided in a context where a company in financial difficulty was actually restructured, and it

certaines, liquides et exigibles (par. 65). Finalement, il considère que l'art. 21 de la *LACC* et le par. 97(3) de la *LFI* précisent à quel moment peut s'opérer la compensation, soit à la date où doivent être établies les « réclamations prouvables » des créanciers, c'est-à-dire le jour de l'ouverture des procédures d'insolvabilité :

À mon avis, les articles 21 *L.a.c.c.* et 97 (3) *L.f.i.* qui édictent que « les règles de la compensation s'appliquent à toutes les réclamations. . . », précisent par là le moment où la compensation s'opère, soit au moment où doivent être établies les réclamations; c'est au jour d'Ouverture que s'établit la réciprocité temporelle. [par. 82]

[110] Le juge Vézina estime, au par. 78, que la réponse à la question de savoir en quoi consiste une « réclamation prouvable » se trouve au par. 121(1) de la *LFI*, c'est-à-dire « [t]outes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date ».

[111] Avec égards, je suis d'avis que plusieurs erreurs ont été commises dans l'arrêt *Kitco*. Premièrement, le juge Vézina s'est erronément appuyé sur l'arrêt de la Cour dans *D.I.M.S. Construction* pour arriver à la conclusion que la compensation pré-post ne pouvait jamais être autorisée en vertu de la *LACC*, alors que cet arrêt a été rendu dans un contexte de faillite sous le régime de la *LFI*. Malgré les similitudes entre les régimes d'insolvabilité établis par la *LACC* et la *LFI*, ces deux lois sont distinctes — et de manière significative en l'espèce. Deuxièmement, l'arrêt *Kitco* repose sur une interprétation restrictive et inappropriée de l'art. 21 de la *LACC*, qui fait fi du caractère « souple » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14) et [TRADUCTION] « flexible » (R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 337) reconnu à la *LACC* ainsi que du vaste pouvoir discrétionnaire dont le juge surveillant est investi, alors que les tribunaux d'autres provinces canadiennes ont jugé que la compensation pré-post pouvait être permise. Troisièmement, l'arrêt *Kitco* a

cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. *Fundamental Differences Between the Two Insolvency Schemes*

[112] It is important to underscore the fundamental differences between the scheme established by the *CCAA* and the one established by the *BIA*, differences that highlight that, under the *CCAA* scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as "an integrated body of insolvency law" and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

[113] The three principal Canadian statutes dealing with insolvency, the *CCAA*, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), have the following main objectives: ". . . to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value" (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, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 40). More specifically, the *CCAA*'s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection*

été rendu dans un contexte de restructuration réelle d'une entreprise en difficultés financières, et il est difficilement transposable dans un contexte comme celui qui nous occupe, où il s'agit plutôt d'une liquidation des actifs et des contrats d'une entreprise.

A. *Les distinctions fondamentales entre les deux régimes d'insolvabilité*

[112] Il importe de souligner les différences fondamentales entre le régime établi par la *LACC* et celui établi par la *LFI*, lesquelles font ressortir, sous le régime de la *LACC*, le maintien de la réciprocité des dettes ainsi que le vaste pouvoir discrétionnaire permettant au juge surveillant d'autoriser la compensation pré-post. Je ne remets pas en doute l'idée que ces deux régimes doivent être perçus comme « un ensemble intégré de règles du droit de l'insolvabilité » et que des efforts législatifs visant à harmoniser les deux régimes ont été déployés depuis plusieurs décennies (*Century Services*, par. 19-24 et 78). Toutefois, comme nous le verrons ci-dessous, de nombreuses différences persistent entre ces deux régimes (Wood, p. 337).

[113] Les trois principales lois canadiennes en matière d'insolvabilité, c'est-à-dire la *LACC*, la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (« *LLR* »), ont comme objectifs fondamentaux : [TRADUCTION] « . . . le traitement juste et équitable des réclamations des créanciers, la protection de l'intérêt public, la création d'un processus juste, opportun et efficient, et, lors de la prise de la décision de restructurer ou de liquider une entreprise, l'établissement d'un équilibre coûts-avantages maximisant la valeur de celle-ci » (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, objectifs mentionnés avec approbation par la Cour dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 40). La *LACC* a plus particulièrement comme objectif principal de permettre à une entreprise insolvable de se rétablir financièrement et commercialement par le dépôt d'un plan d'arrangement auprès de ses créanciers (Wood, p. 338; B. Boucher, « Procédures en vertu

Droit des affaires — Faillite, insolvabilité et restructuration (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

[114] For these reasons, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The *CCAA* is therefore characterized as "remedial" legislation (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

[115] The Court has found that the *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the *CCAA*, a "broad" discretion is also conferred on supervising judges by s. 11 of the *CCAA* (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make "any order that [the judge] considers appropriate", although it specifies that such an order must be consistent with the restrictions set out in the *CCAA* and must be "appropriate" in light of the circumstances of each case. As this Court noted in *Callidus*, s. 11 is in a sense the "engine" of the *CCAA* (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the *CCAA* allows for the implementation of "creative and effective" solutions (*Century Services*, at para. 21, quoting Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors*

de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, nº 2 et 8). En demandant une ordonnance initiale, l'entreprise insolvable se met à l'abri de ses créanciers, suspendant ainsi leurs recours pendant une certaine période, afin de pouvoir concentrer toutes ses énergies sur la confection d'un plan d'arrangement permettant une relance viable (Boucher, nº 2).

[114] Pour ces raisons, le régime établi par la *LACC* est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif énoncé précédemment, soit la restructuration d'une entreprise en difficultés financières, par opposition à la *LFI*, qui prévoit un ensemble de règles préétablies (Boucher, nº 8; Wood, p. 337). En tant que telle, la *LACC* est une loi qualifiée de « réparatrice » (Boucher, nº 3; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 500).

[115] La Cour a reconnu que les dispositions de la *LACC* doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, notamment permettre la survie des activités de l'entreprise et éviter les pertes sociales et économiques pouvant résulter de la liquidation de cette dernière (*Century Services*, par. 70). En raison de la portée réparatrice de la *LACC*, un « vaste » pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la *LACC* (*Callidus*, par. 48; *Century Services*, par. 14). Cet article prévoit qu'un juge surveillant peut rendre « toute ordonnance qu'il estime indiquée », mais précise toutefois qu'une telle ordonnance ne peut être contraire aux restrictions prévues par la *LACC* et qu'elle doit être « indiquée » au regard des circonstances de chaque affaire. La Cour a indiqué dans l'arrêt *Callidus* que l'art. 11 est en quelque sorte le « moteur » de la *LACC* (par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36). Ce pouvoir discrétionnaire conféré au juge surveillant en vertu de la *LACC* permet la mise en place de solutions « créatives et efficaces » (*Century Services*, par. 21, citant Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la*

Arrangement Act (2002), at p. 41), in recognition of the "positional advantage" gained by supervising judges, who "acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [*CCAA*] proceedings" (*Callidus*, at paras. 47-48). Examples of "creative" solutions adopted by courts under the *CCAA* include "security for debtor in possession financing or super-priority charges on the debtor's assets" and the release of "claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors" (*Century Services*, at para. 62).

Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies (2002), p. 50), en reconnaissance de la « position avantageuse » du juge surveillant, lequel « acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure [fondée sur la *LACC*] » (*Callidus*, par. 47-48). À titre de solutions « créatives » retenues par les tribunaux sous le régime de la *LACC*, mentionnons la « constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur », ainsi que la libération de « tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents » (*Century Services*, par. 62).

[116] As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the *CCAA* enables them to propose solutions "that respond to the circumstances of each case and 'meet contemporary business and social needs'" (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the *CCAA* and has no equivalent in the *BIA*, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

[116] Comme l'a reconnu la Cour encore récemment, le vaste pouvoir discrétionnaire conféré au juge surveillant par l'art. 11 de la *LACC* permet à ce dernier de mettre de l'avant des solutions « susceptibles de répondre aux circonstances de chaque cas et de "[s'adapter] aux besoins commerciaux et sociaux contemporains" » (*Callidus*, par. 48, citant *Century Services*, par. 58). Ce vaste pouvoir discrétionnaire du juge surveillant est unique à la *LACC* et n'a pas d'équivalent dans la *LFI*, laquelle est plutôt fondée sur des règles préétablies visant à régir une gamme de situations. Il s'agit donc là d'une distinction majeure entre les deux régimes d'insolvabilité.

[117] Another major difference between these two schemes is that the *CCAA* allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company's business activities averts "the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70) and "preserves going-concern value" (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the *CCAA*, it is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee (s. 71 of the *BIA*). There is thus no loss of mutuality under

[117] Une autre différence majeure entre ces deux régimes est le fait que la *LACC* permet à une entreprise, après qu'elle a obtenu une ordonnance initiale, de poursuivre ses activités commerciales pendant la période de restructuration ou de réorganisation (*Callidus*, par. 41). La poursuite des activités commerciales de l'entreprise en difficulté évite « les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70) et permet de « protéger sa valeur d'exploitation » (*Callidus*, par. 46). Ainsi, lorsque l'entreprise insolvable a recours à la *LACC*, elle n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la *LFI*, suivant lesquelles le syndic obtient la

the *CCAA*. The status of debtor or creditor of the insolvent company remains unchanged and is not bestowed on a third party.

[118] This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. This same fundamental difference between the *CCAA* scheme and the *BIA* scheme also played a crucial role in *D.I.M.S. Construction*, on which Vézina J.A. largely relied in *Kitco*. In *D.I.M.S. Construction*, this Court had to determine whether the schemes established in two Quebec labour law statutes subverted the scheme of distribution provided for by the *BIA*. Those two statutes created a similar mechanism that required an employer subject to one of them to pay an assessment due from a contractor whose services it had retained. Once the employer had paid the assessment, it was entitled to retain the amount it had paid out of any sums it owed to the contractor, thereby effecting compensation (para. 2). In that case, three employers had been directed to pay the assessments of a contractor, D.I.M.S. Construction inc., *before* it went bankrupt on April 1, 1999, but only one of them had done so before that date (paras. 3-4). D.I.M.S. Construction's trustee in bankruptcy, relying on the Court's judgment in *Husky Oil*, asked the Court to declare that two sections of the statutes in question were inoperable in the context of a bankruptcy under the *BIA* (para. 5).

[119] In her analysis, Deschamps J. began by discussing s. 97(3) of the *BIA*, which concerns compensation, and made two relevant observations. First, because s. 97(3) applies to claims against a bankrupt's estate, a creditor must meet the conditions set out in s. 121(1) of the *BIA*, which means that, in order to effect compensation, the creditor must "prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy" (para. 40 (emphasis added)). Second, s. 97(3) states that compensation is effected in the same manner as if the

saisine des biens du failli (art. 71 de la *LFI*). Il n'y a donc pas de perte de réciprocité sous le régime de la *LACC*. La qualité de débitrice ou de créancière de l'entreprise insolvable demeure inchangée et n'est pas octroyée à un tiers.

[118] Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la *LACC*, par opposition à la *LFI*. En outre, cette même distinction fondamentale entre le régime de la *LACC* et celui de la *LFI* a joué un rôle crucial dans l'arrêt *D.I.M.S. Construction*, sur lequel s'est en grande partie appuyé le juge Vézina dans l'arrêt *Kitco*. En effet, dans l'arrêt *D.I.M.S. Construction*, la Cour devait décider si les régimes législatifs établis dans deux lois québécoises en matière de droit du travail portaient atteinte au plan de répartition prévu par la *LFI*. Ces deux lois établissaient un mécanisme similaire par lequel un employeur assujetti à l'une de ces lois devait payer la cotisation due par un entrepreneur dont il retenait les services. Une fois la cotisation payée par l'employeur, ce dernier avait le droit de retenir sur les sommes qu'il devait à l'entrepreneur le montant de la cotisation qu'il avait déboursé, et donc d'opérer compensation (par. 2). Dans cette affaire, trois employeurs avaient été sommés de payer les cotisations de l'entrepreneur D.I.M.S. Construction inc. *avant* sa faillite le 1er avril 1999, mais un seul d'entre eux avait payé la cotisation avant cette date (par. 3-4). Le syndic à la faillite de D.I.M.S. Construction demandait à la Cour de déclarer inopérants deux articles de ces lois dans le cadre d'une faillite sous le régime de la *LFI* en invoquant l'arrêt de la Cour dans *Husky Oil* (par. 5).

[119] Dans son analyse, la juge Deschamps s'attarde d'abord au par. 97(3) de la *LFI* portant sur la compensation et fait deux constats utiles. Premièrement, comme le par. 97(3) s'applique aux réclamations visant l'actif du failli, le créancier doit remplir les conditions prévues au par. 121(1) de la *LFI*, c'est-à-dire que, pour qu'il puisse opérer compensation, il doit « prouver une créance à laquelle le failli était assujetti en raison d'une obligation contractée antérieurement à la faillite » (par. 40 (je souligne)). Deuxièmement, le par. 97(3) précise que

bankrupt were a plaintiff or a defendant in a lawsuit and, exceptionally, makes it possible to proceed "as if the bankrupt's patrimony had not vested in the trustee as a result of the bankruptcy" (para. 41).

[120] Deschamps J. concluded that there are three possible scenarios in Quebec civil law, depending on when an employer pays an assessment due from a contractor: (1) the payment is made by the employer *before* the bankruptcy, and the debts become certain, liquid and exigible *before* the bankruptcy; (2) the payment is made *before* the bankruptcy and the employer is in debt to the bankrupt contractor, but one of the conditions for legal compensation is not met; and (3) the payment is made *after* the bankruptcy (para. 42). Regarding the third scenario — one that also brings into play art. 1651 of the *Civil Code of Québec*, which provides that a person subrogated to the rights of another (the employer in that case) does not have more rights than the subrogating creditor — Deschamps J. concluded that when the employer pays after the contractor's bankruptcy, "[t]he dual status of creditor and debtor", and therefore the mutuality of the debts, does not arise until *after* the bankruptcy (para. 51). It must therefore be inferred that s. 97(3) of the *BIA*, read in conjunction with ss. 121, 136(3) and 141 of the *BIA*, requires that "the mutual debts come into existence before the bankruptcy" in order for compensation to be effected (para. 55 (emphasis added)). Deschamps J. added at para. 56 that, according to the rules specific to the bankruptcy scheme under the *BIA*, the trustee may object to the substitution of a creditor (the employer in that case) if this has the effect of giving the creditor a security that did not exist at the time of the bankruptcy:

> What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. [Emphasis added.]

la compensation s'opère de la même manière que si le failli était demandeur ou défendeur d'une action en justice, et elle permet exceptionnellement de faire « comme si le patrimoine du failli n'avait pas, par la faillite, été dévolu au syndic » (par. 41).

[120] La juge Deschamps conclut que trois scénarios sont possibles en droit civil québécois en fonction du moment où l'employeur paie la cotisation due par l'entrepreneur : (1) le paiement est fait par l'employeur *avant* la faillite et les dettes sont devenues certaines, liquides et exigibles *avant* la faillite, (2) le paiement est fait *avant* la faillite, l'employeur est endetté envers l'entrepreneur failli, mais l'une des conditions de la compensation légale n'est pas satisfaite et (3) le paiement est fait *après* la faillite (par. 42). Relativement au troisième scénario, lequel fait également interagir l'art. 1651 du *Code civil du Québec*, qui prévoit qu'une personne subrogée dans les droits d'une autre (ici, l'employeur) n'a pas plus de droits que le subrogeant, la juge Deschamps conclut que lorsque l'employeur paie après la faillite de l'entrepreneur, « [l]a double qualité de créancier et de débiteur » et donc la réciprocité des dettes ne survient qu'*après* la faillite (par. 51). Par conséquent, il faut en déduire que, lorsque lu en conjonction avec les art. 121, 136(3) et 141 de la *LFI*, le par. 97(3) de la *LFI* prévoit que « les créances mutuelles doivent avoir pris naissance avant la faillite » pour qu'il y ait compensation (par. 55 (je souligne)). La juge Deschamps ajoute, au par. 56, qu'en vertu des règles propres au régime de la faillite sous la *LFI*, le syndic peut s'opposer à la substitution du créancier (ici, l'employeur), si cela a pour effet de conférer à ce dernier une garantie qui n'existait pas au moment de la faillite :

> Ce qui distingue le paiement avant la faillite du paiement après la faillite est le fait que, dans le premier cas, la substitution de créancier a lieu avant le moment où le syndic acquiert les biens du failli. Lorsque le paiement est fait après la faillite, la substitution est postérieure à la faillite et le syndic est en mesure de s'y opposer. Les principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite. [Je souligne.]

[121] The argument is a simple one. For legal compensation to be effected, in addition to the fact that a claim must be shown to be certain, liquid and exigible, [TRANSLATION] "two persons must be reciprocally debtor and creditor of each other" (*Code civil du Québec: Annotations — Commentaires 2020-2021* (5th ed. 2020), by B. Moore, ed., et al., at p. 1558). This is one of the four essential conditions for compensation to be possible. This mutuality of claims is severed when an insolvent company becomes bankrupt, because a trustee in bankruptcy is appointed and the company's property is vested in the trustee (s. 71 of the *BIA*). On the date of the initial bankruptcy event, the bankrupt company loses its status as creditor or debtor in favour of the trustee. As well, the bankrupt company ceases its business activities and normally does not incur any obligations after the bankruptcy. This is why claims provable under the *BIA* must be established on the date of the initial bankruptcy event and why, logically, compensation cannot be effected between pre- and post-bankruptcy debts (ss. 97(3) and 121(1)). However, as the intervener Union des municipalités du Québec rightly noted at the hearing, the situation is very different when an insolvent company applies for an initial order under the *CCAA*, since the company continues its business activities while at the same time seeking a stay of its creditors' remedies (transcript, at pp. 48-49). Under the *CCAA*, the property of the company applying for an initial order is not vested in a monitor. The mutuality of debts remains intact, as the company continues to be the debtor or creditor of a claim (see, on this point, L. Morin and G.-P. Michaud, "Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA*: After the *Kitco* and *Beyond the Rack* Decisions", in Sarra and Romaine, *Annual Review of Insolvency Law 2016*, 311, at pp. 343-44; see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 23-25 (these authors acknowledge that an insolvent company's property is not vested in a monitor under the *CCAA* and that the mutuality of debts is not severed, but they advocate having the courts interpret the *CCAA* in such a way as to put an end to this mutuality)).

[121] L'argument est simple. Pour qu'il y ait compensation légale, en sus du fait que le caractère certain, liquide et exigible de la créance doit être démontré, « deux personnes doivent être réciproquement débitrices et créancières l'une de l'autre » (*Code civil du Québec : Annotations — Commentaires 2020-2021* (5e éd. 2020), par B. Moore, dir., et autres, p. 1558). Il s'agit là d'une des quatre conditions essentielles pour qu'il soit possible d'opérer compensation. Cette réciprocité des créances cesse d'exister lorsqu'une entreprise insolvable devient faillie, puisqu'un syndic à la faillite est nommé et obtient la saisine de ses biens (art. 71 de la *LFI*). La qualité de créancière ou de débitrice de l'entreprise qui devient faillie s'éteint au profit du syndic le jour de l'ouverture de la faillite. De plus, l'entreprise faillie cesse ses opérations commerciales et n'encourt normalement pas d'obligations post-faillite. C'est pourquoi les réclamations prouvables visées par la *LFI* doivent être établies le jour de l'ouverture de la faillite, et il ne peut logiquement y avoir compensation entre des dettes pré et post-faillite (par. 97(3) et 121(1)). Or, comme l'a fait remarquer avec justesse l'intervenante l'Union des municipalités du Québec à l'audience, la situation est tout autre lorsqu'une entreprise insolvable demande la délivrance d'une ordonnance initiale en vertu de la *LACC*, puisqu'elle continue ses activités commerciales, tout en demandant la suspension des recours de ses créanciers (transcription, p. 48-49). Sous le régime de la *LACC*, le contrôleur n'obtient pas la saisine des biens de l'entreprise ayant demandé une ordonnance initiale. La réciprocité des dettes subsiste, l'entreprise demeurant débitrice ou créancière d'une réclamation (voir à ce sujet L. Morin et G.-P. Michaud, « Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA* : After the *Kitco* and *Beyond the Rack* Decisions », dans Sarra et Romaine, *Annual Review of Insolvency Law 2016*, 311, p. 343-344; voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 23-25 (ces auteurs reconnaissent que la saisine des biens de l'entreprise insolvable n'est pas dévolue au contrôleur dans le cadre de la *LACC*, et que la réciprocité des dettes n'est pas éteinte, mais prêchent pour que la *LACC* soit interprétée par les tribunaux de manière à mettre fin à cette réciprocité)).

[122] These two fundamental differences between the *CCAA* scheme and the *BIA* scheme suffice to explain why this Court should reject the approach proposed in *Kitco*. As we will see below, courts of other Canadian provinces have relied in part on these differences between the two schemes to find that s. 21 of the *CCAA*, unlike the equivalent provisions in the *BIA* (s. 97(3)) and the *WURA* (s. 73(1)), does not prohibit pre-post set-off.

B. *Courts of Other Canadian Provinces Have Recognized the Possibility of Effecting Pre-post Set-off*

[123] For two reasons, the right to effect set-off under the *CCAA* has been a subject of debate among Canadian courts. First, before the legislative reform of 1997 (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12) and the addition of s. 21 (formerly s. 18.1), this right was not formally recognized in the *CCAA*. Secondly, questions relating to the framework for the right to effect set-off have arisen in recent decades, particularly with regard to the possibility of staying this right temporarily after an initial order has been made (*CCAA*, s. 11.02(1); see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 ("*Tungsten No. 1*") (decision on application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 ("*Tungsten No. 2*"); *Re Just Energy Corp.*, 2021 ONSC 1793); or of directly restricting the right in the language of an initial order under the *CCAA* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] More specifically, the question now before this Court is whether s. 21 of the *CCAA* allows pre-post compensation. This question is all the more relevant in the context of a restructuring process under

[122] Ces deux distinctions fondamentales entre les régimes de la *LACC* et de la *LFI* suffisent à expliquer pourquoi l'approche mise de l'avant dans l'arrêt *Kitco* doit être rejetée par la Cour. Comme nous le verrons ci-après, les tribunaux d'autres provinces canadiennes se sont notamment appuyés sur ces distinctions entre les deux régimes pour conclure que l'art. 21 de la *LACC*, contrairement aux dispositions équivalentes dans la *LFI* (par. 97(3)) et la *LLR* (par. 73(1)), n'interdit pas la compensation pré-post.

B. *Les tribunaux d'autres provinces canadiennes ont reconnu la possibilité d'opérer compensation pré-post*

[123] Le droit d'opérer compensation en vertu de la *LACC* a fait l'objet de débats dans la jurisprudence canadienne, et ce, pour deux raisons. D'abord, avant la réforme législative de 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, c. 12) et l'ajout de l'art. 21 (autrefois l'art. 18.1), le droit d'opérer compensation n'était pas formellement reconnu dans la *LACC*. Ensuite, des questions portant sur l'encadrement du droit d'opérer compensation se sont soulevées dans les dernières décennies, notamment en ce qui a trait à la possibilité de suspendre temporairement le droit d'opérer compensation à la suite de la délivrance d'une ordonnance initiale (*LACC*, par. 11.02(1); voir *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications c. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 (« *Tungsten n^o 1* ») (décision sur la demande d'autorisation d'appel), conf. par 2015 BCCA 426, 378 B.C.A.C. 116 (« *Tungsten n^o 2* »); *Re Just Energy Corp.*, 2021 ONSC 1793); ou de restreindre ce droit directement dans le texte d'une ordonnance initiale fondée sur la *LACC* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] Plus particulièrement, la question qui nous occupe ici est celle de savoir si l'art. 21 de la *LACC* permet d'opérer compensation pré-post. Cette question se pose avec une plus grande acuité dans le

the *CCAA* because the insolvent company continues its business activities.

[125] One of the first cases in which this question was considered after the 1997 legislative reform was *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, a judgment of Farley J. of the Ontario Superior Court of Justice. There, Farley J. had to decide whether a paragraph included in an initial order whose purpose was to limit the right of Air Canada's creditors to effect set-off should be varied.[2] Air Canada essentially argued that under the *CCAA*, as under the *BIA*, legal set-off cannot be permitted between pre- and post-order debts (paras. 10-11). Because the *BIA* provides, in s. 71 (formerly s. 71(2)), that the bankrupt's property vests in the trustee on the date of the initial bankruptcy event, Farley J. concluded that there is no longer any mutuality between a creditor and a bankrupt debtor following a bankruptcy, despite such mutuality being a necessary condition for set-off:

> *In a bankruptcy*, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. . . . Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. [Emphasis in original; para. 14.]

[126] Farley J. next considered Air Canada's second argument, that s. 21 (then s. 18.1) of the *CCAA* must be interpreted similarly to s. 73(1) of the *WURA* (at paras. 16-17), which provides that the

[2] The paragraph in question read as follows: "THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date" (para. 2). The last sentence was particularly problematic.

cadre d'un processus de restructuration mené sous le régime de la *LACC*, puisque l'entreprise insolvable continue ses opérations commerciales.

[125] L'une des premières affaires dans lesquelles cette question a été examinée, après la réforme législative de 1997, est la décision *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, rendue par le juge Farley de la Cour supérieure de justice de l'Ontario. Dans cette décision, le juge Farley devait déterminer si un paragraphe inséré dans l'ordonnance initiale et qui visait à limiter le droit pour les créanciers d'Air Canada d'opérer compensation devait être modifié[2]. Essentiellement, Air Canada plaidait que la compensation légale prévue par la *LACC* ne pouvait être autorisée entre des dettes pré et post-ordonnance, comme c'est le cas en vertu de la *LFI* (par. 10-11). Puisque la *LFI* prévoit que, à l'ouverture de la faillite, les biens du failli sont dévolus au syndic en vertu de l'art. 71 (autrefois le par. 71(2)), le juge Farley a conclu qu'il n'y a alors plus de réciprocité entre un créancier et un débiteur failli post-faillite, condition pourtant nécessaire pour qu'il soit possible d'opérer compensation :

> [TRADUCTION] *Lors d'une faillite*, le syndic est ajouté à l'instance. Lorsqu'un créancier effectue des opérations post-faillite avec le syndic de faillite, il ne traite pas avec la même partie, c'est-à-dire avec le débiteur avant la faillite. [. . .] Par conséquent, le créancier qui contracte des obligations post-faillite envers un syndic de faillite ne peut invoquer la compensation légale pour éviter d'acquitter de telles obligations en opérant compensation entre celles-ci et ses réclamations (pré-faillite) contre le failli dont il a fait la preuve. Comme ce ne sont pas les mêmes parties qui sont concernées, il ne saurait y avoir d'obligations réciproques. [En italique dans l'original; par. 14.]

[126] Ensuite, le juge Farley a analysé le second argument d'Air Canada qui prétendait que l'art. 21 de la *LACC* (alors l'art. 18.1), devait être interprété de façon similaire au par. 73(1) de la *LLR* (par. 16-17),

[2] Le paragraphe en question était rédigé ainsi : [TRADUCTION] « LA COUR ORDONNE que seuls peuvent être exercés par les personnes concernées les droits d'opérer compensation qui sont autorisés par l'article 18.1 de la LACC à compter de la date de la présente ordonnance. Il est entendu que nul ne peut opérer compensation sur des obligations d'un Demandeur envers une telle personne nées avant la date de la présente ordonnance. » (par. 2). La dernière phrase posait particulièrement problème.

law of set-off applies to "all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company". He rejected this argument for several reasons, emphasizing in particular the differences between the words of s. 73(1) of the *WURA* and those of s. 21 of the *CCAA*. For example, s. 21 does not provide that set-off must be between claims accruing due as of the date an initial order is made. Farley J. noted that these differences in wording reflect a choice made by Parliament, which did not intend to enact identical set-off provisions in Canada's three insolvency statutes (para. 23). For these reasons, he ordered that the paragraph of the order restricting the right to effect set-off be varied (para. 24).

[127] Although he struck out the part of the initial order that precluded pre-post set-off, Farley J. nonetheless stayed set-off until Air Canada's situation was more stable in order to avoid the disruptive consequences that would result from allowing set-off during the status quo period. He suggested that the best time to effect set-off would be in conjunction with the formation of a plan of arrangement (para. 25).

[128] My colleagues argue (at para. 77) that "*Air Canada* and *Tungsten* [which I will discuss below] did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors." This, however, ignores that *Air Canada* is widely recognized as being authoritative and as standing for the proposition that mutuality is not severed by an initial order made under the *CCAA*, which means that pre-post set-off or compensation is possible but is subject to a supervising judge's power to stay it (see R. Thornton, "Air Canada and Stelco: Legal Developments and Practical Lessons", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R.

lequel prévoit que la compensation s'applique à « toutes les réclamations sur l'actif d'une compagnie et à toutes les procédures en recouvrement de créances d'une compagnie, échues ou devenues exigibles à l'ouverture de la liquidation de la compagnie ». Le juge Farley a rejeté cet argument pour plusieurs raisons, insistant notamment sur les différences entre le texte du par. 73(1) de la *LLR* et celui de l'art. 21 de la *LACC*. Par exemple, ce dernier article ne prévoit pas que la compensation doit s'effectuer entre des réclamations devenues exigibles à la date de la délivrance de l'ordonnance initiale. Le juge Farley a souligné que ces différences rédactionnelles reflètent le choix du législateur, lequel n'a pas voulu adopter des dispositions législatives identiques en matière de compensation dans les trois lois canadiennes en matière d'insolvabilité (par. 23). Pour ces raisons, il a ordonné la modification du paragraphe de l'ordonnance qui limitait le droit d'opérer compensation (par. 24).

[127] Bien qu'il ait radié la partie de l'ordonnance initiale qui empêchait la compensation pré-post, le juge Farley a néanmoins suspendu la mise en œuvre de la compensation jusqu'à ce que la situation d'Air Canada se soit davantage stabilisée, afin d'éviter les conséquences perturbatrices qu'entraînerait le fait de permettre la compensation pendant la période de statu quo. Il a suggéré que le meilleur moment pour opérer compensation serait lors de la formulation d'un plan d'arrangement (par. 25).

[128] Mes collègues prétendent (au par. 77) que « les affaires *Air Canada* et *Tungsten* [que je décris ci-dessous] n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers ». Cette prétention ne tient toutefois pas compte du fait que la décision *Air Canada* est largement reconnue comme faisant autorité et appuyant la proposition selon laquelle la réciprocité n'est pas rompue par une ordonnance initiale rendue en vertu de la *LACC*, de sorte que la compensation pré-post est possible mais assujettie au pouvoir du juge surveillant d'en suspendre l'exécution (voir R. Thornton, « Air Canada and Stelco : Legal Developments and Practical Lessons », dans J.

(6th) 147 ("*Tungsten No. 3*"), at para. 15). For example, Robert Thornton writes:

> Air Canada was indebted to certain parties as at the date of the Initial Order. Subsequent to the date of the Initial Order, those parties became indebted to Air Canada. They wished to set-off their post-CCAA debts against Air Canada's pre-CCAA debts owing to them. . . .
>
> . . .
>
> . . . Farley J. held that there was no loss of mutuality upon the commencement of a CCAA proceeding. Accordingly, legal set-off is available both in respect of debts existing as at the date of an initial order and in respect of debts that arose after the date of an initial order. Farley J. was correct in so doing.
>
> . . .
>
> It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA other than (i) the right to exercise them may be "temporally" stayed and (ii) if the CCAA applicant refuses to acknowledge the set-off, it would be necessary for the creditor to seek judicial intervention.
>
> It is the authors' view that it is appropriate for set-off rights to continue after the commencement of a CCAA proceeding. The CCAA applicant continues to carry on business in the ordinary course. [Emphasis added; pp. 94-96.]

[129] In *Tungsten*, the British Columbia Court of Appeal also considered set-off under s. 21 of the *CCAA* — first in an application for leave to appeal two orders of the British Columbia Supreme Court (*Tungsten No. 1*, per Savage J.A.) and then in an appeal from that decision denying leave to appeal (*Tungsten No. 2*). The insolvent company had obtained an initial order under the *CCAA* effective June 9, 2015, at which time it owed approximately $4.4 million to Global Tungsten and Powders Corp. ("GTP") under a loan agreement. It subsequently continued selling tungsten to GTP, which gave notice

P. Sarra, dir., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten n^o 3* »), par. 15). Par exemple, Robert Thornton écrit :

> [TRADUCTION] Air Canada était endettée envers certaines parties à la date de l'Ordonnance initiale. Après cette date, ces parties sont devenues débitrices d'Air Canada. Elles souhaitaient opérer compensation entre leurs dettes post-LACC envers Air Canada et les dettes pré-LACC de cette dernière envers elles. . . .
>
> . . .
>
> . . . Le juge Farley a conclu qu'il n'y a pas perte de mutualité dès l'introduction de procédures en vertu de la LACC. Par conséquent, la compensation légale est possible tant à l'égard de créances existant à la date d'une ordonnance initiale qu'à l'égard de créances nées après cette date. Le juge Farley était fondé à conclure ainsi.
>
> . . .
>
> Il semble maintenant clair au Canada que l'introduction de procédures en vertu de la LACC n'a pas d'incidence sur la compensation légale et sur la compensation en equity, sous réserve (i) du fait que le droit de les appliquer peut être « temporairement » suspendu et (ii) du fait que si la partie qui invoque la LACC refuse d'acquiescer à la compensation, il sera nécessaire de solliciter l'intervention des tribunaux.
>
> Les auteurs sont d'avis qu'il est approprié que les droits d'opérer compensation continuent de s'appliquer après l'introduction de procédures en vertu de la LACC. La partie qui invoque cette loi continue d'exploiter son entreprise comme à l'habitude. [Je souligne; p. 94-96.]

[129] Dans l'affaire *Tungsten*, la Cour d'appel de la Colombie-Britannique s'est également penchée sur la compensation prévue par l'art. 21 de la *LACC*, d'abord dans le cadre d'une demande de permission d'appeler de deux ordonnances de la Cour suprême de la Colombie-Britannique (*Tungsten n^o 1*, le juge Savage), puis en appel de cette décision refusant la permission d'appeler (*Tungsten n^o 2*). L'entreprise insolvable avait obtenu, en vertu de la *LACC*, une ordonnance initiale prenant effet à compter du 9 juin 2015, date à laquelle elle devait approximativement 4,4 millions de dollars à Global Tungsten and

that it wished to set off its claim (the pre-order debt) against the amounts due or accruing due for the tungsten sold to it (the post-order debt) (*Tungsten No. 1*, at paras. 2 and 6). The chambers judge had held that GTP had a valid right of set-off (*Tungsten No. 2*, at para. 7).

[130] In these two decisions, the main question before the Court of Appeal was whether the chambers judge had erred in concluding that the right to effect set-off could be stayed, like the other creditors' remedies, once the initial order had been made. The question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted under the *CCAA*. Relying on s. 21 of the *CCAA* as well as on s. 11 of that statute, which confers a broad discretion on a supervising judge, the Court of Appeal explained that nothing in the words of s. 21 prohibits a supervising judge from making the right of set-off subject to a stay of remedies (*Tungsten No. 1*, at paras. 12-13 and 16; *Tungsten No. 2*, at paras. 31 and 34-35).

[131] Contrary to what my colleagues say at para. 79, in that case both the chambers judge and the Court of Appeal considered the arguments relating to the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, but they did so from the perspective of a stay of the right to effect set-off rather than by questioning the very possibility of pre-post set-off. This shows that my colleagues' concerns about the disruptive potential of pre-post set-off were given adequate consideration by the supervising judge in exercising his discretion to permit or to stay set-off.

[132] In particular, the chambers judge wrote the following: ". . . a temporal stay of rights can be

Powders Corp. (« GTP ») aux termes d'un contrat de prêt. Par la suite, l'entreprise insolvable continuait de vendre du tungstène à GTP, laquelle a envoyé un avis indiquant qu'elle souhaitait opérer compensation entre sa créance (soit la dette pré-ordonnance) et les sommes échues ou à échoir pour la vente de tungstène (soit la dette post-ordonnance) (*Tungsten n^o^ 1*, par. 2 et 6). Le juge de première instance avait reconnu que GTP possédait un droit valide d'opérer compensation (*Tungsten n^o^ 2*, par. 7).

[130] Dans ces deux décisions, la principale question dont la Cour d'appel était saisie consistait à déterminer si le juge de première instance avait fait erreur en concluant que le droit d'opérer compensation pouvait être suspendu, au même titre que les recours des autres créanciers, à partir de la délivrance de l'ordonnance initiale. La question de savoir si compensation pré-post pouvait être opérée n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise sous le régime de la *LACC*. S'appuyant sur l'art. 21 de la *LACC* ainsi que sur l'art. 11 de celle-ci, qui confère un large pouvoir discrétionnaire au juge surveillant, la Cour d'appel a expliqué que rien dans le texte de l'art. 21 n'interdit au juge surveillant d'assujettir le droit d'opérer compensation à la suspension des recours (*Tungsten n^o^ 1*, par. 12-13 et 16; *Tungsten n^o^ 2*, par. 31 et 34-35).

[131] Contrairement à ce qu'avancent mes collègues au par. 79, dans cette affaire, tant le tribunal de première instance que la Cour d'appel ont considéré les arguments relatifs aux incidences de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, mais dans l'optique de la suspension du droit d'opérer compensation plutôt qu'en s'interrogeant sur la possibilité même de la compensation pré-post. Cela démontre que les inquiétudes de mes collègues quant au potentiel perturbateur de la compensation pré-post sont adéquatement prises en compte par le juge surveillant dans l'exercice de son pouvoir discrétionnaire d'autoriser la compensation ou d'en suspendre l'application.

[132] Le juge de première instance a notamment écrit ce qui suit : [TRADUCTION] « . . . une suspension

granted to further the purpose of the initial order and the purposes of the *Act*" (*Tungsten No. 3*, at para. 25). While conceding that there was some merit to the arguments on the effects of pre-post set-off, he was not prepared to reverse the decision in *Air Canada* (paras. 17-18). Moreover, he stayed the right to effect set-off on the basis that, "[i]n order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential", and he added, among other things, that if the stay of set-off were not continued, the restructuring efforts "would be thrown into disarray" and "[t]he status quo would be significantly altered and the restructuring would effectively be at an end" (para. 32). The judge who considered the application for leave to appeal noted in turn that, "[c]learly, if an attempt at compromise or arrangement is to have any prospect of success there must be a means of holding creditors at bay" (*Tungsten No. 1*, at para. 16). He added that not staying the right to effect set-off would favour GTP to the detriment of the other creditors (paras. 18 and 25). Groberman J.A., who wrote the judgment of the Court of Appeal, stressed the principle that a creditor should not be able to exercise a right of set-off to circumvent a compromise or arrangement under the *CCAA* (*Tungsten No. 2*, at paras. 37-39).

[133] Despite my colleagues' protestations to the contrary, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*.

[134] It must be concluded that the approach proposed by the Quebec Court of Appeal in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. This asymmetry is contrary to

temporaire des droits peut être accordée pour appuyer l'application de l'ordonnance initiale et la réalisation des objectifs de la *Loi* » (*Tungsten n^o^ 3*, par. 25). Il a reconnu que les arguments relatifs aux incidences de la compensation pré-post ont du mérite, mais il n'était pas prêt à renverser la décision *Air Canada* (par. 17-18). Il a en outre suspendu le droit d'opérer compensation parce que, [TRADUCTION] « [a]fin de préserver le statu quo en vue d'effectuer la restructuration, la suspension du droit d'opérer compensation est, et était, absolument essentielle », ajoutant entre autres que, si la suspension de la compensation n'était pas reconduite, les efforts de restructuration « seraient désorganisés » et « [l]e statu quo serait considérablement affecté et cela mettrait effectivement un terme à la restructuration » (par. 32). Le juge saisi de la demande d'autorisation d'appel a quant à lui souligné que, [TRADUCTION] « [d]e toute évidence, pour qu'une tentative de transaction ou d'arrangement ait quelque chance de succès, il faut un moyen de tenir les créanciers à distance » (*Tungsten n^o^ 1*, par. 16). Il a ajouté que l'absence de suspension du droit d'opérer compensation aurait pour effet de favoriser GTP au détriment des autres créanciers (par. 18 et 25). Rédigeant l'arrêt de la Cour d'appel, le juge Groberman a insisté sur le principe selon lequel un créancier ne devrait pas pouvoir se prévaloir du droit d'opérer compensation afin de contourner une transaction ou un arrangement fondé sur la *LACC* (*Tungsten n^o^ 2*, par. 37-39).

[133] Malgré les protestations à l'effet contraire de mes collègues, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*.

[134] Force est de constater que l'approche avancée par la Cour d'appel du Québec dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes. Cette asymétrie va à l'encontre du principe de l'interprétation

the principle of homogenous interpretation of federal statutes (Morin and Michaud, at p. 344).

C. *Restructuring an Insolvent Company Versus Liquidating Its Assets*

[135] Finally, in *Kitco*, Vézina J.A. noted that his conclusions were based on the fact that the insolvent company was engaged in a genuine restructuring process and that staying its creditors' remedies was crucial to bringing this process to a successful conclusion. He stressed that Kitco's restructuring plan was in jeopardy because the Agency was effecting compensation with the amounts it was supposed to pay Kitco. Kitco was required to carry on its activities while paying 15 percent in taxes on its gold inputs without receiving the refund to which it was entitled in this regard. It was thus in an [TRANSLATION] "untenable" position relative to competitors in its field (paras. 47-48).

[136] Staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance, particularly where the exercise of a creditor's right to effect pre-post compensation might sabotage the company's efforts to regain financial health.

[137] In this case, however, and in the opinion of the monitor and the interveners themselves, there has never been any question of SM Group proposing a plan of arrangement. Once SM Group's principal creditors filed an application for an initial order under the *CCAA*, it was clear that they wished to opt for a liquidation process — that is, the sale of the insolvent company to a new buyer. In this particular situation, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to

uniforme des lois fédérales (Morin et Michaud, p. 344).

C. *La restructuration d'une entreprise insolvable versus la liquidation des actifs de cette entreprise*

[135] Enfin, dans l'arrêt *Kitco*, le juge Vézina a souligné que ses conclusions étaient fondées sur le fait que l'entreprise insolvable était engagée dans un véritable processus de restructuration et que la suspension des recours de ses créanciers était essentielle pour lui permettre de mener à bien ce processus. Il a insisté sur le fait que le plan de restructuration de Kitco était mis en péril parce que l'Agence opérait compensation sur les sommes qu'elle devait verser à Kitco. En effet, Kitco était obligée de poursuivre ses activités tout en payant des taxes de l'ordre de 15 p. 100 sur ses intrants d'or sans recevoir le remboursement auquel elle avait droit à cet égard. Elle se trouvait ainsi dans une position « insoutenable » comparativement aux entreprises concurrentes dans son domaine (par. 47-48).

[136] La suspension, en vertu de la *LACC*, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale, en particulier lorsque l'exercice du droit d'un créancier d'opérer compensation pré-post risque de saboter les efforts déployés par l'entreprise pour retrouver sa santé financière.

[137] En l'espèce, toutefois, et de l'avis même du contrôleur et des intervenants, il n'a jamais été question pour Groupe SM de proposer un plan d'arrangement. Dès le dépôt d'une demande d'ordonnance initiale en vertu de la *LACC* par les principaux créanciers de Groupe SM, il était clair que ces derniers souhaitaient opter pour un processus de liquidation, soit la vente de l'entreprise insolvable à un nouvel acquéreur. Dans ce cas particulier, alors qu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours

effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, because a plan of arrangement cannot be contemplated, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process.

II. Discretion Not Exercised by the Supervising Judge in This Case

[138] In my view, pre-post compensation is permitted under s. 21 of the *CCAA*, but it must be subject to the exercise of a supervising judge's discretion. In *Callidus*, this Court clarified the framework for the exercise of this discretion under s. 11 of the *CCAA*. The first two criteria are found in s. 11, which provides that a supervising judge may make any order that is "appropriate" in the circumstances of the case and consistent with the restrictions set out in the *CCAA*. The Court added that the exercise of the discretion must also further the remedial objectives of the *CCAA* and be focused in particular on the criteria of appropriateness, good faith and due diligence (para. 70).

[139] My colleagues make a series of arguments against compensation in general and pre-post compensation in particular: the high disruptive potential of compensation; respect for the status quo period; the loss of incentive for the debtor to provide goods and services during the stay period because it would fear not being paid for them, which would deprive it of the funds needed to continue operating; the fact that an interim lender would most likely refuse to continue to finance the debtor's operations if the loaned funds were destined to enrich another creditor; the fact that the rampart set up by a stay to protect against attacks by creditors would crumble; the fact that compensation deviates from the principle of equality among ordinary creditors and that pre-post compensation amounts to giving certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after

des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, puisqu'un plan d'arrangement n'est pas envisageable, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant inexistant.

II. L'absence d'exercice du pouvoir discrétionnaire par la juge surveillante en l'espèce

[138] À mon avis, la compensation pré-post est permise en vertu de l'art. 21 de la *LACC*, mais elle doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. La Cour a précisé, dans l'arrêt *Callidus*, les balises encadrant l'exercice de ce pouvoir discrétionnaire en vertu de l'art. 11 de la *LACC*. Les deux premiers critères sont énoncés à l'art. 11, qui précise que le juge surveillant peut rendre toute ordonnance qui est « indiquée » dans les circonstances de l'affaire et qui n'est pas contraire aux restrictions prévues par la *LACC*. De plus, la Cour a ajouté que l'exercice du pouvoir discrétionnaire doit permettre la réalisation des objets réparateurs de la *LACC* en s'attachant plus particulièrement aux critères de l'opportunité, de la bonne foi et de la diligence (par. 70).

[139] Mes collègues avancent une série d'arguments à l'encontre de la compensation en général et de la compensation pré-post en particulier : le fort potentiel perturbateur d'une compensation; le respect de la période de statu quo; la perte d'incitatifs pour la débitrice de fournir des biens et services durant la période de suspension, de crainte de ne pas être payée en retour, ce qui aurait pour effet de la priver des fonds nécessaires pour poursuivre ses opérations; le fait que le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice si les sommes prêtées sont destinées à enrichir un autre créancier; le fait que le rempart érigé par la suspension contre les attaques des créanciers s'effriterait; le fait que la compensation déroge au principe de l'égalité entre les créanciers ordinaires et le fait que la compensation pré-post équivaut à attribuer à certains créanciers une « sorte

the commencement of proceedings; etc. (paras. 59, 61 and 73).

[140] Most of these arguments presuppose that pre-post compensation will be systematically allowed without regard for the circumstances of each case and without considering whether it is "appropriate" — hence my colleagues' position that pre-post compensation should never be authorized unless there are exceptional circumstances. Although these arguments are legitimate, they must be left to the supervising judge, who will weigh them — along with the other relevant considerations and circumstances — in exercising the discretion to permit or to deny pre-post compensation in a particular case, having regard to the remedial objectives of the *CCAA*.

[141] Believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, the supervising judge in this case did not exercise her discretion under s. 11 of the *CCAA*. Given that this discretion was not exercised by the supervising judge, it is not for this Court to exercise it to determine whether to permit compensation between the amounts owed by the City to SM Group and the claim held by the City against SM Group. The Court has made it clear that supervising judges are in the best position to decide whether to exercise their discretion in a particular case based on "a circumstance-specific inquiry that must balance the various objectives of the *CCAA*" (*Callidus*, at para. 76).

[142] My colleagues are of the view that remanding the case to the court of original jurisdiction would be unhelpful and not in the interests of justice (paras. 84 and 98). I respectfully disagree. In fact, this Court recently noted in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 704, that in cases involving an exercise of discretion by a court of first instance, "it is not in the interests of justice for this Court to step into [that court's] shoes and decide these matters at first instance", and that this

de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures; etc. (par. 59, 61 et 73).

[140] La plupart de ces arguments présument que la compensation pré-post sera systématiquement accordée sans égards aux circonstances propres à chaque affaire, et nonobstant la question de savoir si celle-ci est « indiquée » — d'où la position de mes collègues selon laquelle la compensation pré-post ne devrait jamais être autorisée, sauf circonstances exceptionnelles. Bien que légitimes, ces arguments doivent être laissés à l'appréciation du juge surveillant qui, dans l'exercice de son pouvoir discrétionnaire d'accorder ou non la compensation pré-post dans une affaire donnée, les soupèsera avec les autres considérations et circonstances pertinentes, le tout à la lumière des objectifs réparateurs de la *LACC*.

[141] Estimant être liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*. Vu l'absence d'exercice de ce pouvoir par la juge surveillante, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation entre les sommes dues par la Ville de Montréal à Groupe SM et la créance de cette dernière à l'encontre de Groupe SM. La Cour a précisé que les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée en s'appuyant sur « une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC* » (*Callidus*, par. 76).

[142] Mes collègues sont d'avis que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice (par. 84 et 98). Avec égards, je ne suis pas d'accord. En effet, la Cour a récemment rappelé dans l'arrêt *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704, que dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, « il n'est pas dans l'intérêt de la justice que notre Cour se mette à la place de [ce tribunal] et

Court's role is limited to reviewing the exercise of the discretion "through [a] deferential lens" (para. 88).

III. Conclusion

[143] For these reasons, I would allow the appeal solely for the purpose of remanding the case to the Superior Court to have it determine whether the City may effect compensation between SM Group's pre-initial order debts and the post-initial order amounts owed by the City to SM Group. I would also allow the appeal so that it can be determined whether the City may effect compensation in respect of its water meter claim.

Appeal dismissed with costs, BROWN J. *dissenting.*

Solicitors for the appellant: IMK, Montréal.

Solicitors for the respondent: Stikeman Elliott, Montréal.

Solicitors for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP: McCarthy Tétrault, Montréal.

Solicitors for the intervener Thornhill Investments Inc.: Fasken Martineau DuMoulin, Montréal.

Solicitor for the intervener Ville de Laval: Service des affaires juridiques de la Ville de Laval, Laval.

Solicitors for the intervener Union des municipalités du Québec: Borden Ladner Gervais, Montréal.

tranche ces questions en première instance » et que le rôle de la Cour se limite à réviser l'exercice de ce pouvoir « avec un regard empreint de déférence » (par. 88).

III. Conclusion

[143] Pour ces raisons, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure afin qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM pré-ordonnance initiale et les sommes dues par la Ville à Groupe SM post-ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la Ville peut opérer compensation quant à sa réclamation à l'égard des compteurs d'eau.

Pourvoi rejeté avec dépens, le juge BROWN *est dissident.*

Procureurs de l'appelante : IMK, Montréal.

Procureurs de l'intimée : Stikeman Elliott, Montréal.

Procureurs des intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Thornhill Investments Inc. : Fasken Martineau DuMoulin, Montréal.

Procureur de l'intervenante la Ville de Laval : Service des affaires juridiques de la Ville de Laval, Laval.

Procureurs de l'intervenante l'Union des municipalités du Québec : Borden Ladner Gervais, Montréal.

CITATION: Nordstrom Canada Retail, Inc., 2023 ONSC 1422
COURT FILE NO.: CV-23-00695619-00CL
DATE: 2023-03-03

SUPERIOR COURT OF JUSTICE – ONTARIO2023-03-01

RE: 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 NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Jeremy Dacks, Tracy Sandler, Martino Calvaruso and Marleigh Dick*, for the Applicants

Susan Ursel, Karen Ensslen, for the Proposed Employee Representative Counsel

Brendan O'Neill and Brad Wiffen, for the Proposed Monitor

George Benchetrit, for the Directors and Officers of the Nordstrom Canada Entities

Aubrey Kauffman, for Nordstrom, Inc. (U.S.)

HEARD and DETERMINED: March 2, 2023

REASONS: March 3, 2023

ENDORSEMENT

Background

[1] At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

[2] Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom,

Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

[3] Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

[4] Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

[5] The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

[6] The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

[7] The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

[8] At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

[9] The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

[10] The Proposed Monitor supports the position of the Applicants.

The Nordstrom Canada Entities

[11] Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

[12] As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

[13] Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

[14] Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

Business of the Applicants

[15] Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

[16] Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

[17] On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

Financial Position of the Nordstrom Canada Entities

[18] As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

[19] Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

[20] Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

[21] The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

[22] Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

[23] Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

[24] The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

Requested Relief

[25] Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

[26] I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

B-3 ("BIA") or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

[27] I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta .

[28] There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include *Target Canada Co. (Re)*, 2015 ONSC 303, *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230.

[29] Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period." In my view, the relief requested in this first-day application meets these criteria.

[30] Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014, at para. 28).

[31] The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

[32] I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

[33] Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or

warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

[34] The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

[35] I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

[36] The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

[37] The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

[38] The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

[39] I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

[40] The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.,* 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30–33 and *Lydian*

International Limited, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[41] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[42] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

[43] Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

[44] Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

[45] The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

[46] The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

[47] I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

[48] The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

[49] I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

[50] The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

[51] For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

[52] The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753, at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

[53] In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

[54] Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

[55] In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222, at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

[56] In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback

Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

[57] In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

Disposition

[58] In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Chief Justice G.B. Morawetz

Date: March 3, 2023

CITATION: *Pride Group Holdings Inc. et al.*, 2024 ONSC 2026
COURT FILE NO.: CV-24-00717340-00CL
DATE: 20240409

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CKEDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRIDE GROUP HOLDINGS INC. and those entities listed in Schedule "A" hereto

RE: Pride Group Holdings Inc., et al., Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Leanne Williams, Rachel Nicholson and Puya Fesharaki*, for the Applicants
Raj Sahni, for the Directors and Officers
Olivia Mann-Foster, for Paccar Entities
Jeffrey Levine, for Roynat Inc. and The Bank of Nova Scotia
Stuart Brotman, for The Lending Syndicate
Shaun Parsons, for TD Equipment Finance Canada
John Salmas, for Bank of Montreal
Marc Wasserman, Harvey Chaiton and Blair McRadu, for Mitsubishi HC Capital
Brendan Bissell, for Versafinance US Corp.
Edmond Lamek, for Triumph Business Capital
Rania Hammad and Lee Nicholson, for MOVETRUST and Boat Capital LP
Elaine Gray and Kim Gage, for Daimler Truck Financial Services Canada Corporation and Daimler Truck Financial Services USA LLC
John MacDonald and Tracy Sandler, for RBC as Financial Service Agent
Caroline Descours, for Regions Bank, Regions Equipment Finance Corporation and Regions Commercial Equipment Finance LLC
Jamey Gage and Trevor Courtis, for Bennington Financial Corp.
Heather Meredith, for National Bank of Canada
Pamela Huff, Chris Bur, Daniel Loberto and Kevin Wu, for the Monitor, Ernst & Young Inc.

HEARD: April 5, 2024

ENDORSEMENT

[1] This is the comeback hearing directed by Chief Justice Morawetz in the Endorsement and Initial Order of March 27, 2024.

[2] The Applicants seek an amended and restated initial order (the "ARIO") that, among other things:

a. extends the Stay Period to and including June 30, 2024;

b. approves a debtor-in-possession ("DIP") facility;

c. elevates the priority of the Charges as described below;

d. confirms that no person shall be entitled to set off amounts that are or may become due to any Pride Entity prior to the date of the Initial Order of March 27, 2024 with any amounts that are or may become due from any of the Pride Entities on or after the date of the Initial Order; and

e. approves each of the Governance Protocol, the Real Estate Monetization Plan, and the Intercompany and Unsecured Claims Preservation Protocol.

[3] At the conclusion of the comeback hearing, I advised the parties that, notwithstanding the objections of certain parties discussed below who submitted that a shorter stay extension was appropriate, the requested stay extension to and including June 30, 2024 was granted, effective immediately, and that the DIP facility was approved, subject to one outstanding issue discussed below.

[4] Given the number of parties involved, and the pace at which this matter was proceeding, there were discussions ongoing between the Applicants on the one hand and certain of the Respondents on the other hand (with the assistance of the Court-appointed Monitor) as to other relief sought and/or with respect to the exact wording that the parties were requesting be captured in the ARIO.

[5] Accordingly, I directed the parties to continue those discussions, albeit for a very short period of time, with a view to narrowing or resolving the issues. I directed the Monitor to provide to me, by end of day yesterday, a revised form of draft order that included the additional language that had been agreed by the parties. I further directed that, to the extent that any issues remained outstanding, the Monitor was to identify those issues for me without further submissions from any party and I would determine those issues on the basis of submissions made at the hearing and the materials filed.

[6] Late yesterday, counsel to the Monitor provided to me a revised version of the ARIO reflecting my rulings made at the conclusion of the hearing last Friday (such as the approval of the requested stay extension) as well as additional language reflecting the input of the stakeholders provided over the weekend to which the Applicants agreed, and which the Monitor approved and recommended as being reasonable and appropriate in the circumstances.

[7] Finally, counsel to the Monitor provided to me proposed additional language to be included in the ARIO to which the Applicants and, importantly, the DIP Lender, did not agree, as follows:

a. counsel for Bennington and MOVE Trust proposed, with the support of a number of other securitization funders, an exception to the paramountcy provision in

paragraph 53 of the draft ARIO to be captured with the addition of the following language after the words "notwithstanding any other provision of this Order": except paragraphs 5, 12, 13, 13A and 14 in relation to Securitization Party Assets; and

b. counsel to Triumph Business Capital requested that the DIP Charge be expressly subject to a carveout to be captured in paragraph 61 of the draft ARIO in respect of the assets of the Applicant, Arnold Transportation Services, in the amount of USD $3 million in favour of Triumph. Counsel to the Applicants (with the consent of the DIP Lenders and the recommendation of the Monitor) are agreeable to a carveout, but maintain the position advanced at the conclusion of the hearing last Friday following a brief adjournment in order for counsel to the DIP Lender to obtain instructions in this regard (at my request), that such carveout have a maximum of CDN $3 million.

[8] I will address in this Endorsement all of the relief sought by the Applicants.

[9] Defined terms in this Endorsement have the meaning given to them in the Endorsement of Chief Justice Morawetz dated March 27, 2024 or the motion materials, unless otherwise stated.

[10] The Applicants rely on the Affidavit of Randall Benson sworn April 2, 2024 together with Exhibits thereto, the Affidavit of Sulakhan Johal sworn March 26, 2024 together with Exhibits thereto, the Pre-Filing Report of the Monitor dated March 27, 2024, and the First Report of the Monitor dated April 4, 2024.

[11] The background to, and context of, this Application are fully set out in the Endorsement of the Chief Justice. However, additional events have transpired since that first hearing. As noted above, events continue to transpire, given the rapid pace of this proceeding.

[12] Pursuant to the Initial Order, the Applicants obtained creditor protection which included, among other things:

a. a stay of proceedings to and including April 6, 2024 in favour of the Applicants and the limited partnerships set out in Schedule "A" to the Initial Order (collectively, the "Pride Entities"), together with certain related companies and personal guarantors as described in the Initial Order;

b. the appointment of Ernst & Young Inc. as the Court-appointed Monitor;

c. the appointment of R.C. Benson Consulting Inc. as Chief Restructuring Officer and authorization for the CRO to act as foreign representative of the Pride Entities, including in respect of the proceedings commenced by the Applicants under Chapter 15 of the United States Bankruptcy Code;

d. an order that the Pride Entities comply with the Governance Protocol which permitted them to continue selling trucks in the ordinary course of business, subject to the terms of that Governance Protocol;

e. an order that service of the Notice of Application on any claimant who has filed a lien under the *Repair and Storage Lien Act* under the Personal Property Registry in any Canadian jurisdiction against any of the Pride Entities, together with the cover letter with directions to access the website of the Monitor, constituted sufficient service of this Application, and all future motions; and

f. approval of the Administration Charge and the Directors' Charge.

[13] On April 1, 2024, the CRO, in its capacity as foreign representative, filed a voluntary Chapter 15 petition for certain of the Pride Entities in the United States Bankruptcy Court for the District of Delaware seeking recognition of the Initial Order.

[14] For the reasons below, I am satisfied that the relief sought by the Applicants on this comeback hearing should be granted as set out in this Endorsement.

[15] The proposed stay extension to and including June 30, 2024 is necessary and appropriate in the circumstances to provide time for the continued operation of the business of the Pride Entities while the Applicants determine the appropriate next steps to be taken to further the necessary restructuring.

[16] No party opposed a stay extension. However, a number of Respondents submitted that a shorter stay extension, such as 30 days, should be granted. In my view, the requested stay extension is appropriate in the circumstances. I observe that June 30 is approximately six weeks away, with the result that the additional period of time in dispute is relatively modest: two – three weeks.

[17] Moreover, while there has clearly been a period during which there was a lack of transparency and visibility resulting in a corresponding lack of trust or confidence of various stakeholders in the Applicants (which is what underlies the request for a short extension), that period predated the commencement of this proceeding. This Court is now engaged in a supervisory role, and the Monitor will have a very active role as a Court officer, alongside the CRO.

[18] Among the overarching objectives of this proceeding, and those that are specifically sought to be advanced through the Governance Protocol discussed below, are to increase visibility, transparency and fairness. In my view, no party will be materially prejudiced by the extra two – three weeks requested, and the requested time will be necessary for the Applicants, with the assistance of the Monitor and CRO, to determine the sequence and timing of next steps in an efficient manner.

[19] As I observed to all present at the hearing of this motion, and while I intend to ensure the procedural and substantive fairness to all parties, it is imperative to minimize the number of Court attendances requiring the vast number of counsel, as were present at this hearing,

in order that costs can be minimized and recoveries can be maximized. Moreover, given the recognition proceedings ongoing in the United States, any order approving a stay extension made by this Court would necessitate a recognition motion in the US proceeding, with associated time and expense required.

[20] I am satisfied that the Applicants and the Pride Entities have acted in good faith and with due diligence and continue to do so. I am also satisfied that, provided that the DIP Facility is approved, the Applicants will have sufficient liquidity to fund operations during the proposed extension period, all as reflected in the projected cash flows appended to the First Report. The Monitor supports the proposed stay extension.

[21] Accordingly, the stay extension is approved pursuant to subsections 11.02(2) and (3) of the *CCAA*.

[22] The DIP Facility is also approved. It is clear that the Pride Entities require interim financing to provide stability, continue going-concern operations and restructure their business. The DIP Facility has been negotiated by the Applicants, in consultation with the Monitor and the CRO, in the maximum principal amount of $30 million, with the Royal Bank of Canada, on behalf of itself and as Agent to the Syndicate Lenders (the "DIP Agent"), all pursuant to the DIP Term Sheet dated April 1, 2024.

[23] The DIP Term Sheet includes the following material terms, among others:

a. financing will be provided pursuant to a $30 million, non-revolving multiple advance facility, which includes a $6.5 million initial advance;

b. the term is until June 30, 2024 as may be extended to September 30, 2024;

c. interest is payable at the Canadian prime rate from time to time in effect, plus 250 bps;

d. certain amounts are required to be applied to repay the DIP Facility, including all payments received by any of the Pride Entities outside the ordinary course of business, whether disclosed or not in the DIP Budget and which exceed $1 million individually or in the aggregate; and, subject to the Governance Protocol and the ARIO, all proceeds from the sale of Secured Assets which proceeds are not contemplated in the DIP Budget and are not subject to a security interest in favour of a third-party financier ranking in priority to the security interest of the Administrative Agent as of the Filing Date.

   The DIP Term Sheet also requires that certain amounts be applied as against the Pre-Filing Secured Obligations of the Syndicate Lenders, including amounts paid in respect of Pre-Filing intercompany advances by the Pride Entities and all amounts paid to the Administrative Agent in respect of Pre-Filing Secured Obligations in accordance with the Real Property Monetization Plan and Governance Protocol, in each case, subject to an opinion from counsel to the Monitor confirming entitlement to such amounts; and

e. there is a commitment fee of $200,000.

[24] The DIP Facility is to be secured by a Court-ordered charge (the "DIP Lenders' Charge"), and it requires that an Intercompany Advances Charge also be granted to secure all payments made after the date of the ARIO by one Pride Entity to another in favour of the entity advancing such amount.

[25] I am satisfied that the DIP Facility is necessary to maintain for the time being the business of the Applicants as a going concern, and that the terms are appropriate and competitive in the circumstances. I am also satisfied that the proposed DIP Lenders' Charge should be approved. It is, not surprisingly, a condition of the DIP Facility.

[26] This Court has jurisdiction pursuant to section 11.2 of the *CCAA* to approve interim financing and grant a corresponding charge in an amount that the Court considered appropriate.

[27] DIP financing will be ordered where the benefits of financing to all stakeholders outweigh potential prejudice to some creditors. Even where it can be established that a creditor may be prejudiced, this factor is only one factor to be considered in equal measure with the other factors set out in section 11.2(4): *Re AbitibiBowater Inc.*, 2009 QCCS 6453 at paras. 16 and 37; *League Assets Corp. (Re)*, 2013 BCSC 2043 at para. 51; and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49(f).

[28] For all of the above reasons, I am satisfied that the factors set out in section 11.2(4), and the section 11.2(1) factors enumerated by the court in *CanWest Publishing Inc.*, 2010 ONSC 222, have been satisfied here. Clearly, the DIP Facility will enhance the prospects of a viable compromise or arrangement being made. Notice has been given to secured creditors and service has been effected on all known affected parties. The Monitor supports both the DIP Facility and the corresponding DIP Lenders' Charge.

[29] Finally, the DIP Lenders' Charge will not prime any valid and enforceable security interest of third-party financiers in specific vehicle and lease collateral or any valid and enforceable mortgage in favour of a third-party mortgagee, which rank in priority to the Syndicate Lenders' Security.

[30] No viable restructuring is possible without the DIP Facility, and the business of the Pride Entities is already in serious jeopardy. Additional and immediate funding is critical. The quantum of that funding has been calculated in good faith by the Applicants with the active involvement of the Monitor. Given the number of lenders with security interests in assets of the Pride Group, the state of its operations and its books and records (which impair any due diligence by any third party lender), as well as the significant involvement of the Syndicate Lenders in the discussions leading up to the CCAA filing and their willingness to provide interim financing, it is far from clear that there would be any other viable alternatives, let alone any alternatives on commercially competitive terms.

[31] I am satisfied that with the assistance of both the Monitor and the Chief Restructuring Officer ("CRO") to continue to monitor operations, approval of the DIP Facility and the corresponding DIP Lenders' Charge is appropriate.

[32] I decline to add the additional language creating an exception to the paramountcy provision proposed by Bennington and MOVE Trust (supported by other securitization funders) referred to above. First, the DIP Agent has confirmed that these proposed changes are not acceptable and, as observed above, there is at least today, no alternative to the proposed DIP Facility which I am satisfied is critical and needs to be approved now. Moreover, the ARIO contains the usual comeback clause permitting any party to seek to vary or amend the terms of the ARIO on seven days' notice if and as necessary.

[33] With respect to the proposed carve-out sought by Triumph, as noted above, the Applicants and the DIP Lenders have agreed to such a carveout, in principle. I am satisfied that this is appropriate given that, at least on the evidence to date (including but not limited to the very late-breaking affidavit of Mr. Daniel Mourning of Triumph sworn April 5, 2024 and delivered just prior to the comeback hearing), it is not clear that Arnold is a borrower or included in any of the consolidated financial statements of the Pride Entities, and nor is it clear that Arnold requires any intercompany advances or advances under the DIP to continue operations. I am satisfied that the carveout is appropriate.

[34] However, I am also satisfied that the compromise (a significant one) agreed to on very short notice by the DIP Lenders and the Applicants that the carveout have a maximum of CDN $3 million is appropriate. I observe that even the Mourning Affidavit describes the customer receivables purchased by Triumph as having a value of "approximately" USD $3.3 million. The exact amount is not certain in the record, and I am satisfied that the potential prejudice to Triumph, if indeed there is any, that could result from my declining to increase the carveout by the incremental amount representing the difference between CDN $3 million and USD $3 million, is more than outweighed by the potential prejudice of the DIP Facility not being approved today.

[35] I am also satisfied that all four priority charges and their relative priority are appropriate and should be approved and/or continued. At the initial hearing presided over by the Chief Justice, the priority of the Administration Charge and the Directors' Charge was deferred since that hearing proceeded effectively on an *ex parte* basis and notice of the charges had not been provided to stakeholders as is required by the *CCAA*.

[36] The Initial Order of the Chief Justice granted an Administration Charge in the maximum amount of $2 million and a Directors' Charge in the maximum amount of $4.1 million. The quantum of each was determined in consultation with the Monitor, but related only to the initial 10-day stay period.

[37] I am satisfied that the proposed increase in the maximum amount of the Administration Charge to $3 million and the proposed increase in the maximum amount of the Directors' Charge to $7.4 million are both appropriate. The increased quantum for each charge was again determined by the Monitor with a view to the proposed extension of the stay of

proceedings to June 30, 2024. The Monitor submits that, in its opinion, the increases are reasonable and supports approval thereof. No party today challenges the quantum of the proposed increase of those charges.

[38] In my view, the proposed quantum of each is appropriate. The proposed increase in the quantum of the Administration Charge was foreshadowed in the affidavit of Mr. Johal sworn in support of the Initial Order, so stakeholders have been on notice of this for some time. The increased quantum reflects the estimated financial exposure during the proposed stay extension period as well as the estimated payment cycles of the Pride Entities, and in my view is appropriate, having considered the relevant factors: see *CanWest*, at para. 54. Pursuant to section 11.52 of the *CCAA*, it is approved.

[39] I am also satisfied that the Intercompany Advances Charge is appropriate. Pursuant to the proposed Preservation Protocol discussed below, the Pride Entities would be entitled to continue to utilize their centralized cash management system currently in place, and that includes the ability to make intercompany transfers. This in turn includes the authority for one Pride Entity to advance amounts to a recipient Pride Entity, and for such recipient to borrow from the lending Pride Entity the amounts advanced in order to fund its ongoing operations (referred to in the materials as the "Intercompany Advances").

[40] Moreover, the DIP Facility permits the advance of funds from one DIP Borrower to another, and the requested relief would help to ensure that stakeholders, including but not limited to the DIP Lenders, are not prejudiced by the movement of such funds.

[41] It follows that a corresponding charge in favour of the lending Pride Entity is appropriate. This is consistent with the overarching objective of maintaining the status quo and avoiding, particularly at this early stage, inadvertently altering relative priorities or rights of creditors of different Pride Entities within the group.

[42] Where the operations and expenses of debtor companies are funded in the ordinary course through intercompany advances, *CCAA* courts have found it to be appropriate to approve the continuation of those arrangements and to grant a corresponding charge: *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 at paras. 33-35 [Performance Sports Group]; and *Walter Energy Canada Holdings, Inc., (Re)*, 2016 BCSC 107 at paras. 62-67 [Walter Energy].

[43] I am further satisfied that the proposed increase in the Directors' Charge is appropriate as was also previewed in the Initial Affidavit. Established by the Applicants in consultation with the Monitor, it reflects approximately two weeks of payroll, one month of Canadian sales tax obligations, and one month of US state sales and use taxes, income taxes and payroll taxes that attract director and officer liability in the jurisdictions in which those entities operate during the proposed stay extension period, all in addition to the current accrued vacation pay and current unremitted source deductions.

[44] For all of these reasons, I am satisfied that the Directors' Charge should be approved pursuant to section 11.51 of the *CCAA*.

[45] The general jurisdiction of the court found in section 11 of the *CCAA* includes the ability to make orders that it thinks appropriate. The express power to grant a critical supplier's charge found in section 11.4 does not remove the inherent jurisdiction of the court to grant other critical supplier protections, including provision for the payment of prefiling amounts to suppliers whose services are critical to the post-filing operations of the debtor: *CanWest*, at para. 50.

[46] A supplier is "critical", or can be, where the particular goods or services are sufficiently integrated into the operations of the debtor company that it would be materially disruptive to the operations and restructuring of the debtor for the particular supplier to cease providing such services and/or it would be difficult or impossible to secure an alternate supplier: *Re Target Canada Co.*, 2015 ONSC 303 at paras. 62-65; and *Re Clover Leaf Holdings Company*, 2019 ONSC 6966 at paras. 24-27.

[47] In my view, the particular circumstances of this case justify the proposed authorization for the Pride Entities to pay certain prefiling amounts, including (with the consent of both the Monitor and the CRO), any amounts owing for goods, services or tolls if the payment is necessary to preserve value, together with insurance premiums that were accrued but unpaid as of the date of filing.

[48] The ARIO sought today contemplates the following priorities among charges:

a. first, the Administration Charge;

b. second, the Intercompany Advances Charge;

c. third, the DIP Lenders' Charge; and

d. fourth, the Directors' Charge.

[49] The ARIO would further provide that the Directors' Charge shall, subject to the priorities listed above, rank in priority to all other Encumbrances except for any validly perfected and enforceable security interest of third-party financiers in specific vehicle and lease collateral; and any valid and enforceable mortgage in favour of a third-party mortgagee, in each case, including for greater certainty, such interests in favour of the Administrative Agent and Syndicate Lenders under the Security.

[50] For the reasons set out above, I am satisfied that the proposed priority of the charges is appropriate. It, too, is supported by the Monitor and no party at the hearing seriously contested the proposed relative priorities.

[51] In addition, the proposed ARIO provides that no person shall be entitled to set off amounts that are or may become due to any Pride Entity prior to the date of the Initial Order with any amounts that are or may become due from any of the Pride Entities on or after the date of the Initial Order, or are or may become due from any of the Pride Entities in respect of obligations arising prior to the date of the ARIO with any amounts that are or may become due to any of the Pride Entities in respect of obligations arising on or after the date of the

Initial Order without the prior written consent of the applicable Pride Entity, the CRO and the Monitor, or further Order of this Court.

[52] I observe that such accords with the law as it now stands in any event: see ss. 11 and 11.02 of the *CCAA* and *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 at para. 62. Moreover, any stakeholder ought not to be prejudiced by this language in that they can seek an order lifting the stay of proceedings if and as necessary. I am satisfied, however, that the proposed language should be included in the ARIO given that certain creditors of Pride Entities have suggested, or taken steps in furtherance of, setting off pre-filing obligations against post-filing obligations. It is important that there be clarity in this regard.

[53] I am also satisfied that the Protocols Order is appropriate and should be approved. The Protocols Order provides for Court approval of the Governance Protocol, the Real Estate Monetization Plan, and the Intercompany and unsecured Claims Preservation Protocol. None of these proposed protocols is opposed. The Protocols are fully supported by the Monitor as well as the Syndicate Lenders and the Directors & Officers. In my view, each of them is appropriate. The protocols, and particularly the Governance Protocol, achieve that objective.

[54] The Governance Protocol provides for reasonable controls and oversight over cash proceeds and provides sufficient scrutiny that distributions and remittances are made in accordance with the rights of all stakeholders considered. The overarching objective, as observed above, is to create an environment of visibility, transparency and fairness, and to maintain the status quo particularly in this early phase of this restructuring, where there remain many unknowns.

[55] It is important to observe that the Governance Protocol is not intended to be a final and determinative document describing how revenues of the Pride Group will be dealt with. Rather, it is intended to provide short-term stability, predictability and equality of treatment for lenders.

[56] To this end, I further observe that a number of stakeholders have made submissions to the effect that their consent or lack of opposition to the approval of the Governance Protocol is not to be taken as any agreement as to the appropriateness of its terms, for all time. Approval today of the Governance Protocol is without prejudice to the rights of any stakeholder to make submissions as to proposed amendments or variations at a later date.

[57] The Real Estate Monetization Plan (also referred to in the materials as the Real Estate Protocol) provides for the requirement that the Pride Entities list for sale all of the real property by no later than May 1, 2024 or such later date as the DIP Agent may agree under the direction of the CRO. At my direction, approval of the Monitor is also required.

[58] It appears that one very significant source of potential recoveries will be the realization of net proceeds from the sale of real property. I am satisfied that the Real Estate Monetization Plan provides for the maximization of such recoveries on an accelerated basis, but does so in an orderly way, and subject to appropriate oversight to ensure that it is in the best

interests of the stakeholders to sell a particular parcel of real property as opposed to keeping it for going concern operations. Proceeds will be dealt with in accordance with the terms of the DIP Term Sheet, the Preservation Protocol and any relevant orders of this Court.

[59] The Intercompany and Unsecured Claims Preservation Protocol provides that, after repayment of specific property mortgages registered on title to the real properties once sold, any net proceeds of sale are pooled in accordance with the mechanisms described in that Protocol, with the objective of preserving claims in the priority and manner as they would have attached to the real properties, until distributions of such proceeds are made.

[60] I am further satisfied that this is appropriate. Certain mortgage lenders of the Pride Entities have provided financing for several real properties which has been cross collateralized as against other real properties. This Protocol ensures that any inequity that could result from the timing of the sale of such properties are minimized. Such inequities could arise from the timing of the sale of a property since certain properties are subject to intercompany claims and others are not.

[61] This Protocol was designed to implement a mechanism to permit mortgagees to be repaid from proceeds of monetization of properties in their respective Mortgage Pools (as defined in the Preservation Protocol) as and when they are sold, but the distribution of proceeds to claimants of sold properties mimics, to the greatest extent possible in the circumstances, the realization to which they would have been entitled had the properties in each Mortgage Pool not been cross collateralized.

[62] The Pride Entities will seek an order from this Court authorizing any distribution from the net proceeds of sale of any properties to the relevant mortgagee at the same time as they seek an order approving the sale of that property. Remaining net proceeds after such distributions will be held by the Monitor.

[63] Following the sale of all property in a Mortgage Pool, the Pride Entities, in consultation with the Monitor, the CRO and the DIP Agent, will seek approval of any distribution to claimants with the same nature and priority as they had immediately prior to the sale, with respect to those properties that have been sold.

[64] For all of these reasons, the requested relief is approved. ARIO and Protocols Order to go in the form signed by me today. Both orders have immediate effect without the necessity of issuing and entering.

[65] The Monitor will schedule the next hearing, to address any requested revisions to the Governance Protocol, expected in approximately two weeks' time, through the Commercial List Office.

Osborne J.

COURT FILE NO.: 04-CL-5306
DATE: 20040322

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

RE: 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 STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for the Applicants

David Jacobs and *Michael McCreary*, for Locals 1005, 5328 and 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer and *Rob Centa*, for United Steelworkers of America

Bob Thornton and *Kyla Mahar*, for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and *Andrew Hatnay*, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if “success” may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act* …
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies’ Creditors Arrangement Act (Canada),* 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)…

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of “debtor company” as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt’s assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union’s affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx,* [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:

> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run…eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

> 33…They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

> "11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 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 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.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Proviseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

> for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed,* Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

> obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. …
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 – January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

[66] On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp*., 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

CITATION: BBB Canada Ltd., 2023 ONSC 1014
COURT FILE NO.: CV-23-00694493-00CL
DATE: 2023-02-13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 **BBB BED BATH & BEYOND CANADA LTD.**

Applicant

BEFORE: Chief Justice G.B. Morawetz.

COUNSEL: *Marc Wasserman, Shawn Irving, Dave Rosenblat and Emily Paplawski*, for the Applicant

Kevin Zych, Michael Shakra and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

Evan Cobb, for JPMorgan Chase (ABL Lenders)

Wael Rostom and Jeffrey Levine, for Sixth Street Specialty Lending, Inc. (FILO Agent)

HEARD and DETERMINED: February 10, 2023

REASONS: February 13, 2023

ENDORSEMENT

[1] At the conclusion of the hearing on February 10, 2023, the Initial Order was granted with reasons to follow. These are the reasons.

Introduction

[2] BBB Canada Limited (the "Applicant") brings this application for an Initial Order and related relief under the *Companies' Creditors Arrangement Act* ("CCAA").

[3] While Bed Bath & Beyond Canada LP ("BBB LP" and together with the Applicant, "BBB Canada") is not an applicant, the Applicant seeks to have the stay of proceedings and other benefits of the Initial Order under the CCAA extended to BBB LP.

[4] The Applicant also seeks a temporary stay of any proceeding against its parent company Bed Bath & Beyond Inc., ("BBBI") and together with its various U.S. subsidiaries and BBB Canada, (the "Bed Bath & Beyond Group") arising out of any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant.

[5] The evidentiary basis for the requested relief is set out in the Affidavit of Holly Etlin, Interim Chief Financial Officer of the Bed Bath & Beyond Group.

[6] The Bed Bath & Beyond Group has been in financial difficulty for a number of years, suffering significant net losses since 2018 and over this period, BBB Canada has had a decline in revenues.

[7] Ms. Etlin states that in an effort to improve the Bed Bath & Beyond Group's financial performance, former management embarked on a series of initiatives designed to transform the business. Unfortunately, the financial situation deteriorated. The Bed Bath & Beyond Group's situation significantly worsened throughout 2022, with declining sales in both the United States and Canada, multiple credit rating downgrades, cash flow constraints, and significant inventory reductions.

[8] Ms. Etlin also states that the financial situation continued to decline in January 2023. The ABL Agent (as defined below) declared events of default and delivered notices of acceleration under both the ABL Facility and BBBI's then US $375 million FILO Facility (of which BBB LP is also a borrower and the Applicant is a guarantor), thereby causing the principal amount of such facilities, together with interest and other fees and obligations, to become immediately due and payable. The ABL Agent also declared cash dominion, which restricted the entire Bed Bath & Beyond Group, including BBB Canada, from spending any cash on hand.

[9] Very recently, BBBI announced a proposed underwritten public offering of shares (the "Offering"), which, if all conditions are met, will provide BBBI with additional time to continue its restructuring efforts for Bed Bath & Beyond Group's business in the United States outside of a bankruptcy filing.

[10] Ms. Etlin states, however, that efforts to identify a going concern solution for Canada have not been successful. The Bed Bath & Beyond Group has concluded that there is not enough capital available to restructure both its business in the United States and properly restructure the Canadian business to achieve profitability.

[11] Ms. Eltin states that BBB Canada is not profitable on a standalone basis and after consideration of all strategic alternatives, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada. BBB Canada is insolvent and will be unable to satisfy its obligations. BBB Canada has commenced these proceedings in order to effect an orderly liquidation of its remaining inventory with assistance from a third-party professional liquidator and intends to vacate its leased retail stores and premises.

Business Strucgture

[12] The Applicant is a federal corporation incorporated pursuant to the *Canada Business Corporations Act* and has a registered office in Toronto, Ontario. The Applicant is a wholly owned subsidiary of BBBI, a corporation incorporated in the State of New York with a head office in Union, New Jersey. BBBI is the ultimate parent corporation of the entire Bed Bath & Beyond Group.

[13] BBB LP is a limited partnership formed under the laws of Ontario with its principal place of business in Richmond Hill, Ontario. The Applicant is the general partner and 99% unitholder of BBB LP and while BBB LP is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP. BBB LP is the operating entity in Canada which conducts substantially all of Bed Bath & Beyond's retail operations and is party to all commercial real property leases in Canada.

Business of the Bath Bed & Beyond Group

[14] The Bed Bath & Beyond Group is a retailer that sells a wide assortment of merchandise in the home, baby, beauty and wellness markets. Within Canada, BBB Canada operates 54 Bed Bath & Beyond stores and 11 buybuy Baby stores. As of January 31, 2023, BBB LP employed approximately 387 full-time employees and 1038 part-time employees in connection with its retail operations across Canada.

[15] Ms. Etlin further states that each BBB Canada retail store is located in premises leased by BBB LP. The vast majority of retail leases to which BBB LP is party are indemnified by BBBI.

[16] BBB Canada relies on BBB on for certain administrative and business support services (the "Shared Services") that are integral to BBB Canada's operations. In addition, all procurement of merchandise for BBB Canada is completed by Liberty Procurement Co. Inc., a wholly owned subsidiary of BBBI. Ms. Etlin states that BBB Canada cannot operate or function without the provision of the Shared Services from BBBI.

Financial Position of the Applicant

[17] As at November 26, 2022, the Bed Bath & Beyond banner in Canada had total assets of approximately $427.4 million, and total liabilities of approximately $342.8 million. The buybuy Baby banner in Canada has total assets of approximately $52.7 million in total liabilities of approximately $86.9 million.

[18] With respect to the secured debt position, Ms. Etlin states that BBBI, certain of its US and Canadian subsidiaries (including BBB LP), JPMorgan Chase Bank, N.A., as administrative agent and collateral agent (in such capacity, the "ABL Agent"), Sixth Street Specialty Lending, Inc. as the "first in, last out" agent ("Sixth Street"), and certain lenders, are parties to an Amended Credit Agreement.

[19] The Amended Credit Agreement provides for aggregate revolving commitments of US $565 million (the "ABL Facility") and a "first in, last out" term loan facility of US $475 million (the "FILO Facility" and together with the ABL Facility, the "Credit Facilities"). Prior to the Second Amendment to the Amended Credit Agreement, (the "Second Amendment"), the aggregate revolving commitments under the ABL Facility were US $1.13 billion and the FILO Facility was US $375 million.

[20] In Canada, the Credit Facilities are secured against all present and after-acquired personal property of BBB LP and the Applicant.

[21] On or around January 13, 2023, certain events of default were triggered under the Amended Credit Agreements (collectively, the "Events of Default") as a result of BBBI's failure to prepay an over-advance and satisfy a financial covenant, among other things. On January 23, 2023, the ABL Agent informed the Bed Bath & Beyond Group that, as a result of the ongoing events of default, a cash dominion (the "Cash Dominion Period") had occurred and the ABL Agent had delivered the applicable dominion notices. Ms. Etlin states that such significant restrictions on the Bed Bath & Beyond Groups cash use severely hampered its ability to continue operating in both Canada and the United States. On January 25, 2023, the ABL Agent sent a notice of acceleration and default interest (the "Acceleration Notice") to the Bed Bath & Beyond Group (including BBB Canada) as a result of the ongoing Events of Default.

[22] The Bed Bath & Beyond Group undertook a further in-depth review of all strategic alternatives. On February 6, 2023, BBBI announced that an equity offering was proceeding in the United States but no acceptable bids were received for any executable transaction involving the Canadian business.

Need for CCAA Relief

[23] Ms. Etlin advises that BBB Canada is in urgent need of protection under the CCAA. BBB Canada is not profitable on a standalone basis. In 2021, both the Applicant and BBB LP reported net losses. For the nine-month period ending November 26, 2022, both the Bed Bath & Beyond and the buybuy Baby banners in Canada reported significant net losses and negative EBITDA. Ms. Etlin further states that BBB Canada does not have the capacity or ability to independently effect a recapitalization or restructuring of the Canadian operations without the support of BBBI. BBB Canada is insolvent from a balance sheet and cash flow perspective.

Discussion

[24] Having reviewed the record and hearing submissions, I am satisfied that the Applicant is insolvent and there are claims against the Applicant in excess of $5 million. The Applicant is a "debtor company" as defined in the CCAA. In arriving at the conclusion that the Applicant is insolvent, I have taken into account that BBB Canada is not profitable on a standalone basis. For the nine-month period ending November 26, 2022, the Bed Bath & Beyond banner in Canada reported a net loss of $87.6 million and EBITDA was negative $81.8 million. For the same period, the buybuy Baby banner in Canada reported a net loss of $11.9 million and its EBITDA was negative $10.4 million. In addition, I am satisfied that the Applicant does not have the capacity to

effect a recapitalization or restructuring of its operations without the support of BBBI and finally, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada.

[25] I am also satisfied that this court has jurisdiction over these proceedings. The chief place of business for the Applicant is Ontario. The Applicant's registered office is in Toronto, Ontario and BBB LP is formed pursuant to the laws of Ontario. The corporate office is located in Mississauga, Ontario and a substantial number of retail stores are located in Ontario.

[26] The Applicant wishes to conduct a controlled and orderly winddown of operations in Canada for the benefit of all stakeholders. The CCAA can be used for the purpose of winding down a business. Examples include *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 31; *Express Fashion Apparel Canada Inc.* and *Express Canada GC GP, Inc. (Re)*, (May 4, 2017) Ontario SCJ (Commercial List), Court File No. CV–17–11785–00CL (Initial Order) at para. 10 and *Forever XXI ULC (Re)*, September 29, 2019, Ontario SCJ, (Commercial List), Court File No. CV–19–00628233–00CL (Endorsement).

[27] With respect to the request for a stay of proceedings and related relief during the Initial Stay Period, section 11.02(1) of the CCAA permits the court to grant an initial stay of up to 10 days, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. At an initial hearing the relief must be limited to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period.

[28] The CCAA expressly applies to debtor companies, but not partnerships. However, where the operations of partnerships are integral and closely related to the operations of the Applicant, the CCAA Court has jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted in *Target, supra* above at paras. 42 – 43 and in *4519922 Canada Inc. (Re)*, 2015 ONSC 124, para. 37.

[29] In this case, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP, as it is related to the Applicant, carries on operations that are integral to the business of the Applicant, is party to all Canadian retail leases, and is a guarantor under the Credit Facilities.

[30] I am satisfied that it is appropriate to grant the Stay of Proceedings and to extend such stay to cover BBB LP.

[31] The Applicant also requests a stay of certain derivative claims against BBBI. Most of the retail leases to which BBB LP is a party are subject to an indemnity provided by BBBI in favour of the landlord. Although BBBI is not an applicant, the Proposed Initial Order includes the temporary stay of any proceeding against or in respect of BBBI arising out of or in connection with any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant. The proposed Initial Order also provides that any landlord claim pursuant to a guarantee in relation to either BBB LP or the Applicant shall be unaffected and shall not be released or

affected in any way in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* ("BIA").

[32] The Applicant submits that the CCAA Court has jurisdiction under section 11 to grant a third party stay and references *Target, supra* at para. 50, *McEwan Enterprises Inc.,* 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30 – 33 and *Lydian International Limited,* 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[33] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[34] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicant and the various Landlords, I am prepared to grant this requested stay of proceedings in respect of BBBI for the initial 10 day period prior to the comeback hearing. To be clear, this stay of proceedings will expire on February 21, 2023, unless further extended at the comeback hearing.

[35] I am also satisfied that it is appropriate to permit the Applicant to make prefiling payments, with the consent of the Monitor, to critical suppliers up to a maximum aggregate amount of $500,000, on terms set out in the Initial Order.

[36] In addition, the Applicant proposes that the Monitor, its counsel, counsel to BBB Canada be granted a Court-ordered charge as security for their respective fees and disbursements relating to services rendered in respect of BBB Canada (the "Administration Charge"). With the concurrence of the proposed Monitor, the Applicant proposes that the Administration Charge for the first 10 days be limited to $0.55 million and will be seeking to increase the Charge at the comeback hearing. The court has jurisdiction to grant such relief pursuant to section 11.52 of the CCAA and in the circumstances, I am satisfied that it is appropriate to grant the requested relief.

[37] I am also satisfied that it is appropriate to grant a Charge in favour of the Directors and Officers of BBB Canada (the "D&O Charge"), in the requested amount of $7.5 million for the first 10-day period.

[38] In summary, an Initial Order is granted with Alvarez & Marsal Canada Inc. being appointed as Monitor. The comeback hearing has been scheduled for Tuesday, February 21, 2023, at 9:00 a.m.

Chief Justice G.B. Morawetz

Date: February 13, 2023