

Court Administration
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Hfx. No. 551716

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. for creditor
protection under s. 11 of the CCAA, and other relief

**BOOK OF AUTHORITIES OF SFPC QUANTUM LP
(SISP Approval Hearing – June 9, 2026)**

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CITATION: Tacora Resources Inc. (Re), 2023 ONSC 6126
COURT FILE NO.: CV-23-00707394-00CL
DATE: 20231030

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TACORA RESOURCES INC.**

BEFORE: KIMMEL J.

COUNSEL: *Ashley Taylor, Eliot Kolers, Lee Nicholson, Natasha Rambaran and RJ Reid*, for
the Applicant, Tacora Resources Inc.

Alan Merskey, Jane Dietrich and Ryan Jacobs, for the Monitor (FTI Consulting
Canada Inc.)

Robert Chadwick, Caroline Descours, Peter Kolla and Carlie Fox, for Cargill,
Incorporated and Cargill International Trading Pte Ltd.

Richard Swan, Sean Zweig and Alexander Payne, for the Ad Hoc Group of Senior
Noteholders and the Indenture Trustee

Natasha MacParland, for Crossingbridge Advisors, LLC

Joe Thorne, for 1128349 B.C. Ltd.

HEARD: October 24, 2023

ENDORSEMENT – COME-BACK HEARING
(ARIO AND SOLICITATION ORDER)

The Come-Back Motion

[1] The court made an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") in respect of Tacora Resources Inc. ("Tacora" or the "company") on October 10, 2023 (the "Initial Order"). The come-back hearing was originally scheduled for October 19, 2023, but was adjourned to October 24, 2023 by order dated October 13, 2023 to afford the company and the participating stakeholders additional time to address certain issues of disagreement among them, and in particular their disagreement over the terms and source of debtor in possession ("DIP") financing that the company needs to carry out its intended restructuring efforts.

[2] The court's October 13, 2023 order adjourning the come-back hearing also extended the expiry of the stay of proceedings provided for in the Initial Order from October 20, 2023 to October 27, 2023 (the "Stay Period"). A further stay extension order was granted on October 27, 2023 while the court's decision on this motion was under reserve, extending the Stay Period to October

31, 2023 and increasing the permitted draws under the DIP financing approved under the Initial Order by \$5 million to address the company's immediate cash needs, which the Monitor confirmed and recommended.

[3] The company seeks the following relief on the come-back motion:

- a. an amended and restated initial order (the "ARIO") to, among other things:
 - i. extend the Stay Period until and including February 9, 2024;
 - ii. authorize Tacora to borrow up to \$75,000,000 under the Cargill DIP Facility;
 - iii. approve the Greenhill Engagement Letter and the Transaction Fee Charge;
 - iv. approve the company's proposed Key Employee Retention Plan (the "KERP"), and authorize Tacora to pay the KERP Funds to the Monitor and grant the KERP Charge;
 - v. grant a sealing order over a confidential schedule to the KERP; and
 - vi. grant an increase to the quantum of the Directors' Charge,
- b. a solicitation order (the "Solicitation Order") to, among other things:
 - i. approve the proposed Solicitation Process; and
 - ii. authorize Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.

[4] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Initial Order and the company's proposed ARIO.

[5] The company owns and operates the Scully Mine (the "Scully Mine"), an iron ore concentrate producer located near Wabush, Newfoundland and Labrador, Canada with a production capacity of six (6) million tonnes per annum ("Mtpa").

Stakeholder Positions

The Ad Hoc Group of Noteholders

[6] An *ad hoc* group of holders of senior secured priority notes ("Senior Priority Notes") and holders of senior secured notes ("Senior Notes") of Tacora (the "AHG") oppose the relief sought by the company on the come-back motion. They comprise a substantial majority of the holders of

both series of Tacora notes¹. The total amount of all of the secured notes under both series, including accrued interest, is estimated to be almost \$270 million. The noteholders (including the AHG) are the most significant secured creditors of Tacora. They are the only stakeholders who oppose the relief sought by the company on the come-back motion.

[7] The AHG's opposition to the ARIO is primarily in respect of the requested court approval and authorization of the Cargill DIP Facility. By a cross-motion the AHG seek the court's approval of their competing DIP proposal made on October 8, 2023 (the "AHG DIP Proposal") that is provided for in their own proposed amended and restated initial order (the "AHG ARIO"). Their cross-motion also seeks various alternative relief if their request for approval of the AHG DIP Proposal and AHG ARIO is not successful (the "Alternative Relief"). The Alternative Relief would entail changes to the Cargill DIP Facility and changes to the proposed KERP and other proposed terms of the ARIO dealing with the priority of certain charges, as well as the appointment of a Chief Restructuring Officer ("CRO").

[8] The AGH only opposes one aspect of the Solicitation Order, which is that it should not only provide for the court's authorization to immediately commence the Solicitation Process but it should also include a direction that the Solicitation Process be commenced immediately.

Cargill

[9] The other significant secured creditor of Tacora is Cargill International Trading Pte Ltd. ("Cargill"), with first and second ranking secured debt of almost \$35 million.

[10] Cargill is party to various commercial arrangements and contracts with Tacora. Tacora sells 100% of the iron ore concentrate production at the Scully Mine to Cargill pursuant to an offtake agreement between Tacora, as seller, and Cargill, as buyer, dated April 5, 2017 and restated on November 9, 2018 (as amended from time to time, the "Offtake Agreement"). Pursuant to an amendment dated March 2, 2020, the term of the Offtake Agreement was extended to a life of mine contract such that Tacora is required to sell and Cargill is required to buy all iron ore concentrate produced at the Scully Mine while it remains operational.

[11] The sale of the iron ore concentrate is also subject to a stockpile agreement between Tacora, as seller, and Cargill, as buyer, dated December 17, 2019 (the "Stockpile Agreement"), which works in conjunction with the Offtake Agreement. The Offtake Agreement and other commercial arrangements between Cargill and Tacora have resulted in significant payments by Tacora to Cargill since 2019 despite Tacora's liquidity issues and financial challenges during this period.

[12] In or around December 2022, Tacora required additional financing to fund operations through the liquidity challenges it was facing at that time. On January 3, 2023, Tacora, as seller, and Cargill, as buyer, entered into an advance payment facility agreement (as amended from time

¹ Although not in evidence, at the hearing counsel for the AHG represented the holdings of the AHG to account for approximately 86% of the total value of the Tacora senior secured notes.

to time, the “APF Agreement”). Pursuant to the APF Agreement, Cargill provided Tacora with an advance payment facility (the “Advance Payments Facility”) under which Cargill made advance payments under the Offtake Agreement in the total principal amount of \$30,000,000 (the “Initial Advances”) to Tacora. Until termination of the APF Agreement, Cargill is required to continue paying Tacora for iron ore concentrate under the Offtake Agreement and may not credit such deliveries against the outstanding balance of the Advance Payments Facility.

[13] Subsequently, on May 29, 2023, Tacora and Cargill entered into an Amended and Restated APF Agreement (the “Second APF Amendment”) to provide Tacora with additional liquidity. The Second APF Amendment provided for a new facility under the Advance Payments Facility whereby Cargill would make margin advances (“Margin Advances”) of up to \$25,000,000 to Tacora. The Margin Advances were primarily made to finance margin payments payable to Cargill under the Offtake Agreement. The outstanding amount of Margin Advances fluctuate daily based on the Platts Index 62% price movement. The Margin Advances rank *pari passu* with the Senior Priority Note and senior to the Senior Notes and the Initial Advances. Pursuant to the Second APF Amendment, the maturity date of the Advance Payments Facility was extended to September 12, 2023.

[14] On June 23, 2023, Tacora entered into a further amendment to the APF Agreement (the “Third APF Amendment”) to provide greater flexibility to Tacora on utilizing the new margin facility provided by the Second APF Amendment. Under the Third APF Amendment, Cargill, in its sole discretion, could make additional prepay advances (“Additional Prepay Advances” and together with the Margin Advances, the “Senior Priority Advances”) to Tacora utilizing any availability under the \$25,000,000 facility created by the Second APF Amendment. On June 29, 2023, Cargill made an Additional Prepay Advance in the amount of \$3,000,000. Additional Prepay Advances are repayable upon demand and rank *pari passu* with the Senior Priority Notes and the Margin Advances, and senior to the Senior Notes and the Initial Advances. No further Additional Prepay Advances have been made by Cargill and the only Additional Prepay Advance made to Tacora has been repaid.

[15] To further enhance the company’s liquidity position in the face of continued negative cash flow, Cargill and the company entered into a wet concentrate purchase and sale agreement (the “Wetcon Agreement”) dated July 10, 2023, whereby Cargill agreed to purchase a stockpile of 172,000 tonnes of wet concentrate located at the Scully Mine from Tacora.

[16] In connection with discussions and negotiations between Tacora’s stakeholders regarding a potential consensual recapitalization transaction, Cargill agreed to extend the maturity date of the Advance Payments Facility from time to time, most recently to October 10, 2023. At the October 24, 2023 hearing, Cargill agreed to further extend the maturity date to allow the court time to render its decision on the come-back motion and the AHG’s cross-motion.

[17] Tacora’s former co-founder, Chief Operating Officer, and Chief Commercial Officer, Matt Lehtinen, was hired by Cargill in 2023 and has responsibility for Cargill’s relationship with Tacora. There are Cargill employees on site on a day-to-day basis in connection with the management of the Scully Mine. Cargill has also had a representative on Tacora’s board of directors (“Board”) for many years. Mr. Leon Davies is a Cargill employee and was its Board

appointee when the Offtake Agreement was last amended and throughout the DIP Process (defined below).

[18] Two Cargill entities are equity-holders in Tacora. Cargill is described as a “related party” under IFRS standards in Tacora’s financial statements.

[19] Cargill Incorporated, an affiliate of Cargill, is the counter-party to the Cargill DIP Facility for which approval is sought under the ARIO.

[20] Cargill (in its various capacities as a stakeholder of Tacora) supports the ARIO and Solicitation Order sought by Tacora at this come-back hearing and opposes the relief sought by the AHG’s cross-motion.

The Monitor and Other Noteholders

[21] The court-appointed monitor under the Initial Order, FTI Consulting Canada Inc. (the “Monitor”), supports the ARIO and Solicitation Order sought by the company, as does one of the company’s Senior Secured Priority Noteholders, Crossingbridge Advisors, LLC (under a reservation of its rights more generally). The remaining noteholders (not accounted for in the AHG) have taken no position on the come-back motion or the cross-motion.

Other Stakeholders

[22] A number of other stakeholders were identified by Tacora in its initial CCAA filing.

[23] Tacora employs approximately 450 employees. Some are salaried (36%) and some are hourly (64%) and more than half of the employees are unionized. The current collective bargaining agreement is in effect until December 31, 2027. Most employees are located at the Scully Mine. Only 13 employees are located at the company’s head office in Grand Rapids, Minnesota.

[24] Tacora also contracts with various local service providers that make available staff to assist Tacora with its operations on a regular basis. Certain of these contractors have staff at the Scully Mine during each shift worked by regular Tacora employees, performing either general labour or specialized tasks at the Scully Mine related to repair and maintenance.

[25] In February 2023, Tacora engaged Partners in Performance (“PIP”), a global management consulting firm, to initiate an operational stabilization and turnaround program at the Scully Mine for a period of 20 weeks, commencing on February 27, 2023. The term of PIP’s consultancy agreement was extended. It has a team that are regularly on site at the Scully Mine to continue the operational stabilization and turnaround program and to assist Tacora develop and action a capital project plan to ramp up to 6 Mtpa capacity. Tacora anticipates enlisting PIP’s continued support throughout its planned restructuring process.

[26] Cargill also provides on-site consultancy support to Tacora, historically at no cost to Tacora.

[27] Tacora is a critical customer for several businesses in Wabush who provide it goods and services and who in turn, provide employment to the local community. Tacora is also party to various equipment leases.

[28] Tacora has contracts with the Wabush Lake Railway, owned by Tacora and operated by Western Labrador Rail Services Inc. (“WLRS”), and with the QNS&L Railway, owned and operated by Quebec North Shore and Labrador Railway Company, Inc (“QNS&L”). QNS&L is a wholly owned subsidiary of the Iron Ore Company of Canada, a competitor that operates another mine in the Labrador iron ore trough. WLRS and QNS&L are needed for the transportation of Tacora’s iron ore concentrate from the Scully Mine to the Port.

[29] Société Ferroviaire et Portuaire de Pointe Noire s.e.c. (“SFPPN”) operates the Port used by Tacora (which is the multi-user port located in Sept-Îles, Quebec) that provides facilities to unload iron ore concentrate from trains delivered from the QNS&L Railway. The use of the Port and the provision of services by SFPPN is set out in a long-term operational agreement with an effective date of December 22, 2022.

[30] On November 17, 2017, Tacora entered into an amendment and restatement of consolidation of mining leases (the “MFC Royalty”) with 0778539 B.C. Ltd. (formerly MFC Bancorp Ltd.) (“MFC”), pursuant to which the parties agreed to amend and restate a lease which provided Tacora with tenure and mining rights to certain premises constituting the Scully Mine in exchange for an ongoing royalty payment based on production.

[31] Tacora has various unsecured debt obligations to the Atlantic Canada Opportunities Agency in respect of financial assistance that has been provided to it through contribution agreements entered into as part of a national initiative to support regional recovery and stimulus. Tacora also has unsecured debt obligations to the Innu Nation pursuant to an impact and benefit agreement.

[32] It is evident that there are a number of unsecured creditors and parties with whom Tacora does business who have a stake in the outcome of Tacora’s restructuring efforts. None of these other stakeholders appeared or took any position in respect of the relief sought by Tacora under the proposed ARIO and Solicitation Order.

Summary of Outcome

[33] The relief requested by Tacora under the proposed ARIO and Solicitation Order (with the one change requested by the AHG) is granted. Tacora has satisfied the court of the necessary requirements for these orders to be made and the requested relief to be granted. The AHG’s Cross-Motion is dismissed.

[34] As the court noted at the time of the approval of the Initial Order, this application was made by Tacora in the face of operational and liquidity challenges that it has been attempting to address since Q3 2022. It has not been able to do so to date, despite:

- a. A strategic review process that was undertaken commencing in January 2023 in furtherance of which the applicant engaged Greenhill & Co. Canada Ltd. (“Greenhill”) to assist it to, among other things, explore, review, and evaluate a

broad range of alternatives including sale opportunities or additional investment into Tacora (the “Strategic Process”).

- b. Tacora’s engagement of a mining operations consultant (PIP) to, among other things, implement operational initiatives to ramp up production at the Scully Mine in February 2023.
- c. Various interim capital raises implemented to improve Tacora’s liquidity position in collaboration with its primary secured creditors who agreed to defer various debt obligations over the preceding months.
- d. Attempts since August 2023 to reach an agreement on a consensual restructuring and capitalization plan involving a third party, with the support and involvement of its primary secured creditors, the noteholders, and Cargill.

[35] Tacora’s liquidity and operational challenges and the confluence of factors that have led it to apply for protection under the CCAA transpired over the past few years since the Scully Mine first became operational in 2019 and are detailed in the supporting materials filed. No one has suggested that Tacora is not in need of urgent interim financing and court protection given its current circumstances.

[36] The terms of the Cargill DIP Facility and its implications were considered by Tacora’s Board, with the benefit of the advice and recommendations of the company’s financial advisor and investment banker, Greehill, and of the Monitor. The Cargill DIP Facility was determined to be the superior of the two options for DIP financing that were available to Tacora; the other alternative being the AHG DIP Proposal, the terms of which the company and its advisors determined were inferior, including and primarily from a financial and economic perspective.

[37] Each of the Cargill DIP Facility and the AHG DIP Proposal contain terms that benefit the commercial interests of the counterparties and that could reduce the company’s flexibility and/or options in the context of the company’s planned Solicitation Process (the Cargill DIP Facility with respect to the preservation of the Offtake Agreement pending a transaction arising from, or the termination of, the Solicitation Process, and the AHG DIP Proposal with respect to the provisions for a topping credit bid option and stalking horse agreement). These were accounted for in the deliberations over the two options.

[38] While the Cargill DIP Facility is not the preferred DIP financing option of the AHG, it does not materially prejudice their interests, nor were they treated unfairly or were their interests unduly disregarded in the DIP Process that led up to the company’s acceptance of the Cargill DIP term sheet on October 8, 2023 and the execution of the Cargill DIP Facility.

[39] For the reasons that follow, I have found the terms of the proposed ARIO and Solicitation Order to be fair and reasonably necessary for the continued operations of Tacora in the ordinary course of business to provide stability for the company and to allow it the breathing room that it needs to try to restructure its affairs so that it can continue as a going concern. These orders are approved.

The Issues

[40] In general terms, what the court is concerned with on this come-back motion is whether the applicant has satisfied it of the requirements necessary to grant the ARIO (that includes the approval of the Cargill DIP Facility and DIP Charge) and the Solicitation Order.

[41] The issues raised for the court's consideration by the AHG cross-motion are whether the court should decline to approve the Cargill DIP Facility and replace it with the AHG DIP Proposal (under the AHG ARIO); or, whether the Alternative Relief should be ordered with corresponding amendments to the ARIO as proposed by Tacora. The issues relating to the DIP financing to be approved will be addressed first since they were the primary focus of the written and oral submissions.

Analysis

Should the Cargill DIP Financing be Approved?

[42] This *de novo* come-back hearing requires the court to consider whether the Cargill DIP Facility ought to be approved. Tacora bears the burden of the relief it seeks in this regard. Part of that burden involves dispelling the criticisms to the Cargill DIP Facility that the AHG has raised.

[43] The AHG submits that: (a) the process leading to the company's approval of the Cargill DIP Facility was inherently flawed and unfair; (b) the Cargill DIP Facility does not meet the factors in s. 11.2(4) of the CCAA, in that it seriously prejudices the senior secured noteholders; (c) the Cargill DIP Facility is being used for an improper purpose, to further leverage Cargill's own commercial interests, rather than benefit Tacora; and, in these circumstances, (d) the AHG asks the court to approve its proposed form of ARIO that includes the approval of the AHG DIP Proposal *in lieu* of the Cargill DIP Facility.

[44] These submissions will be addressed in turn. The second submission of the AHG requires the court to consider more broadly whether the applicant has satisfied its onus to demonstrate that it is appropriate for the court to approve the Cargill DIP Facility and Charge, having regard to s. 11.2 of the CCAA, in the context of which any prejudice to the only other secured creditors is one of the relevant factors.

a) The DIP Process

i. The Initiation of the DIP Process

[45] Greenhill was engaged by Tacora in January 2023 to act as financial advisor and investment banker to Tacora. It initially sought interested purchasers for Tacora, but there were no offers or expressions of interest. One potential strategic purchaser that entered into a letter of intent with Tacora and conducted due diligence later withdrew from the potential acquisition, including due to concerns about the Offtake Agreement.

[46] Greenhill turned its attention to efforts to obtain financing, and eventually directed its attention in or about late August and early September 2023 to the solicitation of DIP proposals (the "DIP Process"). Various milestones dates and other parameters were put in place for the

receipt of DIP proposals. Greenhill received four proposals for DIP financing. One such proposal was not actionable, including because it specified that the renegotiation or termination of the Offtake Agreement was a precondition to the delivery of a DIP offer.

[47] Tacora and its advisors recognized that the Offtake Agreement presented some unique constraints and identified certain modifications to that agreement that would be desirable from Tacora's perspective, including: (a) changing the term of the Offtake Agreement from life of mine to renewal-based to provide Tacora "greater flexibility"; and (b) increasing Tacora's profit share under the Offtake Agreement. Cargill has not agreed to these or any other amendments to the Offtake Agreement.

[48] In the early part of the DIP Process Cargill submitted a non-binding DIP proposal, which expressly prevented the disclaimer of the Offtake Agreement. Cargill ultimately decided not to submit a bid capable of acceptance by the original proposal deadline that had been specified.

ii. The AHG DIP

[49] The AHG first submitted a non-binding DIP proposal on August 21, 2023 followed by a draft definitive DIP agreement on August 28, 2023. By this time, Tacora had no other actionable DIP proposals. The Board considered what the AHG was proposing, the advice and endorsement of the company's advisors, and the recommendation of the (at that time proposed) Monitor and determined that this was the best (and also the only) option available to the company at the time.

[50] In anticipation of Tacora's planned filing for CCAA protection on September 12, 2023, Tacora executed the AHG DIP on September 11, 2023 (the "AHG DIP") with the unanimous approval of the Board. The AHG DIP was sent to the court on September 11, 2023 with supporting affidavits sworn by Tacora's CEO and the managing director of Greenhill. It was provided to other key stakeholders late that evening in anticipation of the company's planned CCAA filing the following day. In that context, Cargill received a copy of the AHG DIP.

iii. The Suspension and Resumption of the CCAA Filing and Request for Further DIP financing proposals

[51] Just prior to the company formally making its CCAA filing, it was advised that the noteholders, Cargill, and a third party had reached an agreement in principle regarding a consensual restructuring of Tacora that obviated the need for a CCAA filing, so the filing did not proceed on September 12, 2023. To alleviate immediate cash flow concerns while those parties worked towards a binding agreement, Cargill agreed to make certain contractual payments that it had been withholding to protect what it described as its pre-filing contractual set-off rights (which the company disputed).

[52] Negotiations regarding a consensual restructuring ensued for a number of weeks. In the intervening time period, the company's funding needs changed, certain deadlines contemplated under the AHG DIP lapsed and there was a change in the composition of the members of the AHG that were prepared to provide the funding for the AHG DIP. Accordingly, while still holding out the prospect of a consensual restructuring deal, the AHG, of its own accord, sent to Tacora on September 28, 2023 a revised AHG DIP proposal to address these changed circumstances in the event of a CCAA filing.

[53] Having received a new DIP proposal from the AHG, Greenhill decided to reach out to Cargill on September 29, 2023 to see if it was willing to make a DIP proposal as well. Cargill was not told about the revised AHG DIP proposal. The AHG was not told about the reach out to Cargill.

[54] Initially, Cargill remained focused on achieving a definitive restructuring agreement. When that fell apart, Tacora was informed on October 4, 2023 that no binding agreement had been reached. In anticipation of this possibility, a hearing date had been scheduled for the initial CCAA application on October 6, 2023.

[55] Cargill² submitted a non-binding DIP proposal on October 5, 2023. At the request of the company, Cargill agreed that it would pay certain further outstanding invoices that it had been withholding to protect what it described as its pre-filing contractual set-off rights (which the company disputed) to provide cash flow to the company on the condition that the company agree not to make a CCAA filing prior to October 10, 2023. The company agreed to this.

[56] The company had been communicating with the AHG since receiving its September 28, 2023 proposed revised AHG DIP terms. On the evening of October 5, 2023, Greenhill asked both the AHG and Cargill to submit their respective best and final DIP offers by 5 p.m. on October 7, 2023. They were each made aware that the other had provided non-binding proposals.

[57] Cargill submitted a binding DIP proposal on October 7, 2023. Tacora asked for a higher amount of DIP financing, which Cargill agreed to on October 8, 2023.

[58] The AHG continued to communicate with the company about the changes that it was proposing to make to the AHG DIP. It was also asked to consider making changes requested by the company. There was an exchange of emails that eventually resulted in the final revised draft AGH DIP Proposal being transmitted on Sunday October 8, 2023, which was accompanied by a redline version showing the changes to the September 11, 2023 AHG DIP. The AHG made it clear that they were prepared to stand behind the September 11, 2023 AHG DIP (that was never implemented) with necessary amendments to account for the delay in the CCAA filing etc. That continued to be their position at the hearing.

iv. The Decision to Execute the Cargill DIP Facility

[59] The October 7, 2023 Cargill DIP term sheet (with the increased funding amount that Cargill International agreed to on October 8, 2023) and the October 8, 2023 AHG DIP Proposal were compared and considered side by side at the Tacora October 8, 2023 Board meeting with the benefit of a detailed review and analysis prepared by Greenhill.

² The formal contracting party is an affiliate of Cargill, Cargill International. References in this endorsement to “Cargill” in the context of the DIP Process and ultimately the execution of the Cargill DIP Facility do not attempt to distinguish between the two Cargill entities. They are both called “Cargill” but shall be read as referring to the specific entity that was involved in accordance with the context of the events described.

[60] Below is a summary of the comparison of costs, expenses and key terms and conditions of the AHG DIP Proposal to the Cargill DIP term sheet (ultimately accepted by the company and reflected in the Cargill DIP Facility). As a matter of convenience, this summary has been extracted from the Monitor's Pre-Filing Report dated October 9, 2023, which concluded that the Cargill DIP term sheet:

- a. requires a significantly smaller DIP amount and DIP Charge, thereby reducing the potential prejudice to existing creditors;
- b. has significantly lower costs, including lower aggregate interest, lower DIP fees and lower DIP Expenses. Greenhill's comparison indicated the cost of the Cargill DIP to be less than half the cost of the AHG DIP Proposal and that it represented an overall estimated \$7 million in cost savings;
- c. has significantly more favourable Permitted Variance parameters and similar tests under its terms, conditions and covenants;
- d. provides for significantly less potential operational disruption through the continuation of the various existing Cargill arrangements, including the margin and hedging arrangements which would likely not be available under the AHG DIP; and
- e. provides certainty in respect of the KERP.

[61] In addition to the comparison of the two DIP financing proposals that were available to the company on October 8, 2023, the Monitor compared the cost of the Cargill DIP Facility to that of other court approved interim financings, and concluded that: The cost of the Cargill DIP Facility appears to be within the range of costs, in terms of annualized interest and fees, for interim financings of similar size approved in other CCAA proceedings. The Monitor also expressed the view that the terms of the Cargill DIP Facility are within market parameters in respect of interest and fees.

[62] Even the AHG concedes that there are elements of the Cargill DIP Facility that are more favourable to the AHG DIP Proposal. The primary "flaws" that the AHG identifies stem from the treatment and implications of the Offtake Agreement and the fact that the noteholders' debt will be "primed" to the extent of the Cargill DIP Facility (which will be at least \$75 million and possibly as much as \$100 million). This latter consideration will be discussed in more detail in the sections of this endorsement that follow, dealing with the CCAA requirements and the claimed prejudice to the AHG. The AHG's concerns about the Offtake Agreement also tie into the third area of criticism regarding the ulterior purpose of Cargill's DIP Facility, which the AHG says is to protect that Offtake Agreement, and will also be discussed later in this endorsement.

[63] After going through the various features that rendered the Cargill DIP Facility superior to the AHG DIP Proposal, Mr. Bandhari of Greenhill testified in his second affidavit that it was for these reasons that the Board determined, following the advice and recommendations of the company's advisors, that the company should proceed with the Cargill DIP Facility. All of the Board members and both Greenhill and the Monitor concluded that the terms of the Cargill DIP

term sheet were superior to the revised AHG DIP Proposal. This conclusion is not seriously challenged. As noted above, the AHG's challenges to the Cargill DIP Facility are on other grounds.

[64] It was for these reasons that on October 9, 2023 following the Board's approval, Tacora executed the Cargill DIP Facility.

v. The Board Process and Governance Concerns

[65] The Monitor expressed the view that "there is no better alternative to the [Cargill] DIP Financing Agreement at this time". The Monitor did not recommend the approval of the AHG DIP Proposal. The clear recommendations in both reports from the Monitor is a strong indicator of the fairness of both the process by which DIP financing was solicited, analyzed, and selected, and the terms of the Cargill DIP Agreement itself.

[66] The AHG suggests that the "*Soundair*" principles for approval of a sale (or sale process) should be applied by analogy to the court's consideration of the DIP Process and whether it was fair and reasonable in the circumstances. No authority or precedent was offered for this suggestion and the specific factors do not directly correlate. I find that analogy to be strained and unhelpful.

[67] However, I agree with the more general suggestion that, as part of the court's exercise of its discretion in approving the Cargill DIP Financing under the ARIO, the court can and should consider whether the DIP Process that the company and its advisors engaged in to solicit possible DIP financing options was fair and reasonable. The company also suggests that the court can and should consider whether the Board exercised its reasonable business judgment in its decision to accept the Cargill DIP agreement.

[68] The AHG points to what it describes as several serious process, governance, and substantive problems underlying the request by Tacora for the approval of the Cargill DIP Facility. The AHG says that the DIP Process was not fair and reasonable to them because of certain timing and mechanical aspects (discussed in the next section) but also because their interests were not given due consideration by the Board and the Board was tainted by the presence of the Cargill Board nominee, Mr. Davies, such that the Board cannot be said to have exercised objective, reasonable business judgment.

[69] The AHG selectively focusses on the specific questions put to two of the witnesses who were cross-examined for this motion, divorced from the broader context of the rest of the evidence about the DIP Process and the factors considered by the Board and the company's advisors in the decision to move forward with the Cargill DIP Facility (summarized earlier in this endorsement). The AHG focusses on the evidence of:

- a. Mr. Bandhari of Greenhill, that he did not give any advice to the Board in respect of the fact that the Cargill DIP would prime the senior secured noteholders to the tune of \$75 million or more; and
- b. Mr. Davies, who acknowledged that, while he understood that the AHG would be primed by the Cargill DIP, that [priming] was not something that he and the other directors spent a great deal of time talking about.

[70] From this, the AHG asks the court to infer that when the Board was exercising its business judgement due consideration was not given to the senior noteholders' interests, and in particular that their security would be "primed" by the Cargill DIP Facility by up to \$75 million or more.

[71] This is not a reasonable inference to draw from the totality of the evidence. First, these specific statements do not support the suggested inference since the combination of the two statements is that at least one director (Mr. Davies) was aware of the "priming" implications and did not need to be told about that by Greenhill; and his evidence goes only so far as to say that a great deal of time was not spent on this topic; he does not say that it was not considered at all. Further, these specific statements are consistent with the general statements in the affidavits of Mr. Bandhari and the Monitor's Pre-Filing Report in which it is stated that the potential prejudice to existing creditors (the noteholders being the largest such group) was considered.

[72] The AHG also challenges the Board's process as inherently unfair and flawed from a governance perspective because of the role played by Mr. Davies who was the Cargill Board nominee and remained a Cargill employee throughout. He recused himself and did not vote on the approval of the Cargill DIP Facility when all of the other Board members unanimously voted in favour of it.

[73] Section 132(5) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 ("OBCA") addresses circumstances where directors are required to recuse themselves. None of the circumstances are present in this situation. Thus, Mr. Davies was not required to recuse himself. He was also not required to abstain from voting on the approval of the Cargill DIP Facility, but he did. The AHG suggests that because he abstained from voting, this is a concession of a conflict of interest that should have led him not only to abstain from voting but also to recuse himself from any discussions at the Board about the Cargill DIP Facility.

[74] Merely abstaining from voting does not create a legal conflict, especially one that the OBCA does not recognize. There is no evidence that Mr. Davies' presence at the Board meetings at which the Cargill DIP Facility was discussed tainted the views of the other Board members in any way. His presence at the earlier Board meeting at which the AHG DIP was approved did not result in any dissention over the earlier approval of that financing. There is no basis on which the court can or should infer that his presence at the Board meeting(s), in these circumstances, tainted the Board process so as to undermine the Board's business judgment to proceed with the objectively superior Cargill DIP Facility.

[75] The Board, having regard to relevant factors (including the potential prejudice to other stakeholders such as the senior secured noteholders) and acting on the advice of professional advisors, exercised its reasonable business judgment in good faith and without any reasonable inference of improper involvement of the Cargill Board nominee, in deciding to approve the Cargill DIP Facility on October 8, 2023. While the Board's independent decision to approve the Cargill DIP Facility is not determinative of the ultimate decision of the court about whether to approve the Cargill DIP Facility, it is a relevant consideration. See *Crystallex International Corp, Re*, 2012 ONCA 404, 293 O.A.C. 102, at para. 85, aff'g *Crystallex International Corp, Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 35.

vi. Other Fairness Concerns

[76] The AHG complains that there was an uneven playing field from a process perspective because Mr. Davies and others at Tacora were favouring Cargill in the DIP Process by passing on information to Cargill that gave it an unfair advantage. For this, the AGH relies upon inferences it asks the court to draw from certain exchanges between Tacora and Cargill representatives.

[77] The first exchange of text messages is between Tacora's CEO Mr. Broking and Mr. Davies, Cargill's Board nominee, on September 12, 2023 about a request for Cargill to make certain interim payments. In this text message exchange, Mr. Broking states "I love Cargill". The AGH relies upon these texts to suggest that there was an ongoing dialogue between Tacora and Cargill about the DIP proposals and a bias in favour of Cargill.

[78] Mr. Davies denies that he was involved in any discussions about the DIP financing proposals with any Cargill representatives aside from one specific conversation that he had on October 5, 2023 to see whether Cargill would consider making a DIP proposal and the direct follow up to that regarding the timing of Cargill's internal approval process for making and increasing its proposal. There is nothing in the record to indicate otherwise.

[79] Aside from the identified text message exchange, Mr. Davies' evidence, which was uncontroverted, was that: (i) he took his fiduciary duties as a Tacora director seriously; (ii) he had no involvement in Cargill's DIP proposal or its negotiation other than to encourage Cargill on behalf of Tacora to consider putting forward a DIP proposal; (iii) he shared no confidential Tacora information with Cargill; and (iv) he did not learn of the substance of Cargill's DIP proposal or the AHG's until they were both presented to Tacora's board on October 8, 2023.

[80] Next, the AHG points to the acknowledgment of Tacora's CEO Mr. Broking that he spoke to Cargill representatives between October 5 and 10, 2023. However, his testimony was that these discussions were only about operational matters and he similarly denies having been involved in any direct communications with individuals at Cargill (or the AHG) about the DIP Process or proposed terms. Mr. Broking testified that he was not involved in negotiations of the DIP proposals, and did not see the DIP term sheets until they were provided to Tacora's board on October 8. The AHG seeks to have the court infer that he must be lying about this because of his practice of deleting his text messages, even though he was examined on texts produced by others and the documents produced by the company, none of which contradict his denial of any discussions with Cargill about the DIP.

[81] Mr. Bhandari testified more generally, that although Tacora and its advisors were in discussions with the AHG after September 11 about DIP matters, he provided no details of those discussions to Cargill, and he is not aware of Tacora or any of its advisors doing so either.

[82] The evidence obtained through the r. 39.03 examinations and cross-examinations undertaken by the AHG did not reveal any improper or inappropriate contact between the company's management or Board and Cargill, nor any favoritism in relation to having a Cargill DIP Facility. The conversations taking place with Cargill in this time period were no different in substance than the conversations taking place with the AHG. There is no evidence of any sharing of information with one about what the other was proposing or considering.

[83] The AGH also complains about the fairness of the timing of the request for their final and best DIP proposal over the Canadian Thanksgiving and American Columbus Day holiday weekend. Their position at the hearing is that they were unable to finalize an amended definitive DIP Proposal in that time frame. This is notwithstanding that the company continued to offer to make their advisors available on October 6 and 7, 2023 “to discuss any remaining issues in order for the Ad Hoc Group to make an informed decision on whether to make any revisions to their proposal”.

[84] The inconvenience of the timing of this is not something that the company was in a position to control. It was a function of the timing of the breakdown in the negotiations towards a consensual restructuring on October 4, 2023. Both Cargill and the AHG were given the same amount of time to finalize and submit a definitive DIP financing proposal on October 7, 2023. The AHG had been working on theirs since September 28, 2023.

[85] The AHG further complains that the DIP Process was flawed and unfair because Cargill had seen their first AHG DIP Agreement and knew the terms it needed to beat in the October round, after having declined to submit a binding proposal back in September. However, that ignores the reality of the situation which is that there had to be a further round of DIP negotiations because the AHG DIP Agreement had lapsed. In fact, it was the AHG that initiated those discussions and initiated further negotiations at the end of September.

[86] The AHG knew what they had offered and knew what the company was asking for in terms of possible improvements. They were given the same time and opportunity to make a new DIP proposal as Cargill was on October 5, 2023. There was nothing unfair about the notice that AHG was given relative to the notice that Cargill was given for providing their DIP financing proposals. The company had to act quickly given the ongoing liquidity crisis it was facing. Absent a restructuring, it was clearly understood that the company would need to file for CCAA protection.

[87] The company put no constraints or restrictions on the AHG in terms of any further DIP proposal that they might wish to make. The company accepted, and put before the Board for consideration, the AHG DIP Proposal that was submitted on the morning of October 8, 2023 even though it was received after the deadline that had been imposed of 5 p.m. on October 7, 2023 and even though it did not come in the form of an offer that the company could accept.

[88] The AHG says that, on principle, they were not prepared to re-engage with the company on any terms other than what it considered to be “updates” to the AHG DIP. That was its explanation for not putting forward an “improved” DIP proposal over the Thanksgiving weekend or at any time prior to the October 24, 2023 come-back hearing. The need for updates implicitly recognizes that the AHG DIP had lapsed; yet, the AHG continued to assert in materials filed in advance of the come-back hearing that the AHG DIP signed on September 11, 2023 remained a binding and executable agreement on October 8, 2023.

[89] This position is untenable. The AHG itself proposed a new agreement that included not only new (updated) financial terms but also a new party (one noteholder departing and another added). The company and the AHG recognized by the end of September 2023 that the AHG DIP Agreement was no longer actionable or viable as a result of the time that had elapsed while both Cargill and the AHG were engaged in good faith efforts to try to reach a consensual restructuring.

[90] At the hearing, greater emphasis was placed by the AHG on a variation to the assertion of the continued existence of a binding AHG DIP, namely that they believed that they had an agreement that no further DIP proposals would be considered by the company from anyone else after their AHG DIP had been approved and accepted in September 2023. In other words, that the AHG had the exclusive right to be the DIP lender in any CCAA filing by the company. However, this belief is not said to be based on anything that the AHG was told by the company or its advisors or by the proposed Monitor. The AHG submitted no direct evidence on this point. The AHG DIP did not contain exclusivity for any future DIPs in a CCAA proceeding, nor did it provide a tail period.

[91] There is no objectively reasonable evidentiary basis for the asserted belief that the company would not consider any other DIP financing proposals. It appears to be based on the assertion that the September AHG DIP remained a binding agreement, an assertion that is untenable (as noted above) given that the AHG DIP was no longer capable of execution in October 2023 and the AHG had themselves acknowledged that a new agreement with amended terms was required.

[92] Tacora had the right (in fact, the obligation) to resume the DIP Process when the circumstances and timing had changed and it was planning for its CCAA filing in October 2023. It needed a binding DIP agreement to present to the court for that filing.

vii. The AHG's Proposed Run-Off DIP Process

[93] Up until the come-back hearing, the AHG did not make any attempt after the Thanksgiving weekend, when they claim to have been under undue time pressure (and under the erroneous belief that Tacora had to negotiate solely with the AHG regarding the DIP financing), to make any new or different proposal with any materially new or improved terms, ostensibly because they did not want to lend credibility to what they considered to be a flawed DIP Process.

[94] At the come-back hearing, the AHG suggested a further alternative, that the court direct a short further run-off DIP process by which the company could solicit last and best DIP financing proposals from Cargill International, the AHG and any other interested party, for the Board to consider and make a final decision about (the "Run-Off DIP Process"). A precedent for this proposed further Run-Off DIP Process, in which each party would be given a further opportunity to submit (on a double blind basis) the best DIP proposal for the company's consideration, is said to be found in *Crystallex* in the context of the consideration of a DIP extension. While there is no reported decision containing this direction, it is said to be the process that is referenced by Newbould J. in *Crystallex International Corporation (Re)*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 21. However, there was not a similar immediacy to the company's cash concerns when the court directed the "run off" DIP process in that case.

[95] The company and the Monitor both raised concerns about stability and delay for the company and the need to finalize the ARIQ, the DIP financing, the KERP and to begin the Solicitation Process. They are concerned that the company cannot tolerate the inevitable further uncertainty and instability that the suggested Run-Off DIP Process would entail. The opportunity to make a best and last DIP financing proposal was afforded on October 5, 2023 and has passed.

[96] These concerns are valid and were left largely unanswered. The proposed Run-Off DIP Process is not a realistic option for the company in its present circumstances and could interfere with the company's restructuring process.

[97] After the hearing, in an effort to address a concern raised by the court about there being no binding offer from the AHG that the company could accept if the court were to be inclined to grant the cross-motion and deny the request for approval of the Cargill DIP Facility, the AHG sent a new DIP proposal to the company on the morning of October 26, 2023 and asked that a case conference be convened on October 27, 2023 before the court released its decision. At the case conference, the AHG made the court aware of this offer and of an accompanying alternative to the Offtake Agreement with a new purchaser of the ore produced at the Scully Mine (the "New AHG DIP Proposal"). According to the submissions of counsel to the AHG, the New AHG DIP Proposal is similar to, but an improvement upon, the September AHG DIP. The members of the AHG behind the New AHG DIP Proposal are not the same as those behind either of the AHG DIP or the AHG DIP Proposal. The alternative offtake agreement that accompanied it is an entirely new feature.

[98] The company and the Monitor (and Cargill, although given its commercial self-interest, its concerns carry less weight on this issue) raised concerns about this New AHG DIP Proposal, which the AHG is asking the court to require the company and its Board to consider while the court's decision regarding the approval of the Cargill DIP Facility remains under reserve. The AHG did this without tendering any proposed evidence about this proposal and without a motion for the court to consider whether to receive any proposed "fresh" evidence. The company and the Monitor did not have sufficient time to properly consider and assess the new terms and undertake the complex comparative analysis that would be needed to understand the economic implications of the alternative offtake agreement that accompanied the New AHG Proposal. To do all of this would mean further uncertainty and delay for the company.

[99] Both the company and the Monitor indicated that the company would take the time to consider the New AHG Proposal but strenuously reiterated the earlier arguments, that the company needs the certainty of the approval now of the ARIO (including the DIP financing, and the KERP) and needs the court's approval of the Solicitation Order so that the Solicitation Process can get underway. The company no longer has the luxury of time. Its Stay Period is expiring. It has already gone below the minimum floor of cash that it is comfortable operating with and it is forecasted to run out of during the week after the hearing. The stability of the company's ongoing operations is dependent upon the certainty of the requested court orders and their implementation.

[100] To alleviate the concerns about delay and the company's immediate funding needs, the AHG suggested that they would make funds available to the company under the New AHG DIP Proposal without any exit or back stop fee, if Cargill was not willing to continue funding under the Cargill DIP Facility on an interim basis while the New AHG DIP Proposal (and any further proposal from Cargill) is considered.

[101] The court is concerned that this invites an open-ended process and will lead to delay and instability that could be prejudicial to the company's restructuring efforts. The AHG had the opportunity to submit the New AHG DIP Proposal before the come-back hearing. The presentation of this proposal after the hearing was explained to be with a view to addressing the court's concern

about the lack of any binding offer that the company could accept if the court was otherwise inclined to grant the primary relief on the cross-motion. However, presenting this New AHG DIP Proposal and accompanying alternative offtake agreement while the court's decision was under reserve and without a proper record or any formal request for the introduction of this evidence falls outside of any recognized evidentiary or procedural mechanism. In these circumstances, consideration of the New AHG DIP Proposal could only be accommodated if the court were prepared to delay the release of its decision on the come-back motion and order the Run-Off DIP Process that the court has found (above) to be unrealistic for the company and potentially detrimental to its restructuring efforts.

[102] The company needs stability and needs to move into its Solicitation Process. The AHG already had its chance to put in its best DIP proposal and it submitted the AHG DIP Proposal which was considered and determined to be inferior to the Cargill DIP in a variety of respects. As the Monitor submitted, it is time to put a pin in the process and move forward. That is what the company did at the beginning of October when it completed its DIP Process in which each of Cargill International and the AHG had an opportunity to participate. The court is not prepared to order a re-do of that now through a further Run-Off DIP Process that will take at least a week if not longer. The company has been in a state of limbo for long enough.

[103] That said, the court is encouraged by the prospect that there could be a better DIP proposal for the company. If so, the repayment and replacement or disclaimer of the Cargill DIP Facility remain open for consideration by the company in the future. As the company, the Monitor and Cargill have pointed out, the question of whether the Offtake Agreement can be disclaimed or replaced remains an issue for another day. But at the very least, it is acknowledged that there is the possibility for this to happen in the context of a transaction or restructuring arising out of the Solicitation Process (including a credit bid from the AHG submitted in that process) or in the context of the repayment and replacement of the Cargill DIP Facility. The cost of Cargill's exit fee under the Cargill DIP Facility is the cost of the stability and the timely implementation that the company requires now.

b) The CCAA Requirements For Approval of the Cargill DIP Facility and DIP Charge

[104] The court's authority to grant the requested priority DIP charge for the Cargill DIP Facility is found in s. 11.2 of the CCAA, and must be considered in light of the factors in s. 11.2(4) of the CCAA, which provide as follows:

- (4) In deciding whether to make an order, the court is to consider, among other things,
 - (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

[105] These factors may be equally applicable in deciding who shall be the DIP lender and on what terms DIP financing ought to be provided. See *Great Basin Gold Ltd., Re*, 2012 BCSC 1459, 94 C.B.R. (5th) 228, at para. 14. These factors and how they are satisfied in this case are reviewed in the Monitor's Pre-Filing report and the company's affidavits and they need not each be reviewed in this endorsement.

[106] The AHG's challenges to the s. 11.2(4) criteria regarding the need for governance changes during the CCAA process and the AHG's loss of confidence in existing management, flow from the criticisms of the DIP Process previously discussed. They are not borne out on the record. This section of the endorsement focuses on the primary challenge of the AHG, namely its contention that it will be materially prejudiced as a result of the proposed Cargill DIP Facility and priming Charge.

[107] The Cargill DIP Financing is conditional on the DIP Charge being granted. The only alternative funding option that would be available to the company would also require a DIP charge. Under the AHG DIP proposal, the DIP facility would have been substantially larger; the increased amount being necessary as the Advanced Payments Facility and other financing available from Cargill would no longer be available under the AHG DIP Proposal. Any prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the DIP Financing Agreement as compared to the alternative AHG DIP Proposal.

[108] Material prejudice in the context of s. 11.2(4) requires consideration of how much the creditors are being primed by a priority DIP charge, not who is the priming creditor. On an objective test it is clear that the Cargill DIP Facility is far less prejudicial to creditors generally than the AHG DIP, including because the company will require significantly less financing due to the operational agreements already in place with Cargill.

[109] By letter dated October 6, 2023, the AHG communicated, amongst other things, certain concerns regarding the Applicant accepting DIP financing from the DIP Lender. Those stated concerns included potential prejudice to the AHG from such financing. The proposed Monitor took note of the concerns expressed, noting that: "[u]nder the Ad Hoc Group DIP proposal, the DIP facility would have been substantially larger" and, as a result, "[a]ny prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the [Cargill] DIP Financing Agreement as compared to the alternative Ad Hoc Group DIP Proposal."

[110] The AHG complaint that the Senior Noteholders are being "primed" ignores the fact that the AHG DIP Proposal would prime the Senior Noteholders by a larger margin than the Cargill DIP Facility.

[111] Additionally, the AHG's argument ignores Tacora's other creditors, including Senior Noteholders who are not part of the AHG, trade creditors, employees, lessors and other unsecured creditors. Under the AHG DIP Proposal, the company will need to realize approximately \$30

million more in connection with a restructuring transaction for these creditors to have the same recovery as under the Cargill DIP Facility due to the additional financing that will be required with the AHG DIP Proposal. Accordingly, it is clear that creditors broadly will be less prejudiced with the Cargill DIP Facility.

[112] A further instance of prejudice that the AHG identifies arises from the implications of the Offtake Agreement and the impediments that it could present to the restructuring process if interested third party purchasers or investors are dissuaded by its “life of mine” and other terms (as some already have expressed concerns about in the Solicitation Process and the earlier Strategic Process also undertaken by Greenhill prior to that). Consideration of this must begin with an acknowledgment that, while the AGH asserts that the Offtake Agreement is not commercially reasonable and that it unduly restricts the company’s restructuring efforts, that agreement was in place prior to the issuance of the notes.

[113] This motion must proceed on the basis that the Offtake Agreement is, as of the date of the hearing of this motion, a valid and enforceable agreement to which the company is a party. It is not an entirely one-sided agreement, in that it provides a guaranteed customer and revenue stream for all of the output at the Scully Mine.

[114] The AHG has taken issue, in particular, with an event of default provision in the Cargill DIP Facility involving any termination, suspension or disclaimer of the Offtake Agreement (the “Offtake EOD”). Section 23(d) defines the Offtake EOD to be: The termination, suspension or disclaimer of the Existing Arrangements [including the Offtake Agreement], or the taking of any steps to terminate, suspend or disclaim (if permitted under the CCAA) any of the Existing Arrangements.

[115] However, this same Offtake EOD goes on to expressly indicate that an event of default shall NOT include: (i) the commencement and prosecution of the SISP (defined below), including the solicitation of an Alternative Offtake or Service Agreement, or (ii) taking any step or related action pursuant to a binding agreement entered into in respect of a Restructuring Transaction at or after the Bid Deadline, including executing such agreement, seeking court approval of such binding agreement or taking any steps in connection with consummating the Restructuring Transaction pursuant to such binding agreement in each case at or after the Bid Deadline, without prejudice to any rights that [Cargill] may have pursuant to section 32 (including subsection 32(9)(c)) of the CCAA or otherwise.

[116] Further, s. 29 of the Cargill DIP Facility requires that: The Borrower ... (in consultation with the Monitor) shall pursue a sales and investment solicitation process (the “SISP”) approved pursuant to a Court Order in respect of (a) potential Restructuring Transactions that may be available to the Borrower; and (b) offtake, service or other agreements in respect of the business of the Borrower (“Alternative Offtake and Service Agreements”) that may be available to the Borrower. In fact, the solicitation process agreed to in the Cargill DIP Facility expressly contemplates that the company shall solicit “Alternative Offtake or Services Agreements” as part of the Solicitation Process and the Solicitation Process put forward by the company for court approval contemplates soliciting interest in the “Offtake Opportunity” as part of binding bids.

[117] Reading these provisions of the Cargill DIP Facility together, the Offtake EOD does not limit the company's ability to explore all value-maximizing alternatives, including restructuring transactions that involve either a new offtake agreement or no offtake agreement.

[118] While the company considered it to be of critical importance to its evaluation of the DIP proposals it received for it to be able to fully explore all alternatives available to it during the CCAA Proceedings, it also recognized that it would not be practical to terminate, suspend or disclaim the Offtake Agreement before the company had the means to sell its iron ore concentrate to one or more alternative customers.

[119] The practical restriction created by the Offtake EOD is that the company will not be able to enter a stalking horse agreement that contemplates the termination, suspension or disclaimer of the Offtake Agreement without either refinancing the Cargill DIP Facility or obtaining the Cargill DIP Lender's consent. The company understood this risk when evaluating the Cargill DIP Facility.

[120] This is a thorn in the AHG's side because they made it known to the company that they intend to make a credit bid and might be interested in acting as a stalking horse bidder. While not in the original AHG DIP, the redline version of the AHG DIP Proposal submitted on October 8, 2023 indicates a new provision expressly allowing the AHG to make a stalking horse bid in the Solicitation Process. However, from the company's perspective and the perspective of the creditors as a whole (not the interests of a creditor who might also wish to be a potential purchaser), at the time that the Cargill DIP Facility was considered and approved, there had not been any advanced discussions regarding a stalking horse agreement. Under the Cargill DIP Facility, all parties will be able to participate fully in the solicitation process. In the meantime, should a stalking horse agreement be determined to be favourable, the company maintains the flexibility to refinance (repay and replace) the Cargill DIP Facility at any time.

[121] The terms of the Cargill DIP Financing do not materially prejudice the AHG in their capacity as creditors, either from the perspective of the priming of their existing security (which is less than it would be under their own AHG Financing Proposal) or from the perspective of the overall implications of the Offtake EOD and its practical implications for the restructuring process. The restriction on stalking horse agreements may be prejudicial to the AHG in their capacity as a prospective "credit bidder," but that is not of paramount concern to the interests of the stakeholders generally and is not a material prejudice to the AHG in their capacity as creditors of Tacora arising as a result of the Cargill DIP Facility and DIP Charge within the meaning of s. 11.2(4)(f) of the CCAA.

[122] In *Great Basin* (at para. 15), the court noted that when approving DIP financing it "must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring". The company notes that certain provisions of the AHG DIP Proposal were considered and identified by the company to be restrictive and to provide advantages to the AHG, such as their ability to submit a "topping credit bid" (up to the amount of their total debt) after the completion of the Solicitation Process if the successful bid does not result in full payment of the AHG's pre-filing secured debt. In other words, the AHG would have a "last look" following the final bid deadline even if the AHG did not participate in the Solicitation Process.

[123] The company had a concern that this “last look” could have a chilling effect on prospective purchasers who would be put to the time and expense of the due diligence to make a bid. Another concern identified was that such a clause could cause any interested bidder to have discussions with the AHG regarding a transaction rather than the company, its advisors, and the Monitor, which could result in a loss of control and fairness in the process.

[124] Further, the AHG DIP Proposal would require the company to appoint two (2) new directors from a slate of five (5) directors put forward by the AHG, if requested. In *Quest University, (Re)*, 2020 BCSC 318, 77 C.B.R. (6th) 117 the court recognized that a creditor’s attempt to seek control through board appointments in connection with DIP financing was “unreasonable and inappropriate in the circumstances and it may significantly disadvantage other interests in this proceeding”. Like the present situation, the creditor in *Quest University* had indicated an interest in purchasing the debtor’s property.

[125] On balance, I find the reasons and conclusions of the company, the Monitor and Greenhill that the Cargill DIP Facility is more favourable to the company and will better serve its stakeholders than the AGH DIP Proposal would, to be well founded.

[126] In terms of some of the other factors under s. 11.2(4) of the CCAA, the Cargill DIP Facility amount lines up with the company’s cash flow forecasts for the Stay Period and provides the funding for the company’s anticipated business and financial affairs that are to be managed during the CCAA proceedings. The company needs the Cargill DIP Facility to commence its Solicitation Process which is intended to enhance the prospects of a viable compromise or arrangement being made in respect of the company. The Monitor recommends the approval of the Cargill DIP Facility. I am satisfied, having considered the relevant factors, that the requirements under the CCAA for the court to approve the Cargill DIP Facility and DIP Charge have been satisfied.

c) Alleged Ulterior Objectives of Cargill

[127] Courts are required to carefully and closely scrutinize financing proposals that may advance the interests of one particular stakeholder (see *Quest University*, at paras. 97–99) and “be constantly vigilant against such strategies” (see *Great Basin*, at paras. 179–81).

[128] Both Cargill and the AHG have their own commercial interests that will inevitably influence their conduct in these CCAA Proceedings.

[129] A proposed extension of DIP financing was not approved in *Essar Steel Algoma Inc. et al, Re*, 2017 ONSC 3331, 48 C.B.R. (6th) 264, because of concerns that the DIP lenders were “imposing terms to assist their position as Term Lenders” who were party to a restructuring agreement, and that “their interests are now too closely aligned with what has been proposed and that the provision of DIP lending is now being too negatively affected” (see paras. 19–24). A DIP lender wearing various hats can give rise to concerns about the potential for mischief in the management and operation of the business for its own interest with less than due regard for the interests of the other secured creditors. See *Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc.*, 2021 SKQB 273, 94 C.B.R. (6th) 190.

[130] Cargill does wear various hats in this case but none of its activities to date have given rise to any foundation for the suggestion that it will (or will have the ability under the Cargill DIP

Facility to) exert control over the business of the company or the Solicitation Process in a way that will give less regard to the interests of the other secured creditors.

[131] The AHG accuses Cargill of manipulating the process to “stave off” the CCAA filing on September 12, 2023 (that would have sought approval of the AHG DIP) and appears to be suggesting that the negotiations for a consensual restructuring were a ruse to give Cargill time to put in a DIP proposal of its own to protect its Offtake Agreement. There is no evidentiary foundation for this theory.

[132] It is further alleged by the AHG that the Cargill DIP Facility is being used for the improper purpose of protecting the Offtake Agreement. It is suggested that this conclusion can be reasonably inferred, as the court did in *Quest University* (at paras. 99–100).

[133] The real concern that is expressed in the AHG’s factum is that the current terms of the Offtake Agreement are not commercially reasonable, are considered to be prejudicial to Tacora, and are considered by the AHG to be prohibitive to an effective restructuring. The AHG does not like this agreement and would like Tacora to be able to rid itself of it. As a prospective purchaser, the AHG would no doubt prefer to be rid of the Offtake Agreement. This position exposes that the AHG is also commercially motivated, to try to get rid of a contractual burden of the company to advance its interests as a prospective purchaser.

[134] All participating stakeholders agree that the question of whether the Offtake Agreement is a commercially unreasonable contract and/or whether it can be disclaimed at all is not a question that is before the court to decide on this motion. The validity or enforceability of the Offtake Agreement is not properly before the court on this motion. If Cargill has arguments that the Offtake Agreement cannot be disclaimed those would be available to it irrespective of the DIP Facility terms.

[135] In the meantime, the AHG is concerned that Cargill is bootstrapping its position by building in the Offtake EOD that prevents its disclaimer except as part of the Solicitation Process. From the company’s perspective, this may be realistically the most likely circumstance in the context of its restructuring in which it would want to disclaim the Offtake Agreement. But even if not so, the Offtake EOD can be eliminated if the Cargill DIP Facility is repaid. The inclusion of the Offtake EOD does not lead to the conclusion that the Cargill DIP Facility is being used for an improper purpose just because it recognizes the commercial realities of the company’s existing contractual arrangements with Cargill.

[136] Various assertions are made by the AHG about the refusal by Cargill representatives to produce documents requested in r. 39.03 notices of examination. Even if the Cargill representatives who were examined are treated as “party” as opposed to non-party witnesses and subject to the usual rules of cross-examination (see *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174, at para. 11), the timing, scope and breadth of the document requests that accompanied their notices of examination were not proportionate. Further, many of the requests were for historic documents that relate to the Offtake Agreement, the very existence of which is what the AHG alleges is problematic.

[137] Based on the refusal to produce the requested documents in response to the broad requests, the AHG is asking the court to draw adverse inferences that they would have disclosed Cargill's true motives behind the Cargill DIP Facility to be to gain some advantage for itself under the Offtake Agreement. These witnesses were not obligated to produce all records responsive to the overly broad, discovery-like document requests set out in the notices of examination only delivered late in the evening on Monday, October 16, 2023 in advance of examinations scheduled for October 18 and 19, 2023. For such inferences to be drawn from a refusal to produce documents in these circumstances, there would first need to be some factual basis to which to tether the suggested inference, which there is not.

[138] The fact that Cargill has other commercial interests and contractual rights vis-à-vis Tacora does not mean that it is acting improperly for its own interest with less than due regard for the interests of the other secured creditors when it introduces a term into its proposed DIP that recognizes those other contractual interests but also acknowledges circumstances in which they might be compromised.

[139] While it is true that it is less "messy" to have a truly independent DIP lender in a CCAA restructuring, that is not always realistic or possible. It is often the parties who are already entrenched with the debtor who have the most incentive to see its restructuring efforts succeed. It is a balance. The court does need to be vigilant to ensure that a creditor wearing more than one hat does not take advantage of its position, but for the court to make a finding that a DIP facility from that party is tainted there would need to be something more than the type of speculation and innuendo that has been suggested here.

[140] The Offtake Agreement (among other agreements with Cargill) is the sole source of revenue for Tacora. Cargill has committed to purchasing 100% of the output of the Scully Mine under the Offtake Agreement. This is why Tacora has argued that it is unlikely that it would seek to disclaim, terminate, suspend, etc. that agreement, other than in the context of a transaction arising out of the Solicitation Process, which would be exempt from the restriction in the Cargill DIP Facility on such actions.

[141] In my view, the contractual terms that have been incorporated into the Cargill DIP Facility strike the right balance to counter what is otherwise just a speculative theory of the AHG regarding improper motivations.

d) Should the Court Approve the AHG ARIO that Includes the AHG DIP Proposal

[142] In light of all of the criticisms that it has raised to the Cargill DIP Facility, the AHG also asks the court to consider whether there is a more appropriate DIP financing option available to the company through the AHG DIP Proposal³ that the court should approve (as requested by the

³ For reasons indicated earlier, the company and its advisors have not had the opportunity to consider the New AHG DIP Proposal and it is not properly for the court for consideration at this time.

primary relief on the cross-motion), with an invitation to the company to agree to the AHG DIP Proposal if it wants the CCAA protection to continue.

[143] However, this requested relief is dependent upon a finding that the AHG DIP Proposal is more favourable to Tacora and its stakeholders than the Cargill DIP Facility; whereas, for the reasons outlined earlier in this endorsement, the company and its advisors, and now the court, have found the opposite to be true: the Cargill DIP Facility is more favourable to Tacora and its stakeholders than the AHG DIP Proposal. Thus, there is no basis for granting this alternative relief. Accordingly, this aspect of the cross-motion (for the approval of the AHG ARIO) is dismissed.

[144] In the context of the discussion about the request for the court to approve the AHG ARIO, which includes the AHG DIP Proposal, the court raised the question of its jurisdiction to make the order sought on the cross-motion, which is for an amended and restated initial order that approves alternative DIP financing to be provided by the AHG that the company would have to agree to. Similarly, the Alternative Relief sought by the AHG in respect of the Tacora proposed ARIO includes directions that would require changes to be made to the Cargill DIP Facility to remove the Offtake EOD. This relief appears to be asking the court to become involved in the contractual negotiations between parties and to impose contractual terms upon them. No authority was identified that addresses this jurisdictional question.

[145] The AHG suggested that the court has, in the past, and could in this case, simply indicate that approvals would be granted if these contractual arrangements are made and then leave it to the parties to decide whether those contractual terms will or will not be agreed to. The court was referred to *Nortel Networks Corp. (Re)*, 2010 ONSC 1708, 63 C.B.R. (5th) 44 for this proposition. That may be a tool available to the court in appropriate cases, but since I have concluded that the Cargill DIP Financing should be approved it does not arise in this case.

Should the Court Order any of the Alternative Relief Sought by the AHG on the Cross-Motion?

[146] That leaves the question of whether the court should order any of the Alternative Relief sought by the AHG. The various elements of that Alternative Relief are addressed in turn, with the conclusion that it is not necessary or appropriate to grant any of the Alternative Relief.

[147] The request for a CRO is not warranted or justified. There is precedent for appointing a CRO in a CCAA proceeding. See, for example, *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, 2019 ONSC 1215, 68 C.B.R. (6th) 269, at paras. 30–32. However, this is not typically done over the objection of the company. Further, in this case, this request is predicated on the assertion that the AHG was unfairly treated by management and the Board in the DIP Process, and that either Tacora’s management or its Board is unreasonably impairing, or are likely to unreasonably impair, the possibility of a viable compromise or arrangement. These assertions have not been made out, for reasons outlined earlier in this endorsement.

[148] The AHG’s complaint about “how management and the Board have run the restructuring thus far” is unparticularized (aside from the complaints about the DIP Process addressed earlier in this endorsement that have not been substantiated) and premature given that the CCAA proceedings were commenced less than a month ago. There is no reason to appoint a CRO at this

time. Further, no CRO has been identified and no proposed mandate been formulated. At the hearing the AHG suggested that this request be deferred for further consideration after an appropriate person and mandate had been identified. If the court had been persuaded that there was a reason to consider appointing a CRO, that approach might have been appropriate, but since no justification for doing so has been identified, there is no reason to defer the request.

[149] The KERP should not require the AHG's approval. The AHG does not dispute that a KERP is necessary. The only concern noted by the AHG with respect to the proposed KERP is that "a significant portion of the KERP to be proposed by Tacora will go to executive management resident in Grand Rapids, Minnesota, rather than the non-executive and operation employees (primarily located in Wabush, Newfoundland) whose contributions will be crucial to keeping Tacora operating during the CCAA process." Tacora counters this concern by pointing out that approximately 80% of the Key Employees (27 of 34) covered by the KERP work directly at the Scully Mine in Wabush, Newfoundland, and senior management frequently travels to be on site at the Scully Mine.

[150] No specific counter-proposal for the KERP, or this aspect of it, has been advanced by the AHG. The company and its advisors are best situated to determine who the key employees are that it is at risk of losing during the CCAA process and the appropriate parameters for calculating the KERP payments that they will receive.

[151] The ancillary Post-Filing Credit Extension should not require the AHG's approval or Court approval. The current terms require the Monitor's approval for credit extensions that are built into the Cargill DIP Facility. If the Monitor has concerns then the court would expect those to be brought before the court and for consideration under the court's inherent and supervisory jurisdiction over the CCAA proceedings. But if the Monitor does not have concerns, requiring the company to come back to court for specific extensions would be an added and unnecessary expense.

[152] The Greenhill Priority Transaction Fee Charge should not be subordinated. Greenhill's fees, if earned, are entitled to a super priority. That is typically the basis on which financial advisors are incentivized to continue to work for companies involved in restructuring. Greenhill is already agreeing to defer much of its fees to coincide with the completion of a successful transaction, and to risk not receiving the deferred fees if there is no successful transaction. In the interim, while its success fee is deferred, it has agreed to be paid only a much smaller guaranteed monthly amount. It should not be put at further risk of not receiving its earned fees if there is a successful transaction by having its charge subordinated to the Senior Secured Priority Notes and ranked *pari passu* with the remaining Senior Secured Notes.

[153] The reasons for not granting the Alternative Relief are further elaborated upon as the corollary to the reasons for granting the corresponding provisions in the company's proposed ARIO, discussed in the next section of this endorsement.

Should the Court Approve the ARIO?

[154] I will now turn to address certain aspects of the ARIO that warrant specific consideration.

[155] The main feature for which approval is required is the Cargill DIP Facility and DIP Charge. All creditors likely to be affected by the Cargill DIP Facility and DIP Charge were served with notice of the come-back hearing and only the AHG opposes this approval. That opposition is addressed in the preceding section of this endorsement.

[156] The requested approval and authorization sought for the company to draw up to the maximum amount of the Cargill DIP Facility of \$75 million and to increase the DIP Charge accordingly, is supported by the company's Cash Flow Forecast demonstrating the need for the full amount to pay obligations as they come due, continue operations, and undertake the Solicitation Process during the proposed extended Stay Period. The Monitor supports the approval of the Cargill DIP Facility and authorization to draw up to the maximum available principal amount. The requested increase to the maximum principal amount of the DIP Facility is fair and reasonable and, for reasons previously indicated, satisfies the criteria under ss. 11.2(1) and 11.2(4) of the CCAA.

[157] As previously indicated, the court has independently determined that the Cargill DIP Facility and DIP Charge should be approved with regard to the relevant factors under s. 11.2(4) of the CCAA. The support and recommendations of the Monitor and Greenhill are relevant factors to take into account, as is the Board's approval of the Cargill DIP Facility and DIP Charge. The court "may consider, but not defer to, and is not fettered by, the recommendation of the Board." See *Crystallex* (Ont. C.A.), at para. 85.

[158] The other provisions of the ARIO for which the Court's approval are sought are reasonable and appropriate in the circumstances, because:

- a. The extension of the Stay Period from October 27, 2023 to February 9, 2024 is necessary and appropriate to allow the company's good faith pursuit of the Solicitation Process by which it hopes to identify a value maximization transaction for the benefit of Tacora stakeholders. The Solicitation Process contemplates a motion for court approval of a successful bid during the week of February 5, 2024 (subject to availability). The extension of the Stay Period to February 9, 2024 is supported by the Monitor and Cash Flow Forecasts that are, in turn, based on the Cargill DIP Facility.
- b. Section 11 of the CCAA provides the court with authority to allow debtor companies to enter into arrangements to facilitate a restructuring, which may include the retention of expert advisors like Greenhill where necessary to help with the restructuring efforts. See *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371, 32 C.B.R. (6th) 236, at para. 27. Courts have approved the appointment of advisors in restructuring proceedings, and corresponding charges to secure such advisors' professional fees, where such advisors' knowledge and experience is critical to assisting the debtor with a successful restructuring or is necessary to assist the debtor with a liquidation sale. See *Target Canada Co (Re)*, 2015 ONSC 303, at para. 72. Greenhill's prior experience with the company, including Greenhill's involvement running the Strategic Process starting in March of this year, along with its extensive experience in matters of this nature, makes it well-suited to this mandate. The Monitor recommends that the court approve the

Greenhill Engagement Letter create of the Transaction Fee Charge, as it is of the view that the continued engagement of Greenhill to assist in the implementation of the Solicitation Process will be beneficial to the estate and its stakeholders generally and to the efficient completion of the CCAA Proceeding. The Monitor has considered the fees provided for in the Greenhill Engagement Letter and is satisfied that they are within market parameters. The court accepts the Monitor's recommendations in this regard and the approval of the Greenhill Engagement Letter is not challenged. The Monitor supports the granting of the Transaction Fee Charge, which the court has also found to be reasonable and appropriate in the previous section of this endorsement.

- c. The initial amount of the Directors' Charge was found when the court granted the Initial Order to be appropriately "limited to projected potential uninsured obligations and to what [was] fair and reasonable for the initial 10 day period having regard to the requirements of s. 11.51 of the CCAA and the need for continuity and to keep the directors in place". In connection with the request for the grant of the ARIO, Tacora seeks to increase the quantum of the Directors' Charge to \$5,200,000. The proposed increase has been determined in consultation with the Monitor to reflect the increased potential scope of liability during these CCAA Proceedings. This increase is justified on the same basis as the Directors' Charge was considered to be appropriate when the Court granted the Initial Order. The Monitor supports Tacora's request to increase the quantum of the Directors' Charge, which it believes is reasonable and justified in relation to the quantum of the Directors' estimated potential liability.
- d. The KERP was designed to incentivize Key Employees to continue their employment with Tacora in order to continue the business as a going concern and maximize value for all stakeholders through the proposed Solicitation Process. The KERP complies with the factors to be considered in the approval of such plans (*Just Energy Group Inc et al*, 2021 ONSC 7630, 95 C.B.R. (6th) 264), in that:
 - i. It was developed by Tacora with significant input from the Monitor, and is comparable to other recent KERPs that have been approved in Canada. The Monitor supports approval of the KERP.
 - ii. If the proposed KERP is not approved, the company's CEO believes that it is likely that the Key Employees would consider and pursue other employment opportunities.
 - iii. The Key Employees have distinct and critical roles at Tacora and will allow the Company to continue operating in the ordinary course while also advancing the Solicitation Process. The company is concerned that finding qualified individuals to replace the Key Employees would be challenging, disruptive, costly, and time consuming.
 - iv. The company believes that the KERP will facilitate and encourage the continued participation of Key Employees during these CCAA

Proceedings. The KERP provides for the payment of up to \$3,035,000 to 34 Key Employees (identified out of a work force of approximately 450 employees), including seven corporate personnel (the executive team and the corporate finance team) and 27 Scully Mine personnel.

- v. Individual bonuses for Key Employees range from 16% to 53% of their maximum potential annual compensation (with individual bonuses for Key Mine Employees ranging from 36% to 66% of their base salaries, and individual bonuses for Key Corporate Employees ranging between 49% and 107% of their base salaries), which will be forfeited if they resign or are terminated for just cause prior to the completion of a transaction pursuant to the Solicitation Process or the completion of the CCAA Proceedings.
- vi. The Board of Directors unanimously approved the KERP. As a proposed beneficiary of the KERP, Mr. Broking did not participate in the vote approving the KERP.

[159] The details of the KERP are set forth in Confidential Exhibit “C” to the Second Broking Affidavit. It contains sensitive personal and compensation information, which Tacora’s CEO believes may cause harm to the Key Employees and could result in a distraction for employees if such information became public and generally accessible. Tacora requests a sealing order in relation to the confidential exhibit in order to protect the personal compensation information contained therein and avoid this distraction. To grant this relief, the court must be satisfied of the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as modified by *Sherman Estate v. Donovan*, 2021 SCC 25, 72 C.R. (7th) 223, at paras. 38 and 43, having regard to:

- a. The important public interest in the openness of courts and whether it poses a serious risk to some other important public interest;
- b. Whether the order sought is necessary to prevent the risk to the other identified public interest because alternative measures are not available; and
- c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

[160] Confidential Exhibit “C” contains individual compensation information and the amount of the proposed KERP payments for each eligible employee. Employees have a reasonable expectation that their names and salary information will be kept confidential. Conversely, disclosing this information could create a distraction for key employees who need to be focused right now on the company’s restructuring efforts. Protecting the sensitive personal compensation information of the employees is an important public interest that should be protected. The sealing order is necessary in order to protect the privacy rights of Tacora’s employees while permitting the court to consider the details of the KERP. As a matter of proportionality, the benefits of sealing Confidential Exhibit “C” outweigh its negative effects.

[161] Courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents. See, for

example, *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347, 90 C.B.R. (6th) 102, at paras. 23–28; see also *Just Energy Corp, Re*, 2021 ONSC 1793 at paras. 123–24. Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans. See *Bridging Finance*, at paras. 23–28; *Golf Town Canada Holdings Inc (Re)*, Initial Order issued September 14, 2016 [Court File No. CV-16-11527-00CL] at para. 64; *Acerus Pharmaceuticals Corporation et al (Re)*, Amended and Restated Initial Order issued February 3, 2023 [Court File No. CV-23-00693595-DDCL].

[162] Certain documents were agreed as between the parties to be designated as confidential for purposes of the examinations. Some of the documents were referred to during the examinations and a very few of them were referred to in the factums filed on these motions. This is real time litigation and the 3 C's of the Commercial List encourage parties to find practical solutions to allow cases to move forward expeditiously, as was done here through the agreement to a confidentiality protocol. The court was advised that, with the possible exception of one profit figure, none of the information from the confidential exhibits is relevant to the issues before the court. The confidentiality designations are primarily in respect of personal information.

[163] Thus, the practical solution that was adopted by the parties, of redacting the references to these exhibits in the materials filed with the court, was appropriate. Leave is granted for those filed materials to remain in redacted form. I do not believe that I have made reference in this endorsement to any of the redacted confidential information, but I invite counsel to alert the court immediately if there are any concerns in that regard.

Should the Court Approve the Solicitation Order?

[164] The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a solicitation process prior to or in the absence of a plan of compromise and arrangement. See *Nortel Networks Corporation (Re)*, 55 CBR (5th) 229, at paras. 47–48.

[165] Section 36 of the CCAA sets out certain factors to be considered by the Court in approving a sale. Section 36 does not directly address the factors a court should consider when determining whether to approve a solicitation process; however, such criteria can be evaluated in light of the considerations that will ultimately apply when seeking approval of a sale transaction, including whether the process is reasonable in the circumstances, whether the Monitor approved the process, and the extent to which the creditors were consulted. See *Brainhunter Inc (Re)*, 2009 CanLII 72333 at paras. 16–17.

[166] In *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107, 33 C.B.R. (6th) 60, at paras. 20–21, the court considered the following additional factors in approving a CCAA SISP:

- a. the fairness, transparency and integrity of the proposed process;
- b. the commercial efficacy of the proposed process in light of the specific circumstances; and
- c. whether the sales process will, in the circumstances, optimize the chances of securing the best possible price for the assets for sale.

[167] The *Walter Energy* factors have been cited with approval in subsequent decisions, including the recent CCAA proceedings of *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1631 at para. 9 and *Bron Media Corp (Re)*, 2023 BCSC 1563 at para. 41.

[168] The Solicitation Process was developed by Greenhill in consultation with the Monitor, and provided to the company's secured creditors for feedback. The Solicitation Process will be run by Greenhill with assistance from the company's counsel and with the oversight of the Monitor.

[169] The Monitor has recommended that this court approve the Solicitation Process, as it believes the Solicitation Process: (a) provides for a broad, open, fair and transparent process; (b) provides for an appropriate level of independent oversight; (c) should encourage and facilitate bidding by interested parties; (d) is reasonable in the circumstances; and (e) should not discourage parties from submitting offers.

[170] In these circumstances, it is appropriate for the court to approve the Solicitation Process and grant the Solicitation Order, with the change requested by the AHG that the court not only authorizes but also direct the company and its advisors to immediately commence the Solicitation Process.

Final Disposition

[171] For the foregoing reasons, the ARIO and Solicitation Order shall issue in the forms signed by me today.

Kimmel J.

Date: October 30, 2023

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

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

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1
S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: January 23, 2020

Judgment: May 8, 2020

Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schragger J.C.A. (C.A. Que.)

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

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Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.

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

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

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), in which substantially all of the assets of the debtor companies have been liquidated.

The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

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

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

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

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

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

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

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

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

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

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

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

B. The Initial Competing Plans of Arrangement

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

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

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

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

C. Creditors' Vote on Callidus's First Plan

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

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

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

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

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

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

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

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

III. Decisions Below

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the

outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

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

IV. Issues

37 These appeals raise two issues:

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

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

V. Analysis

A. Preliminary Considerations

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

(1) The Evolving Nature of *CCAA* Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related creditors

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

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

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

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

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

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

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

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

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

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

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

General power of court

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

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

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

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

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

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

an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

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

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

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

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

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

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

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

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

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

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

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly

inviting it do so⁴. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of \$250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

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

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

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

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

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

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

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding

may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

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

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

Interim financing

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

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

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

Priority — secured creditors

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

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

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

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

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

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

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

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

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

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

or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

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

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

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

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

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

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

A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and

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

(Houlden, Morawetz and Sarra, at §33)

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

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

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

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

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

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

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

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

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

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);
- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

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

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

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

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

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature

or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

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

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

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

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

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

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

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

VI. Conclusion

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

Appeal allowed.

Pourvoi accueilli.

Footnotes

- 1 Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040 (C.S. Que.), at para. 10 (CanLII)).
- 2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.
- 3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.
- 4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.
- 5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.
- 6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite ltée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3420, 2010 CarswellBC 3419, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

**Century Services Inc. (Appellant) and Attorney General of Canada on
behalf of Her Majesty The Queen in Right of Canada (Respondent)**

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("*GST*") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of *GST*. The deemed trust extends to any property or proceeds held by the person collecting *GST* and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates

despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the

developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the

reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in

the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts

have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed

trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of *CCAA* law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

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

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

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the

debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), *aff'g* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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 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.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

227 (4) Trust for moneys deducted — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*...

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*...

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11¹ of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

222 (3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature

is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-André Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the *CCAA*, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the *CCAA*.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in

the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

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

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

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

...

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

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

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

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

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

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2)

of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

- 1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
- 2 The amendments did not come into force until September 18, 2009.

Fiera Private Debt Fund v. SaltWire Network Inc.

2024 CarswellNS 239, 2024 NSSC 89, 12 C.B.R. (7th) 62, 2024 A.C.W.S. 1444

IN THE MATTER OF: The Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended

AND IN THE MATTER OF: A Plan or Arrangement of SaltWire Network Inc., The Halifax Herald Limited, Headline Promotional Products Limited, Titan Security & Investigation Inc., Brace Capital Limited and Brace Holdings Limited

John A. Keith J.

Heard: March 24-25, 2024

Judgment: March 26, 2024

Docket: 531463

Counsel: Joshua J. Santimaw, Jennifer Stam, for Applicants

Maurice Chiasson, K.C., Sara L. Scott, for Defendants

John A. Keith J.:

Introduction and Issues

1 These proceedings arise under the *Companies' Creditors Arrangement Act*, R.S.C. c. C-36, as amended (the "*CCAA*") and involve The Halifax Herald Limited ("**The Halifax Herald**"), SaltWire Network Inc. ("**SaltWire Network**"), Headline Promotional Products Limited ("**Headline Promotional**"), Titan Security & Investigation Inc. ("**Titan Security**"), Brace Holdings Limited, and Brace Capital Limited. Where necessary, I refer to these entities collectively as the "**Debtor Companies**".

2 On March 13, 2024, I heard the following, competing emergency motions, each seeking an initial Order under the *CCAA*:

1. A motion filed by Fiera Private Debt Fund III LP and Fiera Private Debt Fund V LP. Each fund is a limited partnership represented by their general partner, Fiera Private Debt GP Inc. (collectively, "**Fiera**"). Fiera is owed in excess of \$32,700,000 by the Debtor Companies and is the senior secured lender in this proceeding;

2. A motion filed by the Debtor Companies under Court File No. 531475.

3 Fiera and the Debtor Companies were aligned on several important issues. They agreed that:

1. The Debtors Companies were insolvent;

2. The Debtor Companies required protection (including emergency, stabilizing relief) under the *CCAA*;

3. David Boyd of Resolve Advisory Services Ltd. would serve as the Chief Restructuring Officer ("**CRO**") during the *CCAA* process.

4 The differences between the two competing applications narrowed essentially to the question of who would serve as monitor in these *CCAA* proceedings. Fiera proposed that KSV be appointed monitor. The Debtor Companies proposed Grant Thornton. There was a related, more minor dispute around who would provide interim (or Debtor-in-Possession, "**D.I.P.**") financing and the terms of any such financing. However, again, the dispute effectively turned on whether the Court appointed KSV or Grant Thornton as monitor.

5 I issued an initial order appointing KSV Restructuring Inc. ("**KSV**") as monitor (the "**Initial Order**"). My reasons are reported at 2024 NSSC 79.

6 The return hearing was scheduled for Friday, March 22, 2024 in accordance with the deadlines established under section 11.02(1) of the *CCAA* (the "**Comeback Hearing**").

7 The first report of the Monitor, KSV, was filed on March 19, 2024.

8 Also on March 19, 2024, Fiera filed a Notice of Motion seeking the following relief at the Comeback Hearing:

1. Declaring that one of the affiliated debtor companies (Headline Promotional) meets the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-222 and that Headline's employees are eligible to receive payments under and in accordance with the *Wage Earner Protection Program Act*, S.C. 2005, c. 47 s. 1, as amended. (the "**WEPP Order**")

2. Amending and restating the Initial Order, to, among other things:

- a. Extend the stay of proceedings up to and including to May 3, 2024;
- b. Increase the maximum principal amount which the Debtor Companies may borrow under the secured debtor-in-possession financing facility from \$500,000 to \$1.5 million pursuant to an amended and restated interim financing term sheet;
- c. Increase the Administration Charge from \$300,000 to \$450,000;
- d. Increase the aggregate limit of pre-filing payments from \$300,000 to \$500,000;
- e. Expand and enhance the CRO's powers; and
- f. Expand and enhance the Monitor's powers.

(the "**First ARIO**")

3. Approving a proposed sale and investment solicitation process ("**SISP**") to be conducted by FTI Capital Advisors-Canada ULC (the "**FTI Capital**") and, in turn, approving an engagement letter dated March 14, 2024 and entered into between the CRO on behalf of the Debtor Companies and the Financial Advisor. The proposed SISP Order would also grant the Financial Advisor a charge in respect of its proposed fees (the "**Financial Advisor's Charge**").

(the "**SISP Order**")

9 I will address each requested Order separately.

WEPP ORDER FOR HEADLINE PROMOTIONAL

10 The WEPP Order was not controversial.

11 Headline Promotional is a promotional products company that employs 10 people. It is not integral to the operations and business prospects of either:

1. The Halifax Herald or SaltWire Network which are the media companies representing the key business opportunities offered at this stage of the *CCAA* restructuring process;

2. Titan Security.¹

12 As of December 31, 2021, Headline Promotional year-end losses were \$100,962. As of December 31, 2022, the year-end losses more than doubled to \$220,475. As of December 31, 2023, the year-end losses increased again to \$303,325.35.

13 I am satisfied that winding down Headline Promotional will stop the financial hemorrhaging and will not materially impact the ongoing efforts to optimize the value which can be realized in the remaining Debtor Companies. For present purposes, the more important point is that the WEPP Order will assist Headline Promotional's terminated employees to access benefits under the *Wage Earner Protection Program Act* (e.g. compensation for unpaid wages, vacation pay, termination pay and severance pay). The Monitor supports granting the WEPP Order.

14 The WEPP Order will be issued in the form presented.

The ARIO

15 I issued the ARIO immediately following the hearing on March 22, 2024. My reasons include:

1. **Extending the stay from March 22, 2024 to May 3, 2024:** This is not a controversial proposition. It is not only reasonable and necessary to extend the stay to May 3, 2024, it is essential. The Debtors Companies clearly require time to pursue restructuring and, in particular, advance the proposed SISP process;

2. **Increased D.I.P. Financing:** Fiera states that the Debtor Companies will require an additional \$1,000,000 in D.I.P. financing, increasing the available amount available under this facility from \$500,000 to \$1,500,000. The Debtor Companies do not dispute the need for this access to cash. The Monitor confirms that the Debtor Companies have already been required to access about \$250,000 of the original \$500,000 and concludes the proposed increase is reasonable and appropriate noting that:

a. The cash flow projections indicate that an additional \$1,000,000 will be required to sustain the Debtor Companies through the extended stay period;

b. The Companies are not projected to have the funding needed to operate and continue these proceedings without this additional access to cash; and

c. The terms of the additional financing are essentially in line with the existing D.I.P. funding, previously approved.

I carefully reviewed the cash-flow statements submitted by the CRO. The increase would clearly enhance the prospects of the Debtor Companies emerging from these proceedings as a viable, on-going business. With the CRO in place, the concerns around management have dissipated. Finally, the financial terms associated with the increased \$1,000,000 in interim funding is commercially reasonable and consistent with the original \$500,000 D.I.P. financing term sheet. Overall, I am satisfied the requirements for interim financing under section 11.2 of the *CCAA* are met.

3. **Increased Administration Charge:** The Order increased the proposed Administration Charge from \$300,000 to \$450,000. The increase was not contested and is largely related estimated professional fees forecasted over the extended stay period. The increases will ensure the effective participation of those professionals essential to the necessary management and execution of the upcoming SISP process. I agree to the proposed increase in the Administration Charge.

4. **Increased pre-filing payments:** At para. 6 of the Initial Order, I confirmed that, with the consent of the Monitor and the CRO, a total amount of no more than \$300,000 may be paid for those pre-filing debts considered necessary for the ongoing operation of the Debtor Companies. In the Monitor's First Report dated March 19, 2024, the Monitor came to the view that an increased limit of \$500,000 for Pre-Filing Payments "should be sufficient, subject to the Debtor Companies' or the Monitor's right to bring a motion to Court on an urgent basis should the need arise to increase this amount." (Monitor's First Report dated March 19, 2024 at page 17) Section 11.4(1) of the *CCAA* contemplates payments to persons who supply goods or services that "are critical to the company's continued operation." Further, in *Re Performance Sports Group Ltd.*, 2016 ONSC 6800, Newbould, J. wrote that "recent amendments [to the *CCAA*], 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." (at paragraph 24).

emphasize that suppliers will be expected to comply with the terms of this Court's Orders and the Monitor reserves the right to bring motions compelling such compliance among suppliers. However, the Court cannot ignore (and the Debtor Companies cannot afford) the destabilizing influence of critical suppliers who may improperly delay or deny the provision of goods or services. I agree to this increase on the understanding that:

- a. The Monitor and CRO deem (and consent to) the payments as critical to the ongoing and uninterrupted operations of the Debtor Companies and the preservation of their property;
- b. The continued supply of services by the supplier is critical and integral to the business;
- c. The failure to pay will result in an immediate materially adverse impact on the Debtor Companies which could seriously jeopardize these ongoing *CCAA* proceedings; and
- d. A minor error at para. 6 of the first Amended Restated Initial Order be corrected. It should read:
- e. Para. 6 of the first Amended Restated Initial Order be corrected. It should read:

"With the consent of the Monitor and the CRO, the Companies Applicant may make payments owing to suppliers, contractors, subcontractors and other creditors in respect of amounts owing prior to the date of this Order where such payments are deemed by the Companies Applicant to be necessary for the ongoing operation of the Companies Applicant of the preservation of the Property, up to an aggregate limit of \$500,000.

(See also *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 32)

5. CRO's expanded and enhanced powers: It is proposed that the Monitor be expressly vested with the following powers, without limiting those already conferred in the CRO Agreement:

- a. approve all of the Debtor Companies' receipts and disbursements;
- b. oversee and have access to all elements of the management and operation of the business of the Debtor Companies and, without limitation, shall be provided advance details of all proposed sale transactions, including estimated production and transportation cost, price and payment terms;
- c. carry out all obligations of the Debtor Companies pursuant to any proposed sale and investment solicitation process or other sale or divestiture of the assets or business of the Debtor Companies including, without limitation, executing agreements, instruments, notices, directions, settlements, filings, authorizations and other documents of whatever nature on behalf of each of the Debtor Companies in connection therewith;
- d. take steps to cause the Debtor Companies, with the approval of the Monitor, to disclaim any agreements to which any of the Debtor Companies are party in accordance with the *CCAA*;
- e. execute all Advance Requests (as defined in the DIP Documents) on behalf of the Debtor Companies; and
- f. cause the Debtor Companies to administer the business or the property as the CRO, in consultation with the Monitor, deems necessary or desirable for the purposes of completing any transaction involving the business or the property or for purposes of facilitating distributions to creditors of the Debtor Companies.

Again, this was not a controversial amendment. Both the Debtor Companies and Fiera agreed to the appointment of David Boyd as CRO. Neither contest increasing his powers, as proposed. Mr. Boyd is an insolvency expert who enjoys the confidence of these key stakeholders. There is no suggestion that their confidence has waned. The Monitor believes that enhancing the CRO's powers will "further assist the [Debtor] Companies with their restructuring efforts and is appropriate

in the circumstances." (Monitor's First Report dated March 19, 2024 at page 16). Moreover, following the Initial Order, the Debtor Companies' President (Mark Lever) stepped down and there is a suggestion that Mr. Lever may bid on some or all of the business opportunities available through the anticipated SISP process. In the circumstances, the CRO now serves as the embodiment of the Debtor Companies for the purposes of helping to ensure continued operations and implementing the SISP proposal, among other things. The proposed enhanced powers are very clearly required to enable the CRO to fulfill his duties effectively and efficiently.

6. Monitor's Expanded and Enhanced Powers: By Notice of Motion dated March 19, 2024, Fiera proposed that the Monitor be empowered to:

- a. Monitor the Companies' receipts and approve disbursements;
- b. Bring motions in these proceedings.

The Monitor's ability to bring motions was not challenged and, in my view, is both reasonable and necessary. The Monitor is an Officer of the Court who acts as its "eyes and ears" in these proceedings (*Ernst & Young Inc. v. Essar Global Fund Limited* 2017 ONCA 1014 ("**Essar Global**") at para. 109 and quoted with approval by the Supreme Court of Canada in *9354-9186 Québec inc. v. Callidus Capital Corp.* 2020 SCC 10 ("**9353-9186 v Callidus**") at para. 52 and again in *Canada v. Canada North Group Inc.*, 2021 SCC 30 at para. 28). The Monitor must be able to bring matters formally before the Court when necessary.

Expanding the Monitor's power to ensure it can review and keep an eye on the Debtor Companies' receipts and disbursements is also reasonable — and was uncontested.

Expanding the Monitor's power to "approve" disbursements was more controversial. Counsel for the Debtor Companies opposed this form of relief. Prior to the hearing, Fiera reconsidered this request and withdrew it. In *obiter*, the decision to withdraw was appropriate, in my view. Empowering a Monitor with broad powers (or expanding the role to what is sometimes referred to as a "super monitor") should not be a routine or regular occurrence. Extraordinary circumstances should exist. In *Arrangement relatif à Bloom Lake General* 2021 QCCS 2946 ("**Bloom Lake**"), expanded powers were considered absolutely necessary for the Monitor to fulfill its statutory duties and maximize recovery. Indeed, Pisonnault, J. concluded that, without the expanded powers, "it will be **impossible** for the Monitor to calculate what the true approximate value of [a key asset] may be in order for the Monitor to fulfill its statutory duties under the *CCAA*." (at para. 81, emphasis added) In *Essar Global*, there were a number of questionable transactions between related parties in the months leading up to *CCAA* proceedings with significant prejudice to the Debtor Company (Algoma Steel) and its stakeholders. The Court was asked to expand the Monitor's powers so that it might file a claim against the related parties alleging oppression under the *Canada Business Corporations Act*. The Court smell that wafted above the suspicious transactions prompted the Court to observe that "The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose." (at paragraph 109) Ultimately, the Court concluded that the Monitor is intended to play a neutral (not adversarial) role in *CCAA* proceedings. Thus, it would be unusual for a Monitor to launch separate a claim of oppression. However, the Court concluded: "... **in exceptional circumstances**, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case." (at para. 120, emphasis added) In Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAAs*", *Annual Review of Insolvency Law*, Toronto, Thomson Reuters, 2019, p. 650 similarly conclude that the Monitor's powers should be extended only when absolutely necessary. The authors write that: "The *CCAA* monitor should remain neutral and exercise supervisory powers over the restructuring process, driven by the debtor, unless evidence demonstrating that its management is failing or neglecting to exercise its fiduciary duties appropriately." (at p. 651)

In this case, as indicated, the President of the Debtor Companies (Mark Lever) has stepped down and there is some suggestion in the materials that Mr. Lever (and perhaps other key management personnel related to the Debtor Companies) may consider bidding on the business opportunities available through these proceedings, thereby giving rise to concerns around conflict. However, at Fiera's request, a CRO has been appointed and, indeed, the CRO's powers have been expanded.

There is no clear reason why the Monitor must now approve the CRO's decisions regarding disbursements. Moreover, Fiera is proposing and supports a SISP proposal, seeking to liquidate and optimize value in the Debtor Companies. No party or stakeholder is suggesting that this idea is doomed such that the Monitor must step in. Finally, it is important that the Monitor retain (and be seen to retain) its neutrality. The Court should be careful not to risk potentially undermining that important objective unless there are exigent circumstances which necessarily demand that the Monitor be vested with increased powers.

SISP ORDER

Background

16 It is necessary to provide some brief background to properly contextualize certain issues which are relevant to the SISP Order.

17 In October, 2023:

1. Fiera and the Debtor Companies were just entering into their final Forbearance Agreement — the ninth in about 4 ¹/₂ years. In that agreement, the Debtor Companies and their principals provided their advance consent to the "commencement of creditor-led proceedings" by Fiera under the *CCAA*;

2. The Debtor Companies (with Fiera's approval) engaged FTI Capital to assist in locating potential buyers or investors for the Media Companies. The filed materials describe these efforts as the "recapitalization program". In his Affidavit sworn March 8, 2024, Russell French (Fiera's Managing Director, Special Situations) testifies that he "was hopeful that FTI would be successful in attracting a potential investor or buyer for The Herald and Saltwire." (at para. 74)

18 On January 31, 2024, the final Forbearance Agreement expired and the "recapitalization program" had yet to achieve any appreciable results in terms of generating a solid offer for the Media Companies.

19 The parties began discussing a further forbearance agreement but Fiera needed finality and, if the private "recapitalization program" failed, "a roadmap for the planning and preparation of *CCAA* proceedings at the end of the process." (Affidavit of Russell French sworn March 8, 2024 at para. 81)

20 On February 24, 2024, Fiera received a letter of intent but described as "highly conditional" and not capable of acceptance by Fiera absent "significant investigation and further work" (Affidavit of Russell French sworn March 8, 2024 at para. 84).

21 By February 26, 2024, the Debtor Companies and Fiera agreed that proceedings under the *CCAA* were necessary but, despite the Debtor Companies' prior consent, disputes arose. The situation deteriorated to the point where both Fiera and the Debtor companies brought competing emergency motions under the *CCAA*, as indicated.

22 The "recapitalization program" was suspended at or around this time. After obtaining the Initial Order under the *CCAA*, Fiera now seeks to resume the SISP process.

23 There is one further, background issue that should be briefly addressed: the materials filed in connection with this motion describe the current SISP process as a "continuation" of the original private "recapitalization program" commenced in October, 2023. Fiera states that the proposed SISP process now before the Court is "designed effectively as a continuation of the FTI-led Recapitalization Process that has been ongoing for several months and will have clear and firm deadlines for the submission of bids." (Affidavit of Russell French sworn March 8, 2024, at para. 21) The Monitor similarly observed that the pre-filing SISP process would continue during the *CCAA* proceedings. (Monitor's First Report dated March 19, 2024 at pp. 8, 9, and 12) FTI's proposed letter of engagement dated March 14, 2024 also described its mandate as continuing its prior services.

24 There are cases in which creditors, debtors and other stakeholders agree on a plan (or transaction) in advance of filing under the *CCAA*. Formal proceedings under the *CCAA* are then launched to expedite the restructuring process already agreed upon.

The benefits include minimizing disruption to the business. This attempt at a pre-ordained result is sometimes called a "pre-packaged" proposal or "pre-pack". It can invite additional Court scrutiny because the Court is being asked to look retrospectively into events that occurred prior to *CCAA* proceedings being launched.

25 Here, the initial process undertaken by the Financial Agent resulted in data and information which will prove useful in the upcoming SISP. However, it did not result in a proposed transaction to be approved through the *CCAA*. Thus, the current motion is not a "pre-pack" in the true sense of the word. However, similar concerns arise in that the Court may, in the future, be required to more closely review what occurred before formal *CCAA* proceedings were launched. In any event, for clarity, despite the language around a "continuation" of an existing sale or investment process, these proceedings are not constrained (and the Court's jurisdiction is not fettered) by whatever may have occurred before Fiera filed for *CCAA* protection.

The Law

26 Section 36 of the *CCAA* enumerates the factors which the Court will consider when assessing the merits of a sale. In *Royal Bank of Canada v. Soundair Corp.*, (1991) 83 DLR (4th) 76, 1991 CanLII 2727 (ON CA), the Ontario Court of Appeal helpfully distilled these factors in the following criteria to be considered when approving a proposed sale:

1. Did the receiver make a sufficient effort to get the best price and did it act providently?
2. Consideration of the interests of all parties.
3. Consideration of the efficacy and integrity of the process by which the offer was obtained.
4. Was there unfairness in the process?

27 The *CCAA* does not contain this same sort of detailed directions for assessing the merits of the pre-transaction sales **process**. However, the jurisprudence confirms that the essential or foundational principles which animate the Court's assessment of a proposed sales transaction equally guide the Court's discretion assessing the underlying sales process. For the purposes of this proceeding, I would synthesize those principles as follows:

1. Whether a sale transaction is warranted at this time. Relevant considerations may include the business realities facing the debtor companies (e.g. liquidity problems or cash crunch; the reasons any of the debtor company's past efforts to address its debts and obligations failed).
2. Whether the sale will benefit the whole "economic community". The goal is to optimize the value in the debtor's business for the benefit of all relevant stakeholders. On this point, and given the nature of this proceeding as a "creditor-led" proceeding under the *CCAA*, several additional, brief comments are relevant:
 - a. Creditor-led proceedings under the *CCAA* are not particularly common but they are clearly permitted under the statute;
 - b. The interim relief granted in "creditor-led" proceedings under the *CCAA* may need to be tailored to the circumstances. For example, the debtor company and creditor may be in full agreement that the proceedings will be initiated or "led" by the creditor. However, a "creditor-led" proceeding may be more adversarial and expose a fractured and contentious relationship between the creditor and the debtor company. Such was the situation here. Other examples include *Arrangement relatif à Groupe Sélection inc.*, 2022 QCCS 4281, urgent application for leave to appeal denied 2022 QCCA 1596 and *Crystallex International Corp.* 2011 ONSC 7701. Indeed, in this case, the President of the Debtor Companies (Mark Lever) stepped down immediately following the Initial Order being granted. To ensure the effective management and operations of the debtor company as a going concern, it became necessary to engage an independent chief restructuring officer; and
 - c. Although the powers available under the *CCAA* are sufficiently flexible to respond appropriately to the unique circumstances of the case, all parties agreed that the principles which guide the Court's discretion and the basis

statutory objectives do not change. Thus, the particular interests which may motivate a creditor do not dominate the CCAA analysis simply because a creditor launched or "leads" the proceeding.

3. Whether a creditor has a good or *bona fide* reason for objecting to the proposed sale process. On this, the Court may consider and weigh all of the affected interests. Where there are numerous affected stakeholders, an individual creditor's preferences or demands may not necessarily represent an enforceable objection.
4. Whether there is a more viable alternative. In very simple terms: does any person have a better idea? Is bankruptcy more beneficial?
5. The Court should ensure that the process being proposed is fair, transparent, commercially efficient, cost-effective in the circumstances, and preserves the integrity of the CCAA process.
6. Whether all parties to the process are acting in good faith and with due diligence.

(*Re. Nortel Networks Corporation*, 2009 CanLII 39492 (ON SC); *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750; *Re. PCAS Patient Care Automation Services Inc.* 2012 ONSC 2840; *Re Lydian International Limited*, 2019 ONSC 7473). (I also note that section 18.6 of the CCAA specifically codifies the obligation to act in good faith).

28 These principles also reflect the following more general imperatives embedded within the CCAA:

1. Providing reasonably sufficient flexibility, time and space to allow the debtor company to engage in restructuring negotiations; optimize the debtor company's value for all stakeholders; and ideally enable the debtor company to emerge from CCAA as an ongoing concern;
2. Equally important, the Court's overarching supervisory jurisdiction and broad discretion over this statutory process. The Supreme Court of Canada's observation in *9354-9186 v Callidus* is germane:

"...the relative weight that the differing objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the Court for approval...**the architecture of the CCAA leaves the case specific assessment and balancing of the remedial objectives to the supervising judge.**"

(at para. 46, emphasis added)

FTI's Engagement Letter and Related Charge

29 Generally speaking, I am agreeable to and approve the terms of FTI's engagement letter dated March 14, 2024. I am satisfied that FTI's familiarity and experience with the Media Companies (including its knowledge of those who may be in the market for the business opportunities presented by the CCAA proceeding):

1. Enables FTI to immediately engage with an identifiable market. Among other things, FTI has spent months identifying potential buyers and has a data room already populated for use in the upcoming SISP process. Ignoring these benefits will cause unnecessary waste and delay;
2. Will facilitate an efficient and commercially efficacious SISP process;
3. Will improve the likelihood of optimizing the value and restructuring options available in the Media Companies.

30 I also accept the Monitor's view that:

1. The financial terms of the Engagement Letter are commercially reasonable;

2. FTI's requested charge for its fees is standard in these proceedings; will provide FTI with necessary assurances around payment and, in doing so, will ensure FTI's professional commitment to this mandate.

Proposed SISP Process

31 As to the terms of the SISP Process attached to the SISP Order, again, I am generally agreeable to the proposed form. It is clear that a SISP process is required; no creditor has raised any objection and, indeed, no other person or stakeholder has identified any alternate path forward. The public interest is a consideration but this SISP offers the opportunity for renewal of the Media Companies and the public service they provide in a commercially reasonable manner.

32 There are several amendments which were required. A copy of the revised Order which will issue is attached. Many of the amendments were minor in nature. However, the following paragraphs bear additional mention:

1. Paragraphs 8 and 14: In my view, it is important that any Potential Bidder (as that term is defined in the SISP Process document receive a copy of the Court's Order). Among other things, the Court's supervisory role should be formally recognized. Moreover, in my view, it is not necessary that the Monitor be required to expressly permit certain key members of the Debtor Companies' management to participate as a Potential Bidder. By way of background, the President of the Debtor Companies (Mark Lever) may be interested in bidding on the business opportunities being made available through the SISP. Mr. Lever and others may be considered "insiders" or key members of management who acquired unique, sensitive, or important information regarding the Debtor Companies. Concerns regarding potential conflict and, more importantly, the fairness and integrity of the SISP process plainly arise. The SISP Process document will be amended to clearly define those "insiders" or key members of management who trigger these concerns. They are "any director, officer, employee, or professional advisor of the Companies with information that could prove useful or valuable to any bidder including, without limitation, [Mark] Lever, [Sarah] Dennis, the CFO, the COO or any other employee of the Companies who is asked to participate in the due diligence being performed by a purchaser or investor, including management meetings or may be a member of a purchase or investor group". The SISP Process document also contains a number of critical safeguards including an obligation to immediately and clearly advise if/when any such key management team member determines that it will be participating in the bidding process. With these protections in place and given the need to maximize value, in my view, it is unnecessary to also require the Monitor's permission before any such person can even be qualified as a potential bidder, before the due diligence process even begins.

2. Paragraph 29(b)(iii): This paragraph originally suggested that Fiera's "concurrency" was required when determining any successful bid or back-up bid. For the reasons given above, in my view, Fiera is entitled to be consulted but cannot insist upon that "concurrency" will govern. In fairness, I note that all parties agreed that it is not the intention of the SISP to fetter the Court's discretion or bind the Court to Fiera's decisions;

3. Paragraph 39: This paragraph indicates that any material amendments to the SISP requires the "consent" of Fiera. I recognize that Fiera is the senior secured lender. I also appreciate that, realistically, the value of the Debtor Companies may not exceed Fiera's debt such that Fiera represents the only actual economic interest. However, for the reasons given above, Fiera does not control the levers of this process. Its "consent" cannot be determinative. Thus, the paragraph has been altered to require that the Monitor also seek Court approval for any material changes to the SISP. For clarity, it is the Court that retains jurisdiction in this process. And, again, all parties agree that the Court retains the ultimate discretion and jurisdiction and is not bound to the decisions of any party.

Motion granted in part.

Appendix — Sale and Investment Solicitation Process

Introduction

On March 12, 2024, upon application by Fiera Private Debt Fund III LP and Fiera Private Debt Fund V LP, each by their general partner, Fiera Private Debt GP Inc. (collectively, the "**Applicants**") the Supreme Court of Nova Scotia (the "**Court**") granted

an Initial Order (as amended and restated and as may be further amended from time to time, the "**Initial Order**") commencing proceedings pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**" and the "**CCAA Proceedings**") in respect of Saltwire Network Inc. ("**Saltwire**"), the Halifax Herald Limited ("**The Herald**"), Headline Promotional Products Limited ("**Headline**"), Titan Security & Investigation Inc. ("**Titan**"), Brace Capital Limited and Brace Holdings Limited.

Pursuant to the Initial Order, KSV Restructuring Inc. was appointed by the Court as the monitor in the CCAA Proceedings (the "**Monitor**") and Resolve Advisory Services Ltd., through the services of David Boyd, was appointed as chief restructuring officer (the "**CRO**") in the CCAA Proceedings.

Saltwire and The Herald (collectively, the "**Companies**"), through the CRO, have retained FTI Capital Advisors — Canada ULC (the "**Financial Advisor**") pursuant to a revised engagement letter dated March 14, 2024, to conduct a sale and investment solicitation process ("**SISP**") under the supervision of the Monitor and with approval of the Court, pursuant to which all interested parties will be provided with an opportunity to participate in the SISP. The SISP will continue the pre-filing efforts of Financial Advisor in soliciting interests for the assets and/or the business of the Companies, which efforts were commenced by the Financial Advisor on November 6, 2023 pursuant to an engagement letter dated October 18, 2023.

This document outlines the SISP, comprised of two phases ("**Phase 1**" and "**Phase 2**", respectively).

Opportunity

1. The SISP is intended to solicit interest in, and opportunities for, a sale of, or investment in, all or part of assets and business operations of the Companies (the "**Opportunity**") which includes principally, the assets or shares relating to the media businesses owned by the Companies (the "**Business**").
2. The Opportunity may include one or more of:
 - (a) a restructuring, recapitalization or other form of reorganization of the business and affairs of the Companies (or some of them) as a going concern; and
 - (b) subject to 0, a sale of all, any or all of the assets or shares relating to the Business (the "**Property**") as a going concern.
3. For greater certainty, the Opportunity shall not include the sale or restructuring of Titan, Headline or the real property owned by the Companies (the "**Real Property**") on a stand-alone basis.
4. Prior to the date of the Initial Order, the Companies, with the assistance of the Financial Advisor, had been conducting a pre-filing sale and investment solicitation process (the "**Pre-filing SISP**") in respect of the Business. From and after the date of the SISP Order, the Pre-filing SISP will be continued under, and be governed by, this SISP. Further, and for greater certainty, any previously submitted non-binding letter of interest shall not be considered an LOI for the purposes of the SISP unless re-submitted in accordance with the terms set out herein.

Timeline

5. The following table sets out the key milestones under the SISP:

Milestone	Deadline
Commencement of the SISP	March 26, 2024
Phase 1 Bid Deadline	5pm ADT, April 25, 2024 (" Phase 1 Bid Deadline ")
Phase 2 Bid Deadline	5pm ADT, May 24, 2024 (" Phase 2 Bid Deadline ")
Court Approval Date	No later than June 28, 2024
Closing Date Deadline	July 31, 2024

Subject to the terms provided for herein or any order of the Court, these dates may be extended by the Monitor in consultation with the CRO and the Financial Advisor pursuant to this SISP.

Nothing herein shall prevent an interested from submitting a letter of intent or expression of interest prior to any deadline in the table above.

Solicitation of Interest: Notice of the SISP

6. As soon as reasonably practicable, but in any event by no later than March 26, 2024:

(a) In consultation with the Monitor and the CRO, the Financial Advisor shall contact again those parties canvassed as part of the Pre-filing SISP to determine whether they now have an interest in this Opportunity in light of the commencement of these proceedings, pursuant to the process in paragraph 0 below. Additionally, the Financial Advisor, in consultation with the Monitor and the CRO, will contact any additional parties it believes may have an interest in this Opportunity, including parties that have approached the Companies, the Financial Advisor or the Monitor indicating an interest in the Opportunity (collectively, "**Known Potential Bidders**");

(b) the Monitor will cause a notice of the SISP (the "**Notice**") to be published in The Globe and Mail (National Edition) and the relevant media company newspapers, and any other newspaper or journals as the CRO, Monitor and Financial Advisor, consider appropriate, if any;

(c) the CRO will cause the Companies to issue a press release with Canada Newswire setting out the information contained in the Notice and such other relevant information which the CRO, Financial Advisor and the Monitor, consider appropriate, designating dissemination in Canada and major financial centres in the United States; and

(d) the Financial Advisor, in consultation with the Monitor and the CRO, will prepare: (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) a non-disclosure agreement in form and substance satisfactory to the Financial Advisor and the Monitor, in consultation with the CRO and consistent with the form and substance of the non-disclosure agreement previously executed by interested parties under the Pre-filing SISP (an "**NDA**").

7. The Financial Advisor will send the Teaser Letter and NDA to all Known Potential Bidders by no later than March 26, 2024 and to any other party who request a copy of the Teaser Letter and NDA or who is identified to the CRO, the Monitor or the Financial Advisor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

PHASE 1: NON BINDING LOIs

Qualified Bidders and Delivery of Confidential Information Package

8. Any party who wishes to participate in the SISP (a "**Potential Bidder**") must provide to the Financial Advisor:

(a) A written acknowledgement which confirms receipt of this SISP Approval Order (including these SISP Procedures) and contains an agreement to accept and be bound by the terms of that Order;

(b) An NDA executed by it, or any portion thereof, and a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder — unless the Financial Advisor confirms to such Potential Bidder that those documents were already provided to the satisfaction of the Financial Advisor and the Monitor,

9. If it is determined by the Financial Advisor and the Monitor in their reasonable business judgement, and in consultation with the CRO that a Potential Bidder: (i) has satisfied the requirements of paragraph 8 above; (ii) has a *bona fide* interest in completing a Sale Proposal or Investment Proposal; (iii) has delivered an NDA; and (iv) and has the financial capability based

on the availability of financing, experience and other considerations, as determined by the Financial Advisor and the CRO, in consultation with the Monitor, to be able to consummate a sale or investment transaction pursuant to the SISP, then such Potential Bidder will be deemed to be a **"Phase 1 Qualified Bidder"**; provided that no Potential Bidder shall be deemed not to be a Phase 1 Qualified Bidder.

10. At any time during Phase 1 of the SISP, the Financial Advisor and the CRO, with the consent of the Monitor, may eliminate a Phase 1 Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP.

11. The Financial Advisor, with the assistance of the CRO and the Monitor, will prepare and send to each Phase 1 Qualified Bidder a confidential information package providing additional information considered relevant to the Opportunity (the **"Confidential Information Package"**). The Financial Advisor, the CRO, the Companies, the Monitor and their respective advisors make no representation or warranty as to the information contained in the Confidential Information Package or otherwise made available pursuant to the SISP or otherwise, except to the extent expressly contemplated in any definitive sale or investment agreement with a successful bidder ultimately executed and delivered by the Companies.

12. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and the Business in connection with their participation in the SISP and any transaction they enter into pursuant to this SISP.

Due Diligence

13. The Financial Advisor and the CRO, in consultation with the Monitor, shall in their reasonable business judgment and subject to competitive and other business considerations, afford each Phase 1 Qualified Bidder such access to due diligence materials and information relating to the Property and the Business as they deem appropriate. Due diligence access may include management presentations, access to electronic data rooms, on-site inspections, and other matters which a Phase 1 Qualified Bidder may reasonably request and as to which the Financial Advisor and the Monitor, in their reasonable business judgment and after consulting with CRO, may agree. The Financial Advisor, with the assistance of the Monitor, will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 1 Qualified Bidders and the manner in which such requests must be communicated. None of the Companies, the Financial Advisor and the Monitor will be obligated to furnish any information relating to the Property or the Business to any person other than to Phase 1 Qualified Bidders. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 1 Qualified Bidders if the Financial Advisor the CRO, in consultation with the Monitor, determine such information to represent proprietary or sensitive competitive information.

14. If any officer, director, professional advisor, or employee of the Companies has information which could prove useful or valuable to any bidder (including, without limitation Mark Lever, Sarah Dennis, the CFO and the COO or any other employee of the Companies with such information):

(a) is asked to participate in due diligence being performed by a purchaser or investor, including management meetings; or

(b) is or may be a member of a purchaser or investor group

(each, a **"Management Member"**)

Then (i) any such Management Member shall be required to advise the Financial Advisor and Monitor of this potential interest. This information shall be provided to the Financial Advisor and Monitor immediately upon the Management Member being asked to participate in due diligence or becoming (or may become) a member of a purchaser or investor group and, in any event, before any management meeting occurs; (ii) competing interested parties shall be advised of the Management Member's potential involvement with another bid by the Financial Advisor or the Monitor; (iii) the Management Member will only be entitled to participate in the meetings with the consent of the interested party; and (iv) the management meeting will be supervised by either or both of the Financial Advisor and the Monitor. The Monitor reserves the right to implement such other procedures as it considers necessary to address any confidentiality issues that may arise during the conduct of the SISP. If a

Management Member fails to disclose its interest or potential interest in a transaction prior to meeting with another interested party, the Monitor shall have the right to preclude that individual or the group with he or she is involved from participating in the SISP.

Non-Binding Letters of Intent from Phase 1 Qualified Bidders

15. A Phase I Qualified Bidder that wishes to pursue the Opportunity further must deliver a non-binding letter of interest (an "**LOI**") to the Financial Advisor and the Monitor in the manner specified in Schedule "I" hereto, so as to be received by them not later the Phase 1 Bid Deadline.

16. Subject to paragraph 0, an LOI so submitted will be considered a qualified LOI (a "**Qualified LOI**") only if:

- (a) it is submitted on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;
- (b) it contains an indication of Phase 1 Qualified Bidder's offer to:
 - (i) acquire all, substantially all or a portion of the Property (a "**Sale Proposal**") and clearly identifies which Property it intends to acquire, or
 - (ii) make an investment in, restructure, reorganize or refinance the Business/the Companies (an "**Investment Proposal**") and clearly identifies which Business/Companies it intends to make an investment in, restructure, reorganize or refinance;
- (c) in the case of a Sale Proposal, it identifies or contains the following:
 - (i) the purchase price or price range in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and key assumptions supporting the valuation;
 - (ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;
 - (iii) a specific indication of the financial capability of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction;
 - (iv) the key material contracts and leases, if any, the Phase 1 Qualified Bidder wishes to acquire and the Qualified Phase 1 Bidder's proposed treatment of any related cure costs;
 - (v) a description of the conditions and approvals required for a final and binding offer;
 - (vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer; and
 - (vii) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;
- (d) in the case of an Investment Proposal, it identifies the following:
 - (i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment;
 - (ii) the aggregate amount of the equity and/or debt investment to be made in the Business/the Companies in Canadian dollars;
 - (iii) the underlying assumptions regarding the pro forma capital structure;
 - (iv) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction;

- (v) a description of the conditions and approvals required for a final and binding offer;
 - (vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;
 - (vii) all conditions to closing that the Phase 1 Qualified Bidder may wish to impose; and
 - (viii) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;
- (e) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by the Financial Advisor and the Monitor in consultation with the CRO.

17. Unless otherwise ordered by the Court, the Monitor in consultation with the Financial Advisor and the CRO, may waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified LOI. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Preliminary Assessment of Phase 1 Bids and Subsequent Process

18. Following the Phase 1 Bid Deadline, the Financial Advisor and the CRO, in consultation with the Monitor, will assess the LOIs and shall determine whether an LOI is a Qualified LOI. A summary of all LOIs shall be provided to the Applicants forthwith after receipt. If it is determined by the Financial Advisor and the Monitor, in consultation with the CRO, that a Phase 1 Qualified Bidder that has submitted a Qualified LOI (i) has a *bona fide* interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "**Phase 2 Qualified Bidder**". Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP.

19. As part of the assessment of Qualified LOIs and the determination of the process subsequent thereto, the Financial Advisor and the CRO, in consultation with the Monitor, and after consultation with the Applicants, shall determine the process and timing to be followed in pursuing Qualified LOIs based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified LOIs received, (ii) the scope of the Property or Business to which any Qualified LOIs may relate, and (iii) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to some or all of the Property.

20. Upon the determination by the Financial Advisor and the CRO in consultation with the Monitor and the Applicants, of the manner in which to proceed to Phase 2 of the SISP, the Financial Advisor, in consultation with the Monitor, the CRO and the Applicants, will prepare a bid process letter for Phase 2 (the "**Bid Process Letter**"), and the Bid Process Letter will be (i) sent by the Financial Advisor to all Phase 2 Qualified Bidders, and (ii) posted by the Monitor on the website the Monitor maintains in respect of this CCAA proceeding.

PHASE 2: FORMAL OFFERS AND SELECTION OF SUCCESSFUL BIDDER

21. Paragraphs 0 to 0 below and the conduct of Phase 2 are subject to paragraphs 0 to 0, above, and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

Formal Binding Offers

22. Phase 2 Qualified Bidders that wish to make a formal offer to purchase or make an investment in the Business or the Property (or any of it) shall submit a binding offer that complies with all of the following requirements to the Financial Advisor and the Monitor as specified in Schedule "I" hereto, so as to be received by them not later than the Phase 2 Bid Deadline or as may be modified in the Bid Process Letter, in consultation with and with the CRO and the Applicants by the Phase 2 Bid Deadline:

- (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified LOIs;
- (b) the bid clearly identifies which of the Property it relates to and is on terms and conditions reasonably acceptable to the Financial Advisor and the Monitor, in consultation with the CRO;
- (c) it indicates whether the bid includes the acquisition of the litigation claim of Saltwire against Transcontinental Nova Scotia Media Group Inc., et. al. and provides an allocated purchase price to the same;
- (d) the bid indicates the number of employees of the Companies that the Phase 2 Qualified Bidder intends to hire;
- (e) the bid confirms that any applicable collective agreements will be assumed by the Phase 2 Qualified Bidder;
- (f) the bid includes a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder or a Back Up Bidder (defined below), its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder or, in the case of a Back Up Bid (defined below), that it shall remain irrevocable until the later of the closing of the transaction with the Successful Bidder or the closing of the transaction contemplated by the Back Up Bid, if the Successful Bid has failed (the "**Back Up Bid Expiration Date**");
- (g) the bid includes duly authorized and executed transaction agreements, including the purchase price or investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto;
- (h) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow the Financial Advisor and the CRO, in consultation with the Monitor to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;
- (i) the bid is not conditioned on the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, to the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 1 from the Phase 1 Qualified Bidder;
- (j) the bid fully discloses the identity of each entity that will be entering into the transaction or the financing, or that is participating or benefiting from such bid;
- (k) the bid is accompanied by a non-refundable deposit in the amount of not less than 10% (the "**Deposit**") of the purchase price or transaction value (as determined by the Financial Advisor, in consultation with the Monitor and the CRO) by wire transfer of immediately available funds, which deposit shall be retained by the Monitor in a non-interest bearing trust account in accordance with paragraph 0;
- (l) the bid includes acknowledgments and representations of the Phase 2 Qualified Bidder that: (i) has had an opportunity to conduct any and all due diligence regarding the Property, the Business and the Companies prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (ii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its bid; and (iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Business, Property, or the Companies or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) entered into in connection with a transaction;
- (m) the bid is received by the Phase 2 Bid Deadline; and

(n) the bid contemplates closing the transaction set out therein on or before July 31, 2024 (the "**Closing Date**").

23. Following the Phase 2 Bid Deadline, the Financial Advisor and the CRO, in consultation with the Monitor, will assess the Phase 2 bids received and, for greater certainty, copies of all Phase 2 bids shall be provided forthwith after receipt to the Applicants unless the Applicants have become a Phase 2 Qualified Bidder. The Financial Advisor and the CRO, in consultation with the Monitor, will designate the most competitive bids that comply with the foregoing requirements to be "Qualified Bids". No Phase 2 bids received shall be deemed not to be Qualified Bids without the approval of the Monitor. Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).

24. The Monitor, in consultation with the Financial Advisor and the CRO, may waive strict compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified Bid

25. The Financial Advisor shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constituted a Qualified Bid within five (5) business days of the expiration of the Phase 2 Bid Deadline, or at such later time as the Financial Advisor and the Monitor, in consultation with the CRO and the Applicants, deem appropriate.

26. If the Financial Advisor and the CRO, with the consent of the Monitor, are not satisfied with the number or terms of the Qualified Bids or otherwise believe that the SISP would benefit from extending the Phase 2 Bid Deadline, the Financial Advisor and the CRO, with the consent of the Monitor and subject to paragraph 0, may extend the Phase 2 Bid Deadline provided that the Phase 2 Bid Deadline shall not be extended for more than 10 business days without the approval of the Monitor or Order of the Courts.

27. The Financial Advisor and the CRO, with the consent of the Monitor, may aggregate separate bids from unaffiliated Phase 2 Qualified Bidders to create one "Qualified Bid".

Evaluation of Competing Bids

28. A Qualified Bid will be valued based upon several factors, including, without limitation, items such as the Purchase Price and the net value provided by such bid, the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions, the proposed transaction documents, factors affecting the speed, certainty and value of the transaction, the assets included or excluded from the bid, any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by the Financial Advisor and the Monitor, in consultation with the CRO.

Selection of Successful Bids

29. Subject to the Bid Process Letter, the Financial Advisor, the CRO and the Monitor:

(a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated among the Financial Advisor, in consultation with the Monitor and the CRO, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and

(b) may

(i) identify the highest or otherwise best bid or bids (each, a "**Successful Bid**", and the Phase 2 Qualified Bidder making each such Successful Bid, a "**Successful Bidder**") for any particular Property or Business in whole or part; and/or

(ii) Identify one or more Qualified Bids to be accepted on a conditional basis subject to the failure of the transaction(s) contemplated by the Successful Bid(s) (a "**Back Up Bid**" and such Phase 2 Qualified Bidder, a "**Back Up Bidder**"); and/or

(iii) (ii) direct such Phase 2 Qualified Bidders to participate in an auction ("**Auction**") to be conducted and administered by the Monitor in accordance with the Auction Procedures Letter (defined below), with the assistance of the Financial Advisor and the CRO. The determination of any Successful Bid and Back Up Bid by the Financial Advisor and the CRO, with the concurrence of the Monitor and in consultation with the Applicants, shall be subject to approval by the Court.

30. In the event that it is determined that there is to be an Auction in respect of some or all of the Property or Business, the Auction shall be governed by an auction procedures letter ("**Auction Procedures Letter**") to be prepared by the Monitor and sent to all applicable Phase 2 Qualified Bidders setting out, among other things, (a) the date, time and location of the Auction (including whether in person or by videoconference); (b) the amount of the starting bid; and (c) the initial minimum overbid.

Sale Approval Motion Hearing

31. At the hearing of the motion to approve any transaction with a Successful Bidder or Successful Bidders (the "**Sale Approval Motion**"), the Monitor shall seek, among other things, approval from the Court to consummate any Successful Bid.

Confidentiality and Access to Information

32. All discussions regarding a Sale Proposal, Investment Proposal, LOI or Phase 2 bid should be directed through the Financial Advisor. Under no circumstances should the management of the Companies be contacted directly without the prior consent of the Financial Advisor and the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process, in the discretion of the Monitor.

33. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between the CRO, the Financial Advisor, the Monitor and such other bidders or Potential Bidders in connection with the SISP, except to the extent the Financial Advisor and the CRO, with the consent of the Monitor, and consent of the applicable participants, are seeking to combine separate bids from Phase I Qualified Bidders or Phase 2 Qualified Bidders.

34. Without limiting the rights of the Applicants herein, the Financial Advisor and the Monitor may consult with any other parties with a material interest in the CCAA proceedings, including the Applicants, regarding the status and material information and developments relating to the SISP to the extent considered appropriate by the Monitor in consultation with the Financial Advisor, provided that such parties (other than the Applicants) shall have entered into confidentiality arrangements satisfactory to the Financial Advisor and the Monitor. The Financial Advisor and/or the Monitor may discuss the status of the SISP throughout the conduct of the SISP.

Supervision of the SISP

35. The Monitor will oversee, in all respects, the conduct of the SISP by the Financial Advisor and, without limitation to that supervisory role, the Monitor will participate in the SISP in the manner set out in herein, in any Bid Process Letter and the Initial Order and is entitled to receive all information in relation to the SISP.

36. This SISP does not and will not be interpreted to create any contractual or other legal relationship between the Companies and any Phase I Qualified Bidder, any Phase 2 Qualified Bidder or any other party, other than as specifically set forth in a definitive agreement that may be signed in connection with a Successful Bid.

37. Without limiting the preceding paragraph, neither the Financial Advisor nor the Monitor shall have any liability whatsoever to any person or party, including without limitation any Potential Bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, the Successful Bidder, the Companies, the Applicants or any other creditor or other stakeholder of the Companies, for any act or omission related to the process contemplated herein. By submitting a bid, each Phase 1 Qualified Bidder, Phase 2 Qualified

Bidder, or Successful Bidder shall be deemed to have agreed that it has no claim against the Monitor or the Financial Advisor for any reason whatsoever.

38. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, Phase 2 bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

39. Subject to the limitations in paragraph 0, the Financial Advisor, with the consent of the Monitor, or order of the Court, shall have the right to modify the SISP (including, without limitation, pursuant to the Bid Process Letter) if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in this CCAA proceeding shall be advised of any substantive modification to the procedures set forth herein. Any material amendment to the SISP, in the opinion of the Monitor, will require the consent of the Applicants. However, for clarity and irrespective of the Applicants' foregoing consent rights, the Monitor shall seek the Court's approval for any material changes to the SISP.

40. The deadlines provided for in this SISP may be extended in the discretion of the Financial Advisor and the Monitor provided that the aggregate discretionary extensions shall not exceed 15 business days. In the event that any one milestone deadline is extended, all subsequent milestones shall be extended by the same number of days and a revised timetable shall be provided to all applicable interested parties and posted on the Monitor's website.

Miscellaneous

41. Notwithstanding the other provisions of the SISP, the Monitor may, in consultation with the CRO, the Financial Advisor and the Applicants, at any time bring a motion:

(a) to seek approval of a stalking horse agreement in respect of some or all of the Property and related bid procedures in respect of such Property or to establish further or other procedures for Phase 2; and/or

(b) to seek approval to terminate the SISP if (i) no *bona fide* purchasers or investors, in the opinion of the Monitor are participating in the SISP; or (ii) the Applicants, acting reasonably, have advised the Financial Advisor and the Monitor that none of the LOIs submitted in phase 1 will result in a transaction acceptable to the Applicants, and after consideration, the Financial Advisor, CRO and the Monitor concur with that view or (iii) the Applicants, acting reasonably, have advised the Financial Advisor, the CRO and the Monitor that none of the offers submitted in phase 2 will result in a transaction acceptable to the Applicants, and after consideration, the Financial Advisor, the CRO and the Monitor concur with that view; and/or

(c) to seek approval of a transaction for any of the Real Property, provided that prior to the completion of the SISP, such Real Property sale does not impair the ability to complete a transaction for the Business; and/or

(d) to seek approval of a transaction for certain Property of some or all of the Companies of de minimis value and which the Monitor, in consultation with the CRO and Financial Advisor, can be sold independently of the Business.

42. In the event that the SISP is terminated in connection with paragraph 0 above, the Applicants shall not, by virtue of having not participated in the SISP, be disqualified from submitting an offer for the Business on the basis of a credit bid or otherwise. For clarity, it is the strong preference of the Applicants to find a solution that results in a transaction where the Applicants are not the controlling shareholder of the Companies or the Business.

43. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of any of the Property or investment in the Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Companies, the CRO the Financial Advisor, or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Companies in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges,

options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders or the definitive documents entered into in connection with the Successful Bid.

44. All Deposits shall be retained by the Monitor in a non-interest bearing trust account. If a Successful Bid is selected and an order authorizing the consummation of the transaction contemplated thereunder is granted, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the cash consideration to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. In the event that the Successful Bid is not completed due to a breach or default of the bidder's obligations thereunder, the Deposit shall be forfeited to the Companies as damages and such Deposit shall be in addition to, and not in lieu of, any other rights in law or equity that the Companies have in respect of such breach or default. Any Deposit delivered with a Phase 2 Qualified Bid that is not selected as a Successful Bid or a Back Up Bid will be returned to the applicable bidder as soon as reasonably practicable (but not later than ten (10) business days) after the earliest of (a) Court approval of an alternative Successful Bid for the same Property or Business, which Order shall have become a final order; (b) the closing of a transaction in respect of the same Property or Business; or (c) 60 days after the date the Phase 2 Qualified Bidder is notified its bid is not a Successful Bid. Deposits in respect of a Back Up Bid will be returned as soon as reasonably practicable (but not later than ten (10) business days) after the Back Up Bid Expiration Date.

45. The consultation and other rights afforded to the CRO herein shall not extend to other officers, shareholders and/or the directors of the Companies without the consent of the Monitor, in its sole discretion.

Schedule "1" — Addresses of Monitor and Financial Advisor

All LOIs and formal binding offers (and any accompanying documents) shall be transmitted by way of email to the Monitor and Financial Advisor as follows:

To the Monitor:

KSV Restructuring Inc.

220 Bay Street, 13th Floor, PO Box 20

Toronto, Ontario M5J 2W4

Attention: Bobby Kofman (bkofman@ksvadvisory.com) and Mitch Vininsky

(mvininsky@ksvadvisory.com)

To the Financial Advisor:

FTI Capital Advisors — Canada ULC

79 Wellington Street West, Suite 2010

Toronto, ON M5K 1G8

Attention: Dean Mullett (dean.mullett@fticonsulting.com) and Richard Kim

(richard.kim@fticonsulting.com)

Footnotes

- 1 Titan Security is a full-service security and health care services company with approximately 100 full and part-time employees. Based on the evidence before the Court, Titan Security recorded a positive net income of \$640,860.16 (or Adjusted EBITDA of \$744,442.48) for the year ending December 31, 2024. Titan Security will be the subject of a separate marketing and sale process.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.)
)
JUSTICE OSBORNE) THURSDAY, THE 24 DAY
) OF APRIL, 2025

**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
HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC
CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC
BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC
CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.**

**ORDER
(Amended and Restated SISP Approval Order)**

THIS MOTION, made by Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI, HBC Canada Parent Holdings Inc., HBC Canada Parent Holdings 2 Inc., HBC Bay Holdings I Inc., HBC Bay Holdings II ULC, The Bay Holdings ULC, HBC Centerpoint GP Inc., HBC YSS 1 LP Inc., HBC YSS 2 LP Inc., HBC Holdings GP Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**") for an order approving the procedures for the Amended and Restated Sale and Investment Solicitation Process in respect of the Applicants attached hereto as Schedule "A" (the "**Amended and Restated SISP**") was heard this day at 330 University Avenue, Toronto, Ontario and via videoconference.

ON READING the affidavits of Jennifer Bewley sworn March 7, 2025, March 14, 2025, and March 21, 2025, and the Exhibits thereto, the affidavit of Adam Zalev sworn April 17, 2025, and the supplemental affidavit of Adam Zalev sworn April 23, 2025, and the Exhibits thereto, the affidavit of Brittney Ketwaroo sworn April 24, 2025 (the "**Ketwaroo Affidavit**"), and the Exhibits thereto, the pre-filing report of Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as proposed monitor of the Applicants dated March 7, 2025 (the "**Pre-Filing Report**"), the first report of A&M, in its capacity as monitor of the Applicants (in

such capacity, the “**Monitor**”), dated March 16, 2025, the Supplement to the First Report of the Monitor dated March 21, 2025, and the Second Report of the Monitor dated April 22, 2025, and on hearing the submissions of counsel to the Applicants, counsel to the Monitor, and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the Affidavit of Service of Brittney Ketwaroo sworn April 21, 2025 and April 24, 2025.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the Amended and Restated SISP or the Amended and Restated Initial Order, dated March 21, 2025 (the “**ARIO**”), as applicable.

APPROVAL OF AMENDED AND RESTATED SALE AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the Amended and Restated SISP (subject to any further amendments thereto that may be made in accordance therewith and with the terms of this Order) be and is hereby approved and the Applicants and the Monitor are hereby authorized and directed to implement the Amended and Restated SISP pursuant to its terms and the terms of this Order. The Applicants and the Monitor are hereby authorized and directed to take any and all actions as may be necessary or desirable to implement and carry out the Amended and Restated SISP in accordance with its terms and this Order.

4. **THIS COURT ORDERS** that each of the Applicants, Reflect Advisors, LLC, (“**Reflect**”), the Monitor and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the Amended and Restated SISP, except to the extent of such losses, claims, damages or liabilities arising or resulting from the gross negligence or wilful misconduct of the

Applicants, Reflect, or the Monitor, as applicable, in performing their obligations under the Amended and Restated SISP, as determined by this Court.

5. **THIS COURT ORDERS** that, pursuant to section 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS), the Applicants, Reflect and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective bidders or offerors and to their advisors, but only to the extent required to provide information with respect to the Amended and Restated SISP in these proceedings.

6. **THIS COURT ORDERS** that notwithstanding anything contained in this Order or in the Amended and Restated SISP, neither Reflect nor the Monitor shall take Possession of the Property or the Art Collection or be deemed to take Possession of the Property or the Art Collection, including pursuant to any provision of the Environmental Legislation.

7. **THIS COURT ORDERS** that notwithstanding anything else contained herein, the Applicants and any Related Person that wishes to submit or participate in a Sale Proposal or Investment Proposal for the Property or the Business, must declare such intention to Reflect and the Monitor in writing by April 7, 2025. Until such time as the Applicant or any Related Person declares no such intention, Reflect and the Monitor shall design and implement additional procedures for the Amended and Restated SISP to limit the sharing of information with the Applicants so as to ensure and preserve the fairness of the Amended and Restated SISP.

8. **THIS COURT ORDERS** that the agreement dated April 24, 2025, engaging Heffel Gallery Limited (“**Heffel**”) as Auctioneer for the Company’s Art Collection (“**Heffel Engagement Letter**”) substantially on the terms to be attached to the Ketwaroo Affidavit, and the retention of Heffel under the terms thereof, is hereby approved and ratified with such amendments as deemed necessary by the Applicants, with the consent of the Monitor, and the Applicants are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the Heffel Engagement Letter.

PROTECTION OF PERSONAL INFORMATION

9. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (Canada) and any similar legislation in any other applicable jurisdictions, the Applicants, Reflect and the Monitor and each of their respective advisors are hereby authorized and permitted to disclose and transfer to prospective Amended and Restated SISP participants (each, a “**Potential Bidder**”) and their advisors personal information of identifiable individuals (“**Personal Information**”), records pertaining to the Applicants’ past and current employees, and information on specific customers, but only to the extent desirable or required to negotiate or attempt to complete a transaction under the Amended and Restated SISP (each a “**Transaction**”). Each Potential Bidder to whom any Personal Information is disclosed shall maintain and protect the privacy of such Personal Information and limit the use of such Personal Information to its evaluation of a Transaction, and if it does not complete a Transaction, shall return all such information to the Applicants or the Monitor, or in the alternative destroy all such information and provide confirmation of its destruction if required by the Applicants, Reflect or the Monitor. Any successful bidder(s) shall maintain and protect the privacy of such information and, upon closing of the Transaction contemplated in the applicable Successful Bid, shall be entitled to use the personal information provided to it that is related to the Business and/or the Property acquired pursuant to the Amended and Restated SISP in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, Reflect or the Monitor, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor, Reflect or the Applicants.

GENERAL

10. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties under the Amended and Restated SISP.

11. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative bodies having jurisdiction in Canada, the United States of America, or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

13. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

14. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. on the date of this Order.

Amended and Restated Sale and Investor Solicitation Process

Introduction

On March 7, 2025, Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI ("**Hudson's Bay**" or the "**Company**"), HBC Canada Parent Holdings Inc., HBC Canada Parent Holdings 2 Inc., HBC Bay Holdings I Inc., HBC Bay Holdings II ULC, The Bay Holdings ULC, HBC Centerpoint GP Inc., HBC YSS 1 LP Inc., HBC YSS 2 LP Inc., HBC Holdings GP Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**") obtained an initial order, as may be amended from time to time (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**") from the Ontario Superior Court of Justice (Commercial List) (the "**Court**").

Pursuant to an Order dated March 21, 2025 (the "**SISP Approval Order**"), the Court approved this sale and investor solicitation process ("**SISP**"). The purpose of this SISP is to seek Sale Proposals and Investment Proposals from Qualified Bidders and to implement one or a combination of them in respect of the Property and the Business.

This SISP describes, among other things: (a) the Property available for sale and the opportunity for an investment in the Business of the Applicants; (b) the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Property and the Business; (c) the manner in which bidders and bids become Final Qualified Bidders and Final Qualified Bids, respectively; (d) the process for the evaluation of bids received; (e) the process for the ultimate selection of a Successful Bidder; and (f) the process for obtaining such approvals (including the approval of the Court) as may be necessary or appropriate in respect of a Successful Bid.

For the avoidance of doubt, the process for soliciting bids in respect of the Company's art and artifact collection (collectively, the "**Art Collection**") will differ and be subject to different requirements and milestones as described below.

Defined Terms

1. The following capitalized terms have the following meanings when used in this SISP:
 - (a) "**Agents**" means collectively: (a) Bank of America, N.A. (including acting through branches and affiliates) in its capacity as administrative agent and collateral agent under the ABL Credit Agreement; (b) the FILO Agent; and (c) Pathlight Capital LP, in its capacity as administrative agent under the Pathlight Credit Agreement (each as defined in the Affidavit of Jennifer Bewley sworn March 7, 2025).
 - (b) "**ARIO**" means the Order of the Court dated March 21, 2025, amending and restating the Initial Order.
 - (c) "**Art Collection**" is defined in the introduction hereto.
 - (d) "**Applicants**" is defined in the introduction hereto.
 - (e) "**Approval Motion**" is defined in paragraph 28.
 - (f) "**Art Auction**" is defined in paragraph 32.

- (g) “**Art Auction Procedures**” is defined in paragraph 32.
- (h) “**Auctioneer**” means Heffel Gallery Limited;
- (i) “**Auctions**” is defined in paragraph 21(a).
- (j) “**Baseline Bid**” is defined in paragraph 24(d)(i).
- (k) “**Bidding Phase**” is defined in paragraph 13.
- (l) “**Bidding Phase Bid Deadline**” is defined in paragraph 14.
- (m) “**Business**” means the business of the Applicants and the Non-Applicant Stay Parties.
- (n) “**Business Day**” means a day (other than Saturday or Sunday) on which banks are generally open for business in Toronto, Ontario.
- (o) “**CCAA**” is defined in the introduction hereto.
- (p) “**Claims and Interests**” is defined in paragraph 10.
- (q) “**Confidential Information Memorandum**” is defined in paragraph 13.
- (r) “**Court**” is defined in the introduction hereto.
- (s) “**Data Room**” is defined in paragraph 13.
- (t) “**Deposit**” is defined in paragraph 15(m).
- (u) “**FILo Agent**” means Restore Capital, LLC in its capacity as agent for the FILo Credit Facility lenders under the ABL Credit Agreement (as defined in the Affidavit of Jennifer Bewley sworn March 7, 2025).
- (v) “**Final Qualified Bid**” is defined in paragraph 15.
- (w) “**Final Qualified Bidder**” is defined in paragraph 24(a).
- (x) “**Financial Advisor**” means Reflect Advisors, LLC.
- (y) “**Form of Investment Agreement**” means the form of equity investment agreement to be developed by the Applicants in consultation with the Monitor and the Financial Advisor and provided to those Qualified Bidders that executed an NDA for an Investment Proposal.
- (z) “**Form of Purchase Agreement**” means the form of purchase and sale agreement to be developed by the Applicants in consultation with the Monitor and the Financial Advisor and provided to those Qualified Bidders that executed an NDA for a Sale Proposal.
- (aa) “**Initial Order**” is defined in the introduction hereto.

- (bb) “**Investment Proposal**” means a proposal to invest in or refinance all or a portion of the Business of the Applicants.
- (cc) “**Known Potential Bidders**” is defined in paragraph 6.
- (dd) “**Lease Monetization Order**” means the Order of the Court dated March 21, 2025 approving of a sale process with respect to the Leases.
- (ee) “**Leases**” means the Applicants’ and the Non-Applicant Stay Parties’ leasehold interests and all related rights and obligations in connection therewith
- (ff) “**Liquidation Process Approval Order**” means the Order of the Court dated March 21, 2025 with respect to the proposed liquidation of inventory.
- (gg) “**Monitor**” means Alvarez & Marsal Canada Inc., solely in its capacity as the Court-appointed monitor of the Applicants in their proceedings under the CCAA.
- (hh) “**NDA**” means a non-disclosure agreement in form and substance satisfactory to the Monitor, the Financial Advisor and the Applicants, which will inure to the benefit of any purchaser of the Property, or any investor in the Business or the Applicants.
- (ii) “**Non-Applicant Stay Parties**” has the definition ascribed to it in the Affidavit of Jennifer Bewley sworn March 7, 2025
- (jj) “**Outside Date**” means July 15, 2025, or such later date as may be agreed to by the Applicants, the Financial Advisor, and the Monitor.
- (kk) “**Potential Bidder**” is defined in paragraph 11.
- (ll) “**Property**” means all of property, assets and undertakings of the Applicants and the Non-Applicant Stay Parties, excluding the Art Collection.
- (mm) “**Qualified Bidder**” is defined in paragraph 12.
- (nn) “**Related Person**” has the same meaning as in the *Bankruptcy and Insolvency Act* (Canada).
- (oo) “**Sale Proposal**” means a proposal to acquire all or a portion of the Property relating to the Applicants’ Business on a liquidation or going concern basis.
- (pp) “**SISP Approval Order**” is defined in the introduction hereto.
- (qq) “**Solicitation Process**” means the process for soliciting and selecting bids for the sale of or investment in the Business and Property.
- (rr) “**Successful Bid**” is defined in paragraph 21(b).
- (ss) “**Successful Bidder**” is defined in paragraph 24(g).
- (tt) “**Teaser Letter**” is defined in paragraph 6.

Supervision of the SISP

2. The SISP Approval Order and the SISP shall exclusively govern the process for the Solicitation Process. For the avoidance of doubt, the Lease Monetization Order shall govern the process for soliciting and selecting bids for the Leases and nothing in this SISP shall alter, restrict or otherwise modify the terms of the Lease Monetization Order.
3. The Monitor will supervise, in all respects, the SISP and any attendant sales or investments. The Monitor, in consultation with the Applicants, the Financial Advisor, and the Agents, shall have the right to adopt such other rules for the SISP that in its reasonable business judgement will better promote of the goals of the SISP. In the event that there is disagreement or clarification required as to the interpretation or application of this SISP or the responsibilities of the Monitor, the Financial Advisor or the Applicants hereunder, the Court will have jurisdiction to hear such matter and provide advice and directions, upon application by the Monitor or the Applicants. For the avoidance of doubt, with respect to the Monitor's role in regards to the SISP, the terms of the Initial Order concerning the Monitor's rights, duties and protections in the Applicants' CCAA proceedings shall govern.

Sale and Investment Opportunity

4. One or more bids for a sale of, or an investment in, all or a portion of the Business or the Property relating to the Applicants' Business, will be considered, either alone or in combination as a Final Qualified Bid or a Successful Bid.
5. A bid may, at the option of the Qualified Bidder, involve, among other things, one or more of the following: a restructuring, recapitalization or other form of reorganization of the business and affairs of the Applicants as a going concern; a sale of the Property or any part thereof as contemplated herein to the Qualified Bidder or to a newly formed acquisition entity; or a plan of compromise or arrangement pursuant to the CCAA or any corporate or other applicable legislation.

Solicitation of Interest and Publication Notice

6. The Financial Advisor, in consultation with the Applicants, the Monitor, the Agents, and their respective advisors, has prepared a list of persons who may have an interest in bidding for the sale of or investment in the Business (the "**Known Potential Bidders**"). Concurrently, the Financial Advisor, in consultation with the Applicants, the Monitor and their respective advisors, has prepared an initial offering summary (the "**Teaser Letter**") notifying Known Potential Bidders of the existence of the SISP and inviting the Known Potential Bidders to express their interest in accordance with the terms of the SISP.
7. Within one business day of the granting of the SISP Approval Order, the Financial Advisor shall distribute to the Known Potential Bidders the Teaser Letter, as well as a copy of the SISP Approval Order and a draft form of NDA.
8. As soon as reasonably practicable after the granting of the SISP Approval Order, but in any event no more than three (3) Business Days after the issuance of the SISP Approval Order, the Applicants will issue a press release setting out the notice and such other information, in form and substance satisfactory to the Monitor in consultation with the Financial Advisor, designating dissemination in Canada and major financial centres in the United States.

“As Is, Where Is”

9. The sale of the Property, investment in the Business, and/or the Art Collection will be on an “as is, where is” basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Applicants, the Financial Advisor or any of their respective agents, except to the extent set forth in the definitive sale or investment agreement executed with a Successful Bidder.

Free Of Any and All Claims and Interests

10. In the event of a sale of all or a portion of the Property or the Art Collection subject to approval by the Court, all of the rights, title and interests of the Applicants in and to the Property or the Art Collection to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the “**Claims and Interests**”) pursuant to such Court orders as may be desirable, except to the extent otherwise set forth in the definitive sale or investment agreement executed with a Successful Bidder.

Participation Requirements in Respect of the Property or Business

11. In order to participate in the SISP in respect of the Property or Business, each person (a “**Potential Bidder**”) must deliver to the Financial Advisor, with a copy to the Monitor, at the addresses specified in Schedule “A” hereto (including by email):
 - (a) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the principals of the Potential Bidder; and
 - (b) an executed NDA, which shall include provisions whereby the Potential Bidder agrees to accept and be bound by the provisions contained herein.
12. A Potential Bidder that has executed an NDA, and has delivered the documents and information described above, and that the Applicants, in their reasonable business judgement, in consultation with the Financial Advisor and the Monitor, determine is likely, based on the availability of financing, experience and other considerations, to be able to consummate a Sale Proposal or an Investment Proposal on or before the Outside Date will be deemed a “**Qualified Bidder**”, and will be promptly notified of such determination by the Financial Advisor.

SISP – BIDDING PHASE FOR THE PROPERTY OR BUSINESS

Due Diligence

13. During this process (the “**Bidding Phase**”), each Qualified Bidder will be provided with: (i) a copy of a confidential information memorandum (the “**Confidential Information Memorandum**”) describing the opportunity to acquire all or a portion of the Property or invest in all or a portion of the Business; and (ii) access to an electronic data room of due diligence information for Qualified Bidders (the “**Data Room**”). The Data Room will contain such due diligence materials and information relating to the Property and the Business as the Financial Advisor, in its reasonable business judgment, in consultation with the Monitor and the Applicants, determines necessary, including, as appropriate, information or

materials reasonably requested by Qualified Bidders, on-site presentation by senior management of the Applicants, and facility tours. The Monitor, the Financial Advisor and the Applicants make no representation or warranty as to the information (i) contained in the Confidential Information Memorandum or the Data Room; (ii) provided through the due diligence process; or (iii) otherwise made available in connection with this SISF, except to the extent expressly contemplated in any definitive sale or investment agreement with a Successful Bidder executed and delivered by the Applicants. Selected due diligence materials may be withheld from certain Qualified Bidders if the Applicants and the Financial Advisor, in consultation and with the approval of the Monitor, determine such information to represent proprietary or sensitive competitive information.

14. A Qualified Bidder that wishes to pursue a Sale Proposal or an Investment Proposal must deliver a final binding proposal subject to the following requirements:
- (a) in the case of a Sale Proposal, a duly authorized and executed purchase agreement based on the Form of Purchase Agreement and accompanied by a mark-up of the Form of Purchase Agreement showing amendments and modifications made thereto, together with all exhibits and schedules thereto, and such ancillary agreements as may be required by the bidder with all exhibits and schedules thereto;
 - (b) in the case of an Investment Proposal, a duly authorized and executed investment agreement based on the Form of Investment Agreement and accompanied by a mark-up of the Form of Investment Agreement showing amendments and modifications made thereto, together with all exhibits and schedules thereto, and such ancillary agreements as may be required by the bidder with all exhibits and schedules thereto;

to the Financial Advisor, the Applicants and to the Monitor at the addresses specified in Schedule "A" hereto (including by email) so as to be received by it no later than 5:00 pm (Eastern Standard Time) on April 30, 2025, or such other date as determined by the Applicants, in consultation with the Financial Advisor and with the consent of the Monitor (the "**Bidding Phase Bid Deadline**").

15. A bid will be considered a "**Final Qualified Bid**" only if the bid complies with, among other things, the following requirements:
- (a) it includes a letter stating that the bidder's offer is submitted in good faith and is irrevocable until the earlier of (i) the approval by the Court of a Successful Bid and (ii) 60 days following the Bidding Phase Bid Deadline, provided that if such bidder is selected as the Successful Bidder, its offer will remain irrevocable until the closing of the transaction with such Successful Bidder;
 - (b) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Monitor and the Applicants, in consultation with the Financial Advisor, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by its bid;
 - (c) in respect of a Sale Proposal, the Property to be included, and in the case of an Investment Proposal, any Property to be divested or disclaimed prior to closing;

- (d) it includes a redline to the Form of Sale Agreement or Form of Investment Agreement, as applicable;
- (e) it includes full details of the proposed number of employees of the Applicants who will become employees of the bidder (in the case of a Sale Proposal) or shall remain as employees of the Applicants (in the case of an Investment Proposal) and, in each case, provisions setting out the terms and conditions of employment for continuing employees;
- (f) details of any liabilities to be assumed by the Qualified Bidder;
- (g) it is not conditional upon, among other things:
 - (i) the outcome of unperformed due diligence by the Qualified Bidder; or
 - (ii) obtaining financing;
- (h) it fully discloses the identity of each entity that will be sponsoring or participating in the bid, and the complete terms of such participation, and discloses any connections or agreements with the Applicants or any of their affiliates;
- (i) it outlines any anticipated regulatory and other approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;
- (j) it identifies with particularity the contracts and leases the bidder wishes to assume or exclude, contains full details of the bidder's proposal for the treatment of related cure costs (and provides adequate assurance of future performance thereunder); and it identifies with particularity any executory contract or unexpired lease the assumption and assignment of which is a condition to closing;
- (k) it provides a timeline to closing with critical milestones;
- (l) it includes evidence, in form and substance reasonably satisfactory to the Monitor and the Applicant, of authorization and approval from the bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the bid;
- (m) it is accompanied by a refundable deposit (the "**Deposit**") in the form of a wire transfer (to a bank account specified by the Monitor), or such other form acceptable to the Monitor, payable to the order of the Monitor, in trust, in an amount equal to not less than 10% of the purchase price, to be held and dealt with in accordance with the terms of this SISP;
- (n) it contains other information reasonably requested by the Financial Advisor, the Monitor or the Applicants;
- (o) it is received by the Bidding Phase Bid Deadline;
- (p) it does not include any request for or entitlement to any break fee, expense reimbursement, or similar type of payment;

- (q) it includes a statement that the bidder will bear its own costs and expenses in connection with the proposed transaction, and by submitting its bid is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
 - (r) it includes an acknowledgement and representation that the bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its bid; and (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the business of the Applicants or the completeness of any information provided in connection therewith and/or the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, except as expressly stated in the purchase and sale agreement or the Investment Agreement.
16. Notwithstanding anything else contained herein, the Applicants and any Related Person that wishes to submit or participate in a Sale Proposal or Investment Proposal must declare such intention to the Financial Advisor and the Monitor in writing by April 7, 2025. Until such time that the Applicant or any Related Person declares no such intention, the Financial Advisor and the Monitor shall design and implement additional procedures for the SISP to limit the sharing of information with the Applicants so as to ensure and preserve the fairness of the SISP.
17. All secured creditors of the Applicants shall have the right to bid in the SISP, including by way of credit bid, provided however that until a secured creditor, including the Agents, declare that they will not submit a bid in the SISP, all consultation and consent rights herein shall be paused and the Monitor and the Applicants may place such limitations on the consultation and consent rights contained herein as they consider appropriate, so as to ensure and preserve the fairness of the SISP.

Evaluation of Final Qualified Bids

18. The Applicants, in consultation with the Financial Advisor, the Monitor, and the Agents, will review each bid as set forth herein and determine if one or more of them constitute a Final Qualified Bid. For the purpose of such consultations and evaluations, the Applicants, the Financial Advisor and/or the Monitor may request clarification of the terms of any bid.
19. Evaluation criteria with respect to a Sale Proposal may include, but are not limited to items such as: (a) the purchase price and net value (including assumed liabilities and other obligations to be performed by the bidder); (b) the firm, irrevocable commitment for financing the transaction; (c) the claims likely to be created by such bid in relation to other bids; (d) the counterparties to the transaction; (e) the terms of the proposed transaction documents; (f) other factors affecting the speed, certainty and value of the transaction (including any regulatory approvals required to close the transaction); (g) planned treatment of stakeholders; (h) the assets included or excluded from the bid; (i) proposed treatment of the employees; (j) any transition services required from the Applicants post-closing and any related restructuring costs; (k) the likelihood and timing of consummating the transaction; and (l) the allocation of value among the assets being acquired.

20. Evaluation criteria with respect to an Investment Proposal may include, but are not limited to items such as: (a) the amount of equity and debt investment and the proposed sources and uses of such capital; (b) the firm, irrevocable commitment for financing the transaction; (c) the debt to equity structure post-closing; (d) the counterparties to the transaction; (e) the terms of the proposed transaction documents; (f) other factors affecting the speed, certainty and value of the transaction (including any regulatory approvals required to close the transaction); (g) planned treatment of stakeholders; and (h) the likelihood and timing of consummating the transaction.
21. If one or more Final Qualified Bids is received:
 - (a) the Applicants, in consultation with the Financial Advisor, the Monitor, and the Agents, shall determine if one or more auctions (the “**Auctions**”) are required. If required, the Auctions will be held on or about May 16, 2025, in accordance with the terms outlined below; or
 - (b) the Applicants, exercising their reasonable business judgment and following consultation with the Financial Advisor, the Monitor, and the Agents, may select the most favourable Final Qualified Bid(s) and negotiate and settle the terms of a definitive agreement or agreements for which approval from the Court will be sought (the “**Successful Bid**”).
22. The Applicants shall have no obligation to enter into a Successful Bid, and reserve the right, after consultation with the Monitor, the Financial Advisor, and the Agents, to reject any or all Final Qualified Bids.
23. If no Final Qualified Bid is received, the SISP shall be automatically terminated.

Auction Process

24. If the Applicants, in consultation with the Financial Advisor and the Monitor, determine that one or more Auctions are required, the Applicants, in consultation with the Financial Advisor and the Monitor, shall conduct Auctions on the following terms:
 - (a) only Qualified Bidders who submitted Final Qualified Bid (“**Final Qualified Bidders**”) and their financial and legal advisors shall be entitled to participate in an Auction;
 - (b) the Final Qualified Bidders who wish to participate at an Auction must appear in person;
 - (c) official actions at any Auction shall be made on the record in the presence of a court reporter;
 - (d) the Applicants and their advisors shall, at the outset of any Auction, announce:
 - (i) the Final Qualified Bid(s) selected by the Applicants, in their reasonable business judgment and on the consent of the Monitor in consultation with the financial Advisor, that are the most favourable Final Qualified Bid(s) as of the date thereof (the “**Baseline Bid**”); and

- (ii) procedures for the conduct of the Auction, including, among other things, any overbid amounts;
 - (e) to make a bid at the Auction, a Final Qualified Bidder will modify and resubmit its Final Qualified Bid, which shall remain exclusive of the Art Collection, which resubmission shall become its new Final Qualified Bid;
 - (f) subsequent bids after the Baseline Bid must be higher and better (as determined by the Applicants, in their reasonable business judgment and in consultation with the Monitor and the Financial Advisor) by at least the amount of any applicable overbids;
 - (g) the Auction shall continue until there are no further higher and better Final Qualified Bids (as determined by the Applicants, in their reasonable business judgment and in consultation with the Monitor and the Financial Advisor) that comply with the procedures set forth for the Auction, and such highest and best Final Qualified Bid at the time shall become the Successful Bid (and the person(s) who made the Successful Bid shall become the “**Successful Bidder**”).
25. For greater certainty, in order for one or more Final Qualified Bids to be the Successful Bid, such Final Qualified Bid(s) must receive the written consent of the Agents, in each case as required under the Intercreditor Agreement dated December 23, 2024 attached as Exhibit “C” to the Affidavit of Jennifer Bewley sworn March 7, 2025.
26. The Applicants, with the consent of the Monitor, and in consultation with the Financial Advisor, may modify Auction procedures at any time.
27. Notwithstanding the foregoing or anything else contained herein, the Applicants reserve the right, taking into account all other factors set forth herein (including execution risk), to choose one or more Qualified Bids as Successful Bidders that did not offer the highest purchase price for the Property or the Business.

Approval Motion for Successful Bid

28. The Applicant will apply to the Court (the “**Approval Motion**”) for an order approving the Successful Bid(s) and authorizing the Applicants to enter into any and all necessary agreements with respect to the Successful Bid and to undertake such other actions as may be necessary or appropriate to give effect to the Successful Bid.
29. The Approval Motion will be held on a date to be scheduled by the Court upon application by the Applicants on or before May 30, 2025.
30. All Final Qualified Bids (other than the Successful Bid) will be deemed rejected on the date of approval of the Successful Bid(s) by the Court.
31. For greater certainty, paragraphs 13 through 30 of the SISP do not apply to any bids or bidders in respect of the Art Collection.

AUCTION IN RESPECT OF THE ART COLLECTION

32. The Applicants and Reflect, in consultation with the Monitor and the Auctioneer, shall design procedures for the art auction (the “**Art Auction**”). The Company will return to Court to seek approval of the art auction procedures (the “**Art Auction Procedures**”) prior to the Art Auction. In designing the Art Auction Procedures, the Applicants and Reflect shall have regard to, among other things:
- (a) the rich heritage and cultural legacy of the Art Collection;
 - (b) the various regulations and laws that apply in respect of Canadian heritage and cultural property as they relate to the Art Collection; and
 - (c) the bidders who have submitted a non-binding letter of interest indicating an interest in participating in the auction of the Art Collection.

OTHER TERMS

Deposits

33. All Deposits will be retained by the Monitor in a trust account. If there is a Successful Bid, the Deposit paid by the Successful Bidder whose bid is approved at the Approval Motion will be applied to the purchase price to be paid or investment amount to be made by the Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits of Qualified Bidders not selected as the Successful Bidder will be returned to such bidders within thirty (30) Business Days of the date upon which the Successful Bid is approved by the Court. If there is no Successful Bid subject to the following paragraph, all Deposits will be returned to the bidders within ten (10) Business Days of the date upon which the SISP is terminated in accordance with these procedures.
34. If a Successful Bidder breaches its obligations under the terms of the SISP, its Deposit plus any interest earned thereon shall be forfeited as liquidated damages and not as a penalty.

Approvals

35. For the avoidance of doubt, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the CCAA or any other statute or as otherwise required at law, the terms of paragraph 47 hereof, or any other Order of the Court in order to implement a Successful Bid.

Agents Consultation

36. The Applicants, the Monitor and the Financial Advisor will communicate and consult with all Agents through the Solicitation Process and will provide information to the Agents in connection with such communications, including copies of all bids within one day of receipt of same. The Applicants, the Monitor and the Financial Advisor shall provide the Agents with any and all information reasonably requested with respect to the SISP.

Amendment

37. If there is any proposed material modification to the SISP by the Applicants, the Applicants will seek Court approval of such material modification on notice to the Service List. Otherwise, the Applicants retain the discretion, with the consent of the Monitor and in consultation with the Financial Advisor and the Agents, to modify the SISP from time to time.
38. This SISP does not, and will not be interpreted to, create any contractual or other legal relationship between the Applicants and any Qualified Bidder, other than as specifically set forth in a definitive agreement that may be signed with the Applicants. At any time during the SISP, the Monitor may, following consultation with the Financial Advisor, and the Applicant, upon reasonable prior notice to the Agents, apply to the Court for advice and directions with respect to the discharge of its power and duties hereunder.

Compliance with Liquidation Process Approval Order

39. In carrying out the terms of this SISP, the Applicants, the Monitor and the Financial Advisor will comply with the terms of the Liquidation Process Approval Order, and any other Order of the Court.

Reservation of Rights

40. Without detracting from the Reservation of Rights (defined below) and any rights which RioCan Real Estate Investment Trust and/or its affiliates may have, no bid shall be considered a Final Qualified Bid: (a) in respect of any Property (as defined in the SISP) of a Non-Applicant Stay Party without the prior written consent of the relevant Non-Applicant Secured Creditor (as defined in the ARIO) in respect of such Property; and (b) in respect of any Property (as defined in the SISP) of RioCan Real Estate Investment Trust without the prior written consent of RioCan Real Estate Investment Trust.
41. All consent and consultation rights provided to the Agents in this SISP in respect of any Property (as defined in the SISP) of a Non-Applicant Stay Party shall instead be provided to RioCan Real Estate Investment Trust and the relevant Non-Applicant Secured Creditor(s) of the Non-Applicant Stay Party in respect of such Business or Property, to the exclusion of the Agents.
42. Nothing in the SISP acknowledges or declares that the interests in the Business or Property (each as defined in the SISP) being marketed within this SISP are capable of being transferred by the Applicants or the Non-Applicant Stay Parties. For clarity, all parties' ability to challenge the Applicants' and Non-Applicant Stay Parties' ability to transfer any Business or Property (each as defined in the SISP) are expressly preserved and not derogated from (the "**Reservation of Rights**").

Schedule "A"

Address for Notices and Deliveries

To the Monitor

Alvarez & Marsal Canada Inc. Court appointed Monitor of Hudson's Bay Company ULC
et al.
Royal Bank Plaza, South Tower
200 Bay Street, Suite 29000
P.O. Box 22
Toronto, ON M5J 2J1

Attn: Alan Hutchens / Greg Karpel
Email: ahutchens@alvarezandmarsal.com / gkarpel@alvarezandmarsal.com

With a copy to

Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Attn: Michael Shakra / Sean Zweig
Email: ShakraM@bennettjones.com / ZweigS@bennettjones.com

To the Financial Advisor

Reflect Advisors, LLC
4705 Benton Smith Road
Nashville, TN 37215

Attn: Adam Zalev
E-mail: azalev@reflectadvisors.com

To the Applicants

Hudson Bay Company ULC
401 Bay Street
Toronto, ON M5H 2Y4

Attn: Jennifer Bewley
Email: jennifer.bewley@hbc.com

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

(SISP Approval Order)

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Tel: +1 416-869-5524

Lawyers for the Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE) FRIDAY, THE 23rd
)
JUSTICE OSBORNE) DAY OF MAY, 2025
)

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 STS
RENEWABLES LTD., EARTH DRILLING CO. LTD., ON TRACK DRILLING INC., STS
RENEWABLES EARTH USA ACQUISITION CO. LTD., EARTH DRILLING CO. LTD.,
HARRIS EXPLORATION DRILLING & ASSOCIATES, INC., SUBTERRA CAPITAL
PARTNERS INC., SUBTERRA DEVELOPMENT LTD., AND SUBTERRA CAPITAL
PARTNERS US INC.

Applicants

SISP APPROVAL ORDER

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, for an order, among other things, approving the sale and investment solicitation process in the form attached hereto as Schedule "A" (the "**SISP**") and certain related relief, was heard this day by videoconference via Zoom.

ON READING the affidavit of Matthew Tokarik sworn May 21, 2025 and the Exhibits thereto (the "**Second Tokarik Affidavit**"), the First Report of PricewaterhouseCoopers Inc. (the "**First Report**") in its capacity as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**"), and on hearing the submissions of counsel for the Applicants, the Monitor, the Bank of Nova Scotia, and the other parties listed on the counsel slip, no one appearing for any other party although duly served as appears from the affidavit of service, filed.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP.

SALE AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the SISP (subject to any amendments thereto that may be made in accordance therewith and with the terms of this Order) be and is hereby approved and the Applicants and the Monitor are hereby authorized and directed to implement the SISP pursuant to the terms thereof. The Applicants and the Monitor are hereby authorized and directed to perform their respective obligations thereunder and to do all things reasonably necessary to perform their respective obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) under the SISP.
4. **THIS COURT ORDERS** that the Applicants, the Non-Applicant Stay Parties (as defined in the SISP), the Monitor, and their respective affiliates, partners, directors, officers, employees, legal advisors, representatives, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities of any nature or kind to any person in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the gross negligence or wilful misconduct of any such person (with respect to such person alone), in performing their obligations under the SISP, as determined by this Court in a final order that is not subject to appeal or other review.
5. **THIS COURT ORDERS** that, pursuant to section 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS), the Applicants and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective bidders or offerors and to their advisors, but only to the extent required to provide information with respect to the SISP in these proceedings.

6. **THIS COURT ORDERS** that in overseeing and conducting the SISP, the Monitor shall have all of the benefits and protections granted to it under the CCAA, the ARIO and any other Order of this Court in the within proceeding, and notwithstanding anything contained herein or in the SISP, the Monitor shall not take possession of any Property or be deemed to take possession of any Property.

PIPEDA

7. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 and any similar legislation in any other applicable jurisdictions, the Monitor, the Applicants, the Non-Applicant Stay Parties and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement (each a “**Participant**”) and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a “**Transaction**”). Each Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and, if it does not complete a Transaction, shall return all such information to the Monitor or the Applicants or the Non-Applicant Stay Parties, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Monitor or the Applicants or the Non-Applicant Stay Parties. Any bidder with a Successful Bid shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or the Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Monitor or the Applicants or the Non-Applicant Stay Parties, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Applicants or the Non-Applicant Stay Parties.

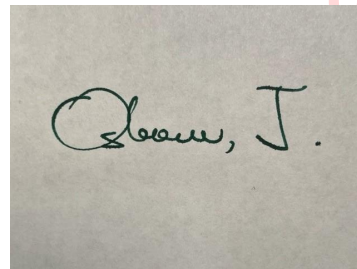
GENERAL

8. **THIS COURT ORDERS** that the Applicants and the Non-Applicant Stay Parties or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties under the SISP.

9. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

11. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto Time) on the date of this Order without the need for entry or filing.

A rectangular box containing a handwritten signature in black ink that reads "Osborne, J.".

Digitally signed
by Osborne J.
Date:
2025.05.23
13:09:03 -04'00'

SCHEDULE "A"

SISP

[ATTACHED]

SCHEDULE “A”
SALE AND INVESTMENT SOLICITATION PROCESS

Introduction

1. On May 15, 2025, STS Renewables Ltd., Earth Drilling Co. Ltd., On Track Drilling Inc., STS Renewables Earth USA Acquisition Co. Ltd., Earth Drilling Co. Ltd., Harris Exploration Drilling & Associates, Inc., Subterra Capital Partners Inc., Subterra Development Ltd., and Subterra Capital Partners US Inc. (collectively, the “**Applicants**”) commenced a proceeding (the “**CCAA Proceeding**”) under the *Companies’ Creditors Arrangement Act* (Canada) (the “**CCAA**”) before the Ontario Superior Court of Justice (Commercial List) (the “**Court**”). The Court granted an initial order (“**Initial Order**”) on that date, among other things appointing PricewaterhouseCoopers Inc., LIT as monitor (in such capacity, the “**Monitor**”) of the Applicants, granting a stay of proceedings in favour of the Applicants, and extending the stay of proceedings to Forum Subterra Limited Partnership, Forum Subterra General Partner Inc., Forum Subterra Limited Partnership 1, Forum Subterra GP1 Inc., Yorkland Geothermal Inc., Forum Subterra Limited Partnership 10, and FSLP GP Inc. (collectively, the “**Non-Applicant Stay Parties**”, and together with the Applicants, the “**STS Entities**”).
2. On May 23, 2025, the Court granted an order amending and restating the Initial Order (the “**ARIO**”), among other things, extending the stay of proceedings in favour of the STS Entities, and approving a DIP Commitment Letter between the Applicants and the Bank of Nova Scotia (in such capacity, the “**DIP Lender**”).
3. Pursuant to an order also dated May 23, 2025 (the “**SISP Approval Order**”), the Court approved a sale and investment solicitation process (the “**SISP**”) to be conducted in respect of the Business and/or Property (each as defined below) of the STS Entities in accordance with the procedures, terms and conditions set forth herein (these “**SISP Procedures**”).
4. These SISP Procedures set forth the process and procedures for: (i) soliciting bids from interested parties for potential transactions involving the STS Entities’ properties, assets and undertakings (collectively, the “**Property**”) and/or business operations, (the “**Business**”) (each of which, for avoidance of doubt, shall include all property and business associated with the Applicants’ Utility Development Business and Drilling Business, as such terms are defined in the affidavit of Matthew Tokarik sworn May 15, 2025) including, without limitation, a sale of or investment in some or all of the Business, Property and/or shares of the STS Entities and/or a reorganization, recapitalization, primary equity issuance or other similar transaction (the “**Opportunity**”), (ii) evaluating any such bids received (each a “**Bid**”) from any bidder in the SISP (each a “**Bidder**”), (iii) selecting any Successful Bid(s), and (iv) obtaining Court approval of any Successful Bid(s).
5. The SISP Approval Order (which includes these SISP Procedures) and any other orders of the Court made in the CCAA Proceedings relating to the SISP shall exclusively govern the process for soliciting and selecting Bids in respect of the Opportunity.
6. Unless otherwise indicated, capitalized terms used but not immediately defined are defined below.

Role of the Monitor

7. The Monitor’s responsibilities under the SISP include:
 - (a) administering the SISP, in consultation with the Applicants and the DIP Lender as set forth herein;
 - (b) consulting with the Applicants and the DIP Lender in connection with these SISP Procedures;

- (c) assisting the Applicants in responding to information requests, including, without limitation, by assisting the Applicants in preparing or modifying financial information, in furtherance of the SISP; reporting to the Court in connection with the SISP and the closing of the transaction(s) contemplated in the Successful Bid(s); and
 - (d) assisting the Applicants with the closing of the transaction contemplated in the Successful Bid(s).
8. The Monitor shall post on the Monitor’s website, as soon as possible, any modification, amendment, variation or supplement to the SISP and inform Potential Bidders (defined below) reasonably impacted by any such modification, amendment, variation or supplement of same.
9. The Monitor may, in consultation with the Applicants, the Non-Applicant Stay Parties and the DIP Lender, seek Court approval of an amendment to the SISP or may seek the Court’s directions in respect of the SISP.

Milestones

10. The following table sets out the key milestones under the SISP (the “**Milestones**”):

Milestone	Deadline
Granting of SISP Order	May 23, 2025
Deadline to publish notice of SISP, and deliver Teaser Letter and NDA to Known Potential Bidders	May 28, 2025
Deadline to set up the Data Room	June 2, 2025
Deadline for submission of Phase I LOIs (the “ Phase I LOI Deadline ”)	No later than 5:00 p.m. (Toronto time) on June 26, 2025
Determination of Qualified Bidders for Phase II, if any (the “ Qualification Deadline ”)	No later than 5:00 p.m. (Toronto time) on July 3, 2025
Deadline for submission of Phase II Bids (the “ Phase II Bid Deadline ”)	No later than 5:00 p.m. (Toronto time) on July 31, 2025
Selection of the Successful Bid(s) (if any) (“ Successful Bidder Notice Deadline ”)	No later than 5:00 p.m. (Toronto time) on August 6, 2025
Deadline for finalizing transaction documents based on Successful Bid(s)	August 13, 2025
Filing of motion to approve the Successful Bid(s) (the “ Sale Approval Motion ”)	No later than 5:00 p.m. (Toronto time) on August 18, 2025
Hearing of the Sale Approval Motion	No later than August 29, 2025, subject to the availability of the Court

Target Date for the Closing of the Successful Bid(s) (the “ Target Date ”)	September 15, 2025
Outside Date for the Closing of the Successful Bid(s) (the “ Outside Date ”)	September 30, 2025

11. Subject to any order of the Court, the Milestones may be amended or extended by the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender.

Solicitation of Interest; Notice of the SISP

12. As soon as reasonably practicable, but, in any event, by no later than May 28, 2025, the Monitor shall:
- (a) in consultation with the Applicants and the DIP Lender, prepare a list of potential bidders, including: (i) parties that were contacted by PricewaterhouseCoopers Corporate Finance pursuant to the pre-CCAA filing sale process; (ii) parties that have approached the Applicants or the Monitor indicating an interest in the Opportunity; (iii) local and international strategic and financial parties who the Monitor, in consultation with the Applicants, believes may be interested in the Opportunity; and (iv) parties that showed an interest in the Applicants, their Business, and/or the Property by way of previous, out-of-court strategic reviews and/or sales processes, in each case whether or not such party has submitted a letter of intent or similar document (collectively, the “**Known Potential Bidders**”);
 - (b) cause a notice of the SISP (and such other relevant information that the Monitor, in consultation with the Applicants and the DIP Lender, considers appropriate) (the “**Notice**”) to be published in *National Post* and any other newspaper or journal as the Monitor, in consultation with the Applicants and the DIP Lender, considers appropriate, if any;
 - (c) cause a press release to be issued with Canada Newswire or a comparable newswire entity setting out the information contained in the Notice and such other relevant information that the Monitor, in consultation with the Applicants and the DIP Lender, considers appropriate;
 - (d) prepare: (i) in consultation with the Applicants and the DIP Lender, a process summary (the “**Teaser Letter**”) describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) a non-disclosure agreement in form and substance satisfactory to the Monitor, in consultation with the Applicants and the Non-Applicant Stay Parties, and as approved by the DIP Lender which shall inure to the benefit of any purchaser of the Business or Property or any part thereof (an “**NDA**”); and
 - (e) cause the Teaser Letter and NDA to be sent to each Known Potential Bidder and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

Potential Bidders and Due Diligence Materials

13. Any party who wishes to participate in the SISP (a “**Potential Bidder**” and collectively, the “**Potential Bidders**”) must provide to the Monitor: (a) an executed NDA; (b) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder, as well as a signed copy of the SISP confirming the Potential Bidder’s commitment to comply with the SISP; and (c) any other

information that the Monitor may reasonably request; provided, however that if a party has previously executed a non-disclosure agreement with the Applicants that is acceptable to the Monitor, the Monitor may determine that no further NDA is be required.

14. As soon as practicable, but, in any event, by no later than June 2, 2025, a confidential virtual data room (the “**Data Room**”) will be made available by the Monitor to each Potential Bidder who has satisfied the conditions set forth in paragraph 13 above and is otherwise deemed suitable to participate in the SISP by the Monitor in consultation with the Applicants and DIP Lender. The Data Room will contain due diligence materials and information relating to the STS Entities, the Property and the Business as the Monitor, in consultation with the Applicants, the Non-Applicant Stay Parties and the DIP Lender, deems appropriate, and may also include management presentations and other matters which a Potential Bidder may reasonably request and as to which the Monitor, in its judgment and in consultation with the Applicants and the DIP Lender, may agree. The Monitor will designate one or more representatives to coordinate all reasonable requests for additional information and due diligence access from Potential Bidders and the manner in which such requests must be communicated. Neither the Monitor nor the Applicants nor the Non-Applicant Stay Parties will be obligated to furnish any information relating to the STS Entities, the Property or the Business to any person other than as is expressly provided for in the SISP. Furthermore, and for the avoidance of doubt, selected due diligence materials may be withheld from certain Potential Bidders if the Monitor, in consultation with the Applicants, the Non-Applicant Stay Parties and the DIP Lender, determines that such access could negatively impact the fairness or integrity of the SISP, the ability to maintain the confidentiality of the confidential information subject to the NDA, the Business or the Property or the realizable value thereof.
15. The Monitor and the Applicants and the Non-Applicant Stay Parties make no representation or warranty as to the accuracy or completeness of the information to be provided through the due diligence process, including in the Data Room or otherwise. Potential Bidders and Bidders must rely solely on their own independent review, investigation and/or inspection of all such information and of the Property and the Business in connection with their participation in the SISP and any transaction they enter into with the Applicants or the Non-Applicant Stay Parties in connection therewith. None of the Monitor, the Applicants, the Non-Applicant Stay Parties, the DIP Lender, or any of their respective directors, officers, employees, agents, representatives, advisors or estates shall be responsible for, and none of them will bear any liability with respect to, any information obtained by any person in connection with the SISP or the Opportunity.
16. Without limiting the generality of any term or condition of any NDA, and unless otherwise expressly agreed to by the Monitor, in consultation with the Applicants or Non-Applicant Stay Parties (as applicable), no Potential Bidder or Bidder shall be permitted to have any discussions with: (a) any counterparty to any contract with the Applicants or Non-Applicant Stay Parties (or any of them), any creditor of the Applicants or Non-Applicant Stay Parties, any current or former director, manager, shareholder, officer, member or employee of the Applicants or Non-Applicant Stay Parties (or any of them), other than in the normal course of business and wholly unrelated to the SISP and the Opportunity; or (b) any other Potential Bidder or Bidder regarding the SISP or the Opportunity or any Bids submitted or contemplated to be submitted pursuant thereto. In the event that the Monitor consents to any such discussion pursuant to the terms hereof, such discussion shall occur on such terms the Monitor may require.

Phase I – Submission of Non-Binding Letters of Intent

17. If a Potential Bidder wishes to submit a Bid, it must deliver a non-binding letter of intent (a “**Phase I LOI**”) that complies with all of the following requirements to the Monitor at the address specified in Schedule “1” attached hereto (including by email) so as to be received by the Monitor no later than 5:00 p.m. (Toronto Time) on June 26, 2025 (i.e., the Phase I LOI Deadline) or such other date or time as may be agreed by the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender:
 - (a) it has been duly executed by all required parties;

- (b) it is received by the Phase I LOI Deadline;
- (c) it provides written evidence, satisfactory to the Monitor, in consultation with the Applicants and the DIP Lender, of the Potential Bidder's ability to fully fund and consummate the proposed transaction within the timeframe contemplated by the SISP and to satisfy any obligations or liabilities to be assumed on closing of the proposed transaction, including without limitation, a specific indication of the sources of capital;
- (d) it identifies all proposed material conditions to closing including, without limitation, any internal, regulatory or other approvals and any form of agreement or other document required from a government body, stakeholder or other third party, any necessary finding or equity injections required, and an anticipated timeframe and any anticipated impediments for obtaining such approvals, along with information sufficient for the Monitor, in consultation with the Applicants and the DIP Lender, to determine that these conditions are reasonable and appropriate;
- (e) it: (i) identifies the Potential Bidder and representatives thereof who are authorized to appear and act on behalf of the Potential Bidder for all purposes regarding the transaction; and (ii) fully discloses the identity of each entity or person that will be sponsoring, participating in or benefitting from the transaction contemplated by the Phase I LOI;
- (f) it provides an outline of the due diligence completed to the date of submission of the Phase I LOI and any additional due diligence required to be conducted in order to submit a Phase II Bid;
- (g) it clearly indicates:
 - (i) that the Potential Bidder is seeking to acquire all, substantially all or a portion of the Property and/or Business, whether through an asset purchase agreement, a share purchase pursuant to a vesting order or a reverse vesting order (a "**Sale Proposal**"); and/or
 - (ii) that the Potential Bidder is offering to make an investment in, restructure, reorganize, recapitalize or refinance all or some of the STS Entities and the Business (an "**Investment Proposal**");
- (h) in the case of a Sale Proposal, it identifies or contains the following:
 - (i) the purchase price or price range in Canadian or United States dollars and a description of any non-cash consideration, including any earn-out or deferred payment, and key assumptions supporting the valuation;
 - (ii) if the purchase price involves an earn-out or other deferred payment, the Sale Proposal shall include a description of the Potential Bidder's proposal and/or commitments for and relating to obtaining necessary regulatory approvals and the Potential Bidder's commercialization strategy, manufacturing capabilities, proposed sale milestones and minimum sale amounts, budget and/or commitment for capital expenditures, direct marketing and sales initiatives and support and proposed product positioning within the Potential Bidder's current product portfolio;
 - (iii) any contemplated purchase price adjustment;
 - (iv) whether the Potential Bidder wishes to purchase the shares, partnership units, or the Property;

- (v) a description of the specific assets that are expected to be subject to the transaction and any assets expected to be excluded;
 - (vi) a description of those liabilities and obligations (including operating liabilities) which the Potential Bidder intends to assume and such liabilities and obligations it does not intend to assume;
 - (vii) information sufficient for the Monitor, in consultation with the Applicants and the DIP Lender, to determine that the Potential Bidder has the sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (vi) above;
 - (viii) a description of the anticipated tax planning, if any;
 - (ix) any other terms or conditions of the Sale Proposal that the Potential Bidder believes are material to the proposed transaction;
- (i) in the case of an Investment Proposal, it identifies or contains the following:
- (i) a description of how the Potential Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, and a description of any non-cash consideration;
 - (ii) the aggregate amount of the equity and/or debt investment to be made in the Business or the STS Entities in Canadian or United States dollars, including the cash and non-cash component thereof, including any contemplated adjustment to the investment;
 - (iii) the underlying assumptions regarding the *pro forma* capital structure;
 - (iv) a specific indication of the sources of capital for the Potential Bidder and the structure and financing of the proposed transaction;
 - (v) a description of the specific assets that are to be included in the transaction and any assets that are to be excluded;
 - (vi) a description of those liabilities and obligations (including operating liabilities) which the Potential Bidder intends to assume and which liabilities and obligations it does not intend to assume;
 - (vii) information sufficient for the Monitor, in consultation with the Applicants and the DIP Lender, to determine that the Potential Bidder has sufficient ability to satisfy and perform any liabilities or obligations assumed pursuant to subparagraph (vi) above; and
 - (viii) any other terms and conditions of the Investment Proposal that the Potential Bidder believes are material to the proposed transaction; and
- (j) it contains such other information as may be reasonably requested by the Monitor, in consultation with the Applicants and the DIP Lender.

18. The Monitor, in consultation with the Applicants and the DIP Lender, may seek to clarify the terms of a Phase I LOI with respect to any of the requirements specified in paragraph 17 and may, in consultation with the Applicants and with the prior written consent of the DIP Lender, accept a revised and/or clarified Phase I LOI provided that the initial Phase I LOI was received prior to the

Phase I LOI Deadline.

19. The Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may waive compliance with any one or more of the requirements specified in paragraph 17 and deem any such non-complaint Phase I LOI to be a compliant Phase I LOI.
20. The Monitor will inform the Applicants and the DIP Lender as soon as practicable of any material development in connection with submission of Phase I LOIs and will remit copies of any Phase I LOIs received to each of them.

Evaluation of Phase I LOIs; Selection of Qualified Bidders

21. The Monitor, in consultation with the Applicants and the DIP Lender, shall review and consider each Phase I LOI and any other materials submitted by a Potential Bidder. A Phase I LOI will be evaluated based upon several factors, including without limitation: (a) the net value provided by the Sale Proposal or Investment Proposal; (b) the identity, circumstances and ability of the Potential Bidder to successfully complete such transactions; (c) the proposed transaction documents; (d) factors affecting the speed, certainty and value of the transaction; (e) the Property included or excluded from the proposed transactions; (f) any related restructuring costs; and (g) the likelihood of consummating such transaction, each as determined by the Monitor in consultation with the Applicants and the DIP Lender.
22. The Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, shall notify each Potential Bidder who submitted a Phase I LOI as to whether its Phase I LOI was selected to continue to Phase II of the SISP (each, a **“Qualified Bidder”**, and the corresponding Bid being a **“Qualified Bid”**) before the Qualification Deadline or at such later time the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, deems appropriate. Only Qualified Bidders may continue to participate in the SISP.
23. The Monitor shall be under no obligation to accept the highest or best Phase I LOI(s) or any Phase I LOI as a Qualified Bid(s). In the event that no Qualified Bidder is selected, the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may extend the Phase I LOI Deadline or may terminate the SISP.
24. Subject to any order of the Court, and notwithstanding anything to the contrary contained herein, if the DIP Lender has not approved of any Potential Bidder being designated as a Qualified Bidder by the Qualification Deadline, the SISP shall automatically terminate at such time, unless otherwise agreed to by the DIP Lender provided, however, that for the purposes of this paragraph, the DIP Lender shall be deemed to approve any Potential Bid or combination of Potential Bids that would fully repay all obligations then owing by the Applicants to the Bank of Nova Scotia.
25. In the event the SISP terminates, the Monitor, in consultation with the Applicants and the DIP Lender, shall forthwith commence an orderly liquidation of the assets of the Applicants (the **“Orderly Liquidation”**) pursuant to a process in form and substance acceptable to the DIP Lender without the need for further Court approval. In connection therewith, the Monitor shall be entitled, but not required, to retain a third-party liquidator or liquidators to assist with the Orderly Liquidation.

Phase II – Submission of Phase II Binding Bids

26. Any Qualified Bidder who wishes to make a binding offer with respect to a Sale Proposal or Investment Proposal contained in its Phase I LOI shall submit a binding Bid (a **“Phase II Bid”**) in accordance with paragraph 27 below to the Monitor at the address specified in Schedule “1” hereto (including by email), which Phase II Bid shall be delivered by such Qualified Bidder by no later than 5:00 p.m. (Toronto Time) on July 31, 2025 (i.e., the Phase II Bid Deadline), or such other date

or time as may be agreed by the Monitor in consultation with the Applicants and with the prior written consent of the DIP Lender.

27. A Phase II Bid must meet the following conditions:

- (a) it has been received by the Phase II Bid Deadline;
- (b) it must include a duly authorized and executed definitive transaction document in respect of a Sale Proposal and/or Investment Proposal and shall include, among other things:
 - (i) an acknowledgement that the Phase II Bid is not conditional upon: (A) the outcome of unperformed due diligence by the Qualified Bidder including the review of any Additional Confidential Information; (B) obtaining financing; or (C) any other material closing condition, provided that a Phase II Bid may be conditional upon the Applicants obtaining the Approval Order and receiving the required approvals or amendments relating to the licences required to operate the Business, if necessary;
 - (ii) any and all conditions and approvals required to complete the closing of the transaction; and
 - (iii) all terms in respect of such Sale Proposal and/or Investment Proposal, as applicable;
- (c) either individually or in combination with other Bids that make up one Phase II Bid, it shall be an offer to purchase or make an investment in some or all of the Applicants, Property or Business and shall be consistent with the necessary terms and conditions established by the Monitor, in consultation with the Applicants and the DIP Lender, and communicated to Qualified Bidders;
- (d) it must include a letter stating that the Qualified Bidder's offer contained in the Phase II Bid: (i) is irrevocable until approval of the Successful Bid(s) by the Court; and (ii) if such Qualified Bidder is selected as a Successful Bidder, its offer shall remain irrevocable until the closing of the transaction contemplated by such Phase II Bid;
- (e) it must include written evidence of a firm, irrevocable commitment for financing or other evidence of the Qualified Bidder's ability to consummate the proposed transaction that will allow the Monitor, in consultation with the Applicants and the DIP Lender, to make a determination as to the Qualified Bidder's financial and other capabilities to consummate the proposed transaction;
- (f) it must include written evidence, in form and substance satisfactory to the Monitor, in consultation with the Applicants and the DIP Lender, of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution and delivery of such Phase II Bid, and identification of any anticipated shareholder, regulatory or other approvals outstanding, and the anticipated process and timeframe and any anticipated impediments for obtaining such approvals;
- (g) it must not include any request for or entitlement to any break or termination fee, expense reimbursement or similar type of payment;
- (h) it must fully disclose the identity of each entity that will be entering into the transaction or the financing thereof, or that is otherwise participating in or benefiting from such Phase II Bid, and the direct and indirect principals thereof;

- (i) it must include acknowledgements and representations of the Qualified Bidder that the Qualified Bidder:
 - (i) has, to its satisfaction, had an opportunity to conduct any and all due diligence regarding the Opportunity and the Applicants prior to making its Phase II Bid;
 - (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or Property in making its Phase II Bid;
 - (iii) did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Business, the Property, the Opportunity, or the Applicants, or the accuracy or completeness of any information provided to or obtained by the Bidder in connection therewith, except as may be expressly stated in the definitive transaction document(s) signed by the Applicants; and
 - (iv) promptly will commence any governmental or regulatory review of the proposed transaction by the applicable competition or other governmental authorities if such a review is required;
 - (j) it is accompanied by a cash deposit (the “**Deposit**”) which shall be in an amount not less than 10% of the purchase price (in the case of a Sale Proposal) or imputed value (in the case of an Investment Proposal) that shall be paid to the Monitor in trust, which Deposit shall be held and dealt with in accordance with these SISP Procedures;
 - (k) contains such other information as may be reasonably requested by the Monitor in consultation with the Applicants and the DIP Lender;
 - (l) contemplates that the Qualified Bidder will bear its own costs and expenses (including legal and advisor fees) in connection with the proposed transaction, and by submitting its Phase II Bid, is agreeing to refrain from and waive any assertion or request for reimbursement on any basis; and
 - (m) contemplates and reasonably demonstrates a capacity to close the transaction set out therein by the Target Date, and in any event no later than September 30, 2025 (i.e., the Outside Date).
28. The Monitor will inform the Applicants and the DIP Lender as soon as practicable of any material development in connection with the submission of Phase II Bids and will remit copies of any Phase II Bids received to each of them.
29. Following the Phase II Bid Deadline, the Monitor, in consultation with the Applicants and the DIP Lender, will assess the Phase II Bids received. The Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may designate the most advantageous Phase II Bids that comply with the requirements set forth in paragraph 27 to be “**Selected Bid(s)**” (and the Qualified Bidder(s) having made the Selected Bid(s) as “**Selected Bidder(s)**”). Only Selected Bidders shall be eligible to become the Successful Bidder(s). The Monitor shall advise all Qualified Bidders not designated as a Selected Bidder of such decision as soon as reasonably practicable.
30. The Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may waive compliance with any one or more of the requirements set out in paragraph 27 and deem such non-compliant Phase II Bid(s) to be a Selected Bid(s).
31. The Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may aggregate separate Selected Bids from unaffiliated Selected Bidders to create one

Selected Bid.

32. The Monitor, in consultation with the Applicants and the DIP Lender, shall be entitled to discuss and negotiate the Phase II Bid(s) prior to the Phase II Bid Deadline for purposes of amending or clarifying the terms and form thereof.
33. The Monitor may, in consultation with the Applicants and the DIP Lender, following the receipt of any Phase II Bid, either independently or following a request from the Applicants or the DIP Lender, seek clarification with respect to any of the terms or conditions of such Phase II Bid and/or request and negotiate one or more amendments to such Phase II Bid before determining if the Phase II Bid should be designated as a Selected Bid pursuant to paragraph 29.
34. The Monitor shall be under no obligation to accept the highest or best Phase II Bid(s) or any Phase II Bid(s) as a Selected Bid(s). In the event that there are no Selected Bidders or that no satisfactory Phase II Bid is received, the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may extend the Phase II Bid Deadline or terminate the SISP and implement the Orderly Liquidation.
35. Subject to any order of the Court, and notwithstanding anything to the contrary contained herein, if the DIP Lender has not approved of any Qualified Bidder being designated as a Selected Bidder before the Selected Bidder Deadline, the SISP shall automatically terminate at such time, unless otherwise agreed to by the DIP Lender, and the Monitor shall forthwith implement the Orderly Liquidation, provided, however, that for the purposes of this paragraph, the DIP Lender shall be deemed to approve any Qualified Bid or combination of Qualified Bids that would fully repay all obligations then owing by the Applicants to the Bank of Nova Scotia.

Selection of Successful Bid(s)

36. The Monitor, in consultation with the Applicants and the DIP Lender, will review and evaluate each Selected Bid upon several factors including, without limitation: (a) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same (it being understood that, all else being equal, cash consideration is preferable to non-cash consideration, with the value of any non-cash consideration being determined by the Monitor in its business judgment, in consultation with the Applicants and the DIP Lender); (b) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in item (a); (c) the identity, circumstances and ability of the Selected Bidder to successfully complete such transactions and the timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; financial wherewithal to meet all commitments; and required governmental or other approvals); (d) the proposed transaction documents; (e) factors affecting the speed, certainty and value of the transaction; (f) the assets and liabilities included or excluded from the Selected Bid; (h) any related restructuring costs; (i) any synergies between the Bidder's business and the Business; (j) the likelihood of the Court's approval of the Selected Bid as a Successful Bid; and (k) the net benefit to the Applicants and its stakeholders, each in consultation with the Applicants and the DIP Lender.
37. Following such review and evaluation, if the Monitor receives one Phase II Bid that the Monitor: (a) designates as a Selected Bid, and (b) determines with respect to such Selected Bid, that it would be appropriate to consummate the transaction contemplated therein, then the Monitor shall, in consultation with the Applicants and with the prior written consent of the DIP Lender, designate such Selected Bid as a successful bid (the "**Successful Bid(s)**"), and the Selected Bidder(s) making such Bid(s), the "**Successful Bidder(s)**"), with or without negotiation of the Selected Bid.
38. At any stage of the SISP, the Monitor, in consultation with the Applicants and the DIP Lender, may ascribe monetary values to non-monetary terms of any Bid for the purposes of assessing and/or valuing such Bids, including without limitation, the value to be ascribed to any liabilities or

contracts to be assumed or not assumed.

39. As soon as reasonably practicable and by no later than the Successful Bidder Notice Deadline, the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, shall advise each Selected Bidder whether it has been designated as a Successful.
40. The Monitor shall be under no obligation to accept the highest or best Selected Bid(s) or any Selected Bid(s) as a Successful Bid(s). In the event that there are no Successful Bidders, the Monitor, in consultation with the Applicants and with the prior written consent of the DIP Lender, may extend the Successful Bidder Notice Deadline or terminate the SISP.
41. Subject to any order of the Court, and notwithstanding anything to the contrary contained herein, if the DIP Lender has not approved of any Selected Bidder being designated as a Successful Bidder before the Successful Bidder Notice Deadline, the SISP shall automatically terminate at such time, unless otherwise agreed to by the DIP Lender, provided, however, that the DIP Lender shall be deemed to approve any Selected Bid or combination of Selected Bids that would fully repay all obligations then owing by the Applicants to the Bank of Nova Scotia.

Sale Approval Motion

42. The Successful Bid(s) shall be selected by no later than August 6, 2025, and the Monitor shall provide notice of such decision to the applicable Successful Bidder(s) as soon as reasonably practicable thereafter. The definitive documentation in respect of the Successful Bid(s) must be finalized and executed by no later than August 13, 2025 which definitive documentation shall be conditional only upon the receipt of the Approval Order(s) (as defined below) and the express conditions set out therein and shall provide that the Successful Bidder(s) shall use all reasonable efforts to close the proposed transaction by the Target Date, and in any event by no later than the Outside Date, or such longer period as may be agreed to by the Monitor, with the prior written consent of the DIP Lender, and the applicable Successful Bidder(s).
43. The Applicants shall apply to the Court for one or more orders (the “**Approval Motion(s)**”): (i) approving the Successful Bid(s) and authorizing the taking of such steps and actions and completing such transactions as are set out therein or required thereby; and (ii) granting a vesting order and/or reverse vesting order to the extent that such relief is contemplated by such Bid(s), as applicable, so as to vest title to any purchased assets in the name of the applicable Bidder(s) and/or vesting unwanted liabilities out of the Applicants (collectively, the “**Approval Order(s)**”). The Approval Motion(s) will be held on a date to be scheduled by the Applicants, in consultation with the Monitor, the DIP Lender and the Successful Bidder(s), and confirmed by the Court, which shall use its commercially reasonable efforts to schedule the Approval Motion(s) by no later than August 18, 2025, subject to the Court’s availability and the terms hereof. With the consent of the Monitor, the DIP Lender and the Successful Bidder(s), the Approval Motion(s) may be adjourned or rescheduled without further notice, by an announcement of the adjourned date at the Approval Motion(s) or in a notice to the service list of the CCAA Proceedings (the “**Service List**”) prior to the Approval Motion(s). The Applicants shall consult with the Monitor, the DIP Lender and the Successful Bidder(s) regarding the motion materials to be filed for the Approval Application(s).
44. All the Selected Bids other than the Successful Bid(s), if any, shall be deemed to be rejected by the Applicants on and as of the date of approval of the Successful Bid(s) by the Court with no further or continuing obligation on the Monitor to such unsuccessful Selected Bidder(s), except for the return of the Deposit pursuant to paragraph 48.

Participation of DIP Lender

45. The Monitor, in consultation with the Applicants, may, as it deems appropriate, consult with the DIP Lender throughout the SISP upon such assurances as to confidentiality as the Monitor may require.

The DIP Lender has irrevocably confirmed in writing to the Monitor that it shall not submit or participate directly in the submission of a Bid and accordingly shall be entitled to the consent and consultation rights provided for herein.

46. Subject to any order of the Court, and notwithstanding anything to the contrary contained herein, following the Phase II Bid Deadline: (a) the DIP Lender may support any Phase II Bid(s) by financing such Phase II Bid; and (b) the DIP Lender's decision to provide any such support shall not affect any of its rights hereunder, including its consultation and consent rights.

Insider Participation

47. The Monitor shall not furnish any information to any officer, director, or employee of, or other non-arm's length party in relation to, the Applicants (each such person, an "**Insider**") where the Insider's receipt of such information might create an unfair advantage or jeopardize the integrity of the SISP, unless such Insider irrevocably confirms in writing to the Monitor that he, she or it shall not submit or participate directly or indirectly in the submission of a Bid.

Deposits

48. Any Deposit shall be held by the Monitor in a single interest-bearing account designated solely for such purpose. A Deposit paid by a Successful Bidder shall be dealt with in accordance with the definitive documents for the transactions contemplated by the applicable Successful Bid. Deposits, and any interest thereon, paid by Qualified Bidders not selected as either a Successful Bidder shall be returned to such Qualified Bidders within three (3) business days of Court approval of the Successful Bid(s).

"As is, Where is"

49. Except to the extent otherwise set forth in a definitive sale or investment agreement with the Successful Bidder(s), any sale of the Property or investment in the Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Applicants, the Monitor or any of their respective directors, officers, employees, agents, representatives, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, financial and monetary claims and charges, options and interests therein and thereon pursuant to Court order(s), to the extent that the Court deems it appropriate to grant such relief and except as otherwise provided in such Court order(s).

Further Orders

50. At any time during the SISP, the Monitor, the Applicants, the Non-Applicant Stay Parties, or the DIP Lender may apply to the Court for advice and directions with respect to any aspect of the SISP, including, but not limited to, the continuation of the SISP or with respect to the discharge of their powers and duties hereunder.

Confidentiality and Access to Information

51. Unless expressly provided for herein, participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Qualified Bidders, Selected Bidders or Successful Bidder(s), or the details of any Bids submitted or the details of any confidential discussions or correspondence between the Applicants, the Monitor, the DIP Lender and such other Potential Bidders, Qualified Bidders, Selected Bidders or Successful Bidder(s) in connection with the SISP, except to the extent that the Monitor (in consultation with the Applicants and the DIP Lender, and with the consent of the applicable Bidders) are seeking to combine separate Bids to form a Selected Bid pursuant to the terms hereof.

52. All discussions regarding a Sale Proposal, Investment Proposal or Bid in the SISP should be directed through the Monitor. Under no circumstances should the management of the Applicants be contacted directly without the prior written consent of the Monitor and the DIP Lender. For greater certainty, the Monitor shall be present at any discussions between any Potential Bidder, Qualified Bidder, Selected Bidder or Successful Bidder and the Applicants (which includes any directors, officers, employees, agents, representatives, and advisors of the Applicants), unless otherwise expressly agreed to by the Monitor and the DIP Lender. Any such unauthorized contact or communication between any Bidder and the Applicants will result in the immediate disqualification of such Bidder from the SISP, unless otherwise agreed to by the Monitor and the DIP Lender.

Additional Terms

53. The Monitor shall oversee and conduct the SISP in all respects, and, without limitation to that supervisory role, the Monitor will participate in the SISP in the manner set out in the SISP Approval Order, including these SISP Procedures, the Initial Order and any other orders of the Court, and is entitled to receive all information in relation to the SISP. In the event that there is disagreement as to the interpretation or application of the SISP, the Court will have the jurisdiction to hear and resolve such dispute.
54. The SISP does not and will not be interpreted to create any liability, obligation, contractual or other legal relationship between the Monitor, the Applicants, Non-Applicant Stay Parties and/or the DIP Lender on the one hand, and any Potential Bidder, Qualified Bidder, Selected Bidder, Successful Bidder and/or any other party on the other hand, other than as specifically set forth in a definitive agreement executed by the Applicants or Non-Applicant Stay Parties, as applicable, with the approval of the Monitor and the DIP Lender.
55. Without limiting the generality of the preceding paragraph, none of the Monitor, the Applicants, Non-Applicant Stay Parties, nor the DIP Lender shall have any liability or obligation whatsoever to any person or party (including to one another), including, without limitation, any Potential Bidder, Qualified Bidder, Selected Bidder, Successful Bidder, or any other creditor or other stakeholder of the Applicants, for any act or omission related to the process contemplated by these SISP Procedures. By submitting a Phase I LOI and/or a Phase II Bid, each respective interested party shall be deemed to have agreed that it has no claim against the Monitor, the Applicants, Non-Applicant Stay Parties, or the DIP Lender for any reason whatsoever in relation to the SISP or the Opportunity, other than as specifically set forth in a definitive agreement executed by the Applicants with the approval of the Monitor and the DIP Lender.
56. Participants in the SISP are responsible for all costs, expenses and liabilities, including, without limitation, finder's fees, broker's fees or any similar fees, incurred by them in connection with the submission of any Phase I LOI or Phase II Bid, due diligence activities, and any further negotiations or other actions whether or not they lead to the consummation of a transaction. None of the Monitor, the Applicants, Non-Applicant Stay Parties or the DIP Lender shall be liable to any person for any claim for brokerage commission, finder's fee or like payment in respect of the consummation of any transaction arising out of or in connection with the SISP. Any such claim shall be the sole liability of the parties that submitted such Successful Bid(s) and shall not affect the consideration to be paid by the Successful Bidder(s) under the applicable Successful Bid(s).
57. Notwithstanding anything contained herein, with the consent of the Applicants and the DIP Lender, the Monitor may at any time: (i) remove any portion of the Property and/or Business from the SISP; and (ii) also with the consent of the Non-Applicant Stay Parties but only to the extent it impacts the Non-Applicant Stay Parties, establish further or other procedures for the SISP, provided that the Service List shall be advised of any material modification to these SISP Procedures.
58. The Monitor, with the prior written consent of the Applicants, the Non-Applicant Stay Parties (but only to the extent to impacts the Non-Applicant Stay Parties) and the DIP Lender, and in accordance with these SISP Procedures, shall have the right to modify the SISP if, in its reasonable business judgment, such modification would enhance the process or better achieve the objectives of the SISP; provided that the Service List shall be advised of any material modification to these SISP Procedures.

Reservation of Rights

59. Nothing in the SISP acknowledges or declares that the interests in the Business or Property being marketed within this SISP are capable of being transferred by the Applicants or the Non-Applicant Stay Parties. For clarity, the Non-Applicant Stay Parties shall not be required to transfer any of their own Business or Property without their consent, and all parties' ability to challenge the Applicants' and Non-Applicant Stay Parties' ability to transfer any Business or Property are expressly preserved and not derogated from (the "**Reservation of Rights**").

SCHEDULE "1"

Address of Monitor

To the Monitor:

PricewaterhouseCoopers Inc., LIT

18 York Street Suite 2500
Toronto, ON M5J 0B2

Attention: Michael McTaggart & Christine Sinclair

Email: michael.mctaggart@pwc.com / christine.l.sinclair@pwc.com

With a copy to:

Reconstruct LLP

80 Richmond Street West, Suite 1700
Toronto, ON M5H 2A4

Attention: Sharon Kour

Email: skour@reconllp.com

AND IN THE MATTER OF STS RENEWABLES LTD., EARTH DRILLING CO. LTD., ON TRACK DRILLING INC., STS RENEWABLES EARTH USA ACQUISITION CO. LTD., EARTH DRILLING CO. LTD., HARRIS EXPLORATION DRILLING & ASSOCIATES, INC., SUBTERRA CAPITAL PARTNERS INC., SUBTERRA DEVELOPMENT LTD., AND SUBTERRA CAPITAL PARTNERS US INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings Commenced in Toronto

SISP APPROVAL ORDER
(May 23, 2025)

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Lawyers for the Applicants



ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-25-00743275-00CL

DATE: 23-MAY-2025

NO. ON LIST: 2

TITLE OF PROCEEDING: STS RENEWABLES LTD. et al.

BEFORE: Justice OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig & Thomas Gray	Counsel for the Applicants	zweigs@bennettjones.com
		grayt@bennettjones.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Shayne Kukulowicz & Jeremy Bornstein	Counsel for the DIP Lender	skukulowicz@cassels.com
		jbornstein@cassels.com
Brian Kolenda	Counsel for Forum Investment and Development Corporation	bkolenda@litigate.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Sharon Kour	Counsel for the Monitor	skour@reconllp.com

ENDORSEMENT of Justice Osborne:

1. This is the comeback hearing in this CCAA proceeding.

2. On May 15, 2025, I granted the Applicant certain ten-day relief as set out in the Initial Order of that date, including a stay of proceedings. They return today seeking additional relief, and in particular an Amended and Restated Initial Order (ARIO) and a SISP Approval Order:
 - a. extending the Stay Period to and including August 8, 2025;
 - b. approving the ability of the Applicants to enter into the proposed DIP Facility and granting the corresponding DIP Lender's Charge;
 - c. increasing the quantum of the Administration charge to a maximum of \$1.2 million;
 - d. increasing the quantum of the Directors' Charge to a maximum of \$1.7 million;
 - e. approving a key employee retention plan (KERP) and granting a corresponding charge subordinate only to the Initial Charges and the DIP Lender's Charge;
 - f. sealing the summary of the KERP filed as a confidential exhibit to the First Report of the Monitor dated May 22, 2025; and
 - g. approving a sale and investment solicitation process (SISP) and authorizing the Applicants and the Monitor to implement same.
3. The Service List has been served.
4. No party has filed materials in opposition to the motion, and none appears today to oppose the relief sought. The relief is supported by the DIP Lender, and is recommended by the Court-appointed Monitor.
5. Defined terms in this Endorsement have the meaning given to them in my Endorsement of May 15 2024, the motion materials, and/or the Reports of the Monitor.
6. For the reasons set out below, I am satisfied that the proposed relief should be granted.
7. With respect to the continued stay of proceedings, I am satisfied that such would preserve the status quo and afford the Applicants the necessary time and breathing space, in the context of stability, required to advance the restructuring and in particular to conduct that SISP while continuing the ordinary course operations of the Business.
8. The Applicants are forecasted, by the cash flow forecast appended to the First Report, to have sufficient liquidity (assuming the proposed ARIO is granted) to fund their obligations and the costs of these proceedings through the end of the Stay Period.
9. No creditor is expected to suffer material prejudice as a result of the proposed extension of the Stay of Proceedings, and it is supported by the Monitor who is of the view that it is reasonable and appropriate in the circumstances.
10. The proposed stay extension is granted pursuant to section 11.02(2) of the *CCAA*. It continues to apply to the Non-Applicants State Parties, with their consent.
11. I am also satisfied that the proposed DIP Facility and the corresponding DIP Lender's Charge should be approved as requested, pursuant to section 11.2(1) of the *CCAA*. I am satisfied that the factors set out in subsection 11.2(4) have been met here.
12. The Monitor is supportive of the quantum of the DIP Facility and the terms thereof, and the cash flow forecast appended to the First Report reflects that such funds are reasonable and appropriate to achieve these objectives.

13. In the same way, the DIP Lender's Charge should be correspondingly approved, also, as recommended by the Monitor.
14. The proposed increase in the Administration Charge is also appropriate and is permitted under section 11.52 of the *CCAA*, the requirements of which have been satisfied here. In addition, the factors set out in *CanWest Publishing* have been met here: *CanWest Publishing Inc.*, 2010 ONSC 2221 at para. 54. The Administration Charge will assist in securing the involvement of the necessary professionals and achieve the best possible outcome for stakeholders: see *Walter Energy (Re)*, 2016 BCSC 107, at para. 41 ("*Walter*"); and *U.S. Steel Canada Inc*, 2014 ONSC 6145 at para 22 ("*U.S. Steel*").
15. The Directors' Charge was also initially sized as security for the obligations and liabilities to be incurred or potentially incurred by the Directors and Officers during the Initial Stay Period. As with the Administration Charge, the proposed increase is intended to achieve the same objective during the extension of the Stay Period.
16. It is important to have the continued involvement of the Directors and Officers in these proceedings. The Monitor and the DIP Lender are supportive of the proposed increase, and I am satisfied that such is appropriate. The Directors and Officers will only be entitled to the benefit of the Directors' Charge to the extent that existing insurance policies in their favour are unavailable or insufficient. I am satisfied that this relief is appropriate.
17. The proposed KERP was developed in consultation with the Monitor and DIP Lender, and is intended to authorize retention payments to certain individuals who have been identified as Key Employees of the Applicants. Jurisdiction to approve a KERP is founded in the general power of the Court under section 11 of the *CCAA* to make any order it sees fit in a *CCAA* proceeding.
18. I am satisfied that the Key Employees are essential to the continued operation of the Business and in particular, will be needed to assist in the SISP and in the closing of the transaction thereunder assuming that occurs.
19. I am satisfied that the KERP, including its terms and conditions, is appropriate. It is supported by the DIP Lender and recommended by the Monitor who is of the view that the terms of the KERP are comparable to the terms of other KERPs that have been approved by this Court. This KERP will provide the necessary incentive for the Key Employees to remain employed and this will in turn benefit not only the Applicants, but all of their stakeholders and maximizing the chances of the success of this restructuring.
20. While the factors affecting the decision of whether or not a KERP should be approved are fact specific, and vary from case to case, certain factors are generally required, including: the importance of an employee to the restructuring process; whether the employee will consider other employment; whether the KERP was developed in consultation with the Monitor or other professionals; and whether the monitor supports the KERP: see *Walter* at para. 57 and *Re Timminco Limited*, 2012 ONSC 2515 at para 15.
21. The corresponding KERP Charge is therefore appropriate for the same reasons, and to provide security for the obligations under the KERP.
22. The KERP, the KERP Charge and the proposed priority of Charges are approved.
23. The Applicants seek a sealing order with respect to the KERP Summary. It contains confidential and sensitive information about the identity and compensation of the Key Employees. The sealing relief is limited, proportionate and appropriate. In particular, the ARIO continues to have the comeback provision, and any party may request advice, directions or relief from this Court on notice at any time in this proceeding, including but not limited to relief with respect to the sealing order.

24. I am satisfied that the test as articulated by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* has been met here. Jurisdiction to grant a sealing order is found in section 137(2) of the *Courts of Justice Act*. The proposed sealing order is approved.
25. Further, I am satisfied that the proposed SISP Approval Order should be granted. The factors set out in *Nortel* have been met here for the reasons set out in the materials. I have also considered the sale approval factors set out in subsection 36(3) of the *CCAA*. While not technically applicable to this stage, I have considered them in conjunction with the *Nortel* factors. They are satisfied.
26. The proposed SISP contemplates that the Monitor will solicit offers in respect of the Non-Applicant Stay Parties. The objective is to canvass the market for any and all offers. Obviously, any sale or transaction will be subject to Court approval. The proposed SISP contains a reservation of rights in favour of the Non-Applicant Stay Parties who will have the ability to challenge any proposed transaction by the Applicants in respect of the Non-Applicant Stay Parties. It is understood by all that a *CCAA* debtor cannot sell property that it does not own.
27. Finally with respect to the SISP, the Non-Applicant Stay Parties have certain rights of first offer (ROFOs). The scope and validity of those rights have not been agreed by those parties and the Applicants. To the extent that relief is required from this Court it will be sought on a motion at a later date. The existence and terms of the ROFOs, and the respective positions of the Applicants and the Non-Applicant Stay Parties will be disclosed to bidders as part of the SISP in order that they are aware of the existence of the rights and the dispute and can therefore be fully informed as they participate in the SISP.
28. Both orders to go in the form signed by me today. They have immediate effect without the necessity of issuing and entering.

Osborne J.

MAR 23 2026

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

AMENDED AND RESTATED INITIAL ORDER

BEFORE THE HONOURABLE JUSTICE JOHN KEITH:

The Applicant proposes to make a compromise or arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended, and it applied for an initial order and, now or in the future, other relief under the CCAA as may be sought on notice of motion.

The following parties received notice of this application:

The Service List attached here to as Schedule "A"

The following parties, represented by the following counsel, made submissions:

Party	Counsel
Applicant	Stephen Kingston and Ben Pryde, McInnes Cooper
HPS Investment Partners LLC	Gavin MacDonald, Cox & Palmer; Marc Wasserman, Dave Rosenblat, Osler, Hoskin & Harcourt LLP
FTI Consulting Canada Inc.	Maria Konyukhova, Stikeman Elliott LLP

On motion of the Applicant and upon reading the affidavits of Brittany Bartlett sworn February 14, 2026, March 11, 2026 and March 19, 2026 (the "**Bartlett Affidavits**") and the Exhibits thereto, and on hearing the submissions of counsel for the Applicant and such other counsel as appeared, with all parties being duly served as appears from the affidavits of service of Stephen Kingston sworn March 12, 2026 and March 20, 2026 and on reading the Pre-Filing Report of FTI Consulting Canada Inc. ("FTI") in its capacity as the Monitor of the Applicant (the "Monitor") dated March 12, 2026, the Supplement to the Monitor's Pre-Filing Report dated March 13, 2026 and the Monitor's First Report dated March 19, 2026,

i and FTI's consent act as the monitor attached to the within application, the following is ordered and declared:

SERVICE

1. The service of the notice of application in chambers, and the supporting documents, as set out in the affidavit of service is hereby deemed adequate notice so that the motion is properly returnable today and further service thereof is hereby dispensed with.

DEFINITIONS

2. For the purposes of this Initial Order, all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Bartlett Affidavit.

APPLICATION

3. The Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

4. The Applicant, in consultation with the Monitor, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

5. The Applicant shall remain in possession and control of its current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Applicant shall be authorized and empowered to continue to retain and employ consultants, agents, experts, accountants, counsel, and such other persons (collectively "**Assistants**") and the employees currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.
6. The Applicant may pay the following expenses whether incurred prior to or after this Order:
 - a. all outstanding and future wages, salaries, employee and pension benefits, vacation pay, and expenses payable to employees who continue to provide service on or after the date of this Order ("**Active Employees**"), in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

- b. all existing and future employee health, dental, life insurance, short and long term disability and related benefits (collectively, the “**Group Benefits**”) payable on or after the date of this Order to Active Employees, in each case incurred in the ordinary course of business and consistent with existing policies and arrangements or such amended policies and arrangements as are necessary or desirable to deliver the existing Group Benefits;
 - c. with prior written approval of the Monitor, the fees and disbursements for any Assistants retained or employed by the Applicant in respect of these proceedings, at their reasonable standard rates and charges.
7. Except as otherwise provided to the contrary herein, the Applicant may pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:
 - a. all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance including directors and officers insurance, maintenance, and security services; and
 - b. payment for goods or services actually supplied to the Applicant following the date of this Order.
8. The Applicant may pay reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course prior to the date of this Order, which are determined by the Applicant, in consultation with the Monitor, to be necessary to the continued operation of the Business or preservation of the Property and such payments are approved in advance by the Monitor or by further Order of this Court. Notwithstanding the foregoing, any such payments shall not exceed the amount of \$125,000 in the aggregate.
9. The Applicant shall remit or pay, in accordance with legal requirements or on terms as may be agreed to between the Applicant and the applicable authority:
 - a. any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of: i) employment insurance, ii) Canada Pension Plan, iii) Quebec Pension Plan, and iv) income taxes;
 - b. all goods and services or other applicable sales taxes (collectively, “**Sales Taxes**”) required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

- c. any amount payable to the Crown in right of Canada or of any Province or any regulatory or administrative body or any other authority, in all cases in respect of municipal realty, municipal business, or other taxes, assessments or levies of any nature or kind which are: i) entitled at law to be paid in priority to claims of secured creditors; ii) attributable to or in respect of the ongoing Business carried on by the Applicant; and iii) payable in respect of the period commencing on or after the date of this Order.
10. Until such time as the Applicant disclaims a real property lease in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases, including, for greater certainty, common area maintenance charges, utilities and realty taxes, and any other amounts payable to the landlord under the lease, or as otherwise may be negotiated between the Applicant and the landlord from time to time, for the period commencing from and including the date of this Order, in accordance with its existing lease agreements. On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid.
11. Except as specifically permitted herein or by further order of this Court, the Applicant is hereby directed, until further order of this Court: i) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date without prior written consent of the Monitor; ii) to grant no security interests, trusts, liens, charges, or encumbrances upon or in respect of any of its Property; and iii) to not grant credit or incur liabilities except in the ordinary course of the Business or with the prior written approval of the Monitor.

RESTRUCTURING

12. The Applicant shall, subject to such requirements as are imposed by the Monitor, have the right to:
 - a. permanently or temporarily cease, downsize or shut down any of its business or operations;
 - b. terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate;
 - c. pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any refinancing; and
 - d. in accordance with its ordinary course of business, dispose of redundant or nonmaterial assets not exceeding \$500,000 in value.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

13. Until and including May 29, 2026 or such later date as this Court may order (the "**Stay Period**"), no claim, grievance, application, action, suit, right or remedy, or proceeding or enforcement process in any court, tribunal, or arbitration association

(each, a "**Proceeding**") shall be commenced, continued, or enforced against or in respect of any of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO PROCEEDINGS AGAINST THE NON-FILING AFFILIATES

14. During the Stay Period, no Proceeding shall be commenced or continued against or in respect of those affiliates of the Applicant listed in **Schedule "B"** attached hereto (the "**Non-Filing Affiliates**"), or any of their current and future assets, businesses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the "**Non-Filing Affiliates' Property and Business**") including, without limitation, terminating, making any demand, accelerating, amending or declaring in default or taking any enforcement steps under any agreement or agreements with respect to which the Applicant is a party, borrower, principal obligor or guarantor, and no default or event of default shall have occurred or be deemed to have occurred under any such agreement or agreements, by reason of:
- a. the insolvency of the Applicant;
 - b. the Applicant having made an application to this Court under the CCAA, or in connection with the application made to this Court pursuant to Subsection 130(1) of the *Companies Act*;
 - c. the Applicant being a party to this proceeding or any ancillary proceedings;
 - d. the provisions of this Order or any other order in these proceedings or any ancillary proceedings;
 - e. the Applicant taking any step related to this CCAA proceeding;
 - f. any default or cross-default arising from the matters set out in subparagraphs (a), (b), (c), (d) or (e) above, or arising from the Applicant breaching or failing to perform any contractual or other obligations (collectively, the "**Non-Filing Affiliates' Default Events**"),

except with the prior written consent of the Applicant and the Monitor, or with leave of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave

of this Court, provided that nothing in this Order shall i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on; ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA; iii) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety, or the environment; iv) prevent the filing of any registration to preserve or perfect a security interest; or v) prevent the registration of a claim for lien and the related filing of an action to preserve the right of a lien holder, provided that the Applicant shall not be required to file a defence during the Stay Period.

16. During the Stay Period, all rights and remedies of any Person against or in respect of the Non-Filing Affiliates, or affecting the Non-Filing Affiliates' Property and Business, as a result of a Non-Filing Affiliates' Default Event, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate, or cease to perform any right, renewal right, contract, agreement, licence, or permit in favour of or held by the Applicant or the Non-Filing Affiliates (as a result of a Non-Filing Affiliates' Default Event), including but not limited to renewal rights in respect of existing insurance policies on the same terms, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, or other services to the Business or the Applicant, are hereby restrained until further order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Applicant, and the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses, and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. Notwithstanding anything else contained herein, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property, or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current, or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court, these proceedings are dismissed by final order of this Court, or with leave of this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. The Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
22. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of \$100,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 31 and 33 hereof.

APPOINTMENT OF MONITOR

23. FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Business and financial affairs of the Applicant, the Property, and the Applicant's conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and the Applicant and its shareholders, officers, directors, employees and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, cooperate fully with the Monitor in the exercise of its powers and discharge of its obligations, and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.
24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:
- a. monitor the Applicant's receipts and disbursements;
 - b. report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the activities of the Applicant and such other matters as may be relevant to the proceedings herein;

- c. advise the Applicant in its development of the Plan and any amendments to the Plan, and, to the extent deemed appropriate by the Monitor, assist in its negotiations with creditors, customers, vendors, and other interested Persons;
 - d. assist the Applicant, to the extent deemed appropriate by the Monitor, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
 - e. have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents and to the Business of the Applicant, to the extent that is necessary to adequately assess the Applicant's Business and financial affairs or to perform its duties arising under this Order;
 - f. be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order, including any affiliate of, or person related to the Monitor;
 - g. develop a claims process to ascertain the quantum of the claims of all creditors; and
 - h. be at liberty to perform such other duties as are required by this Order or by this Court from time to time.
25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.
26. Nothing herein contained shall limit the protections afforded the Monitor at law including those protections set out in the CCAA.
27. The Monitor shall provide any creditor of the Applicant with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.
28. The Monitor, counsel to the Monitor, and all counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case not to exceed their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a monthly basis and, in

addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

29. The Monitor and its legal counsel shall pass their accounts from time to time before a judge of this court or a referee appointed by a judge.

ADMINISTRATION CHARGE

30. The Monitor, the Monitor's counsel, and the Applicant's counsel (collectively, the "Chargees") shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$400,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 31 and 33 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

31. The priorities of the Administration Charge and the Directors' Charge (collectively, the "Charges"), as among them, shall be as follows:

- a. First - Administration Charge (to the maximum amount of \$250,000); and
- b. Second - Directors' Charge (to the maximum amount of \$100,000).

#400,000 (A.V.J.)

32. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
33. Each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person, except for any Person who is a "secured creditor" as defined in the CCAA that has not been served with the Notice of Application for this Order.
34. The Applicant and the Chargees shall be entitled, upon giving notice to parties likely affected, to seek an order changing the amount of the Charges or providing that the Charges shall rank in priority to any Encumbrances over which the Charges may not have obtained priority pursuant to this Order.
35. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any encumbrance over any Property that ranks in priority to, or pari passu with any of the Charges unless the Applicant also obtains the prior written consent of the Chargees, or further order of this Court.

36. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application for a bankruptcy order issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) any negative covenants, prohibitions, or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease, or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:
- a. the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
 - b. none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicant seeking the creation of the Charges; and
 - c. the payments made by the Applicant pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

SERVICE AND NOTICE

37. The Monitor shall: i) without delay, publish in the Chronicle Herald newspaper a notice containing the information prescribed under the CCAA, and ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner (including by electronic message to the e-mail addresses as last shown in the Applicant's books and records), a notice to every known creditor who has a claim against the Applicant of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.
38. The Applicant and the Monitor may give notice of this Order, any other materials and orders in these proceedings, and any notices, and provide correspondence, by forwarding originals or true copies by prepaid ordinary mail, courier, personal delivery, or electronic transmission to the Applicant's creditors or other interested parties at their respective addresses (including e-mail addresses) as last shown in the books and records of the Applicant and any such notice by courier, personal delivery, or electronic transmission shall be deemed to be received on the earlier of (a) the date of forwarding thereof, if sent by electronic transmission at or prior to 5:00 p.m. prevailing Atlantic Daylight Savings Time (or on the next business day following the date of forwarding thereof if sent on a non-business day); (b) the next business day following the date of forwarding thereof if sent by courier, personal

delivery or electronic transmission sent after 5:00 p.m. prevailing Atlantic Daylight Savings Time; or (c) if sent by ordinary mail, on the third business day after mailing.

39. The Applicant and the Monitor, and any party who has filed a demand of notice may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsel's e-mail addresses as recorded on the service list from time to time, and the Monitor may post a copy of any or all such materials on its website at cfcanada.fticonsulting.com/CFFI.

GENERAL

40. The Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
41. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, construction lien trustee, or a trustee in bankruptcy of the Applicant, the Business or the Property.
42. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction outside Nova Scotia, is requested to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.
43. Each of the Applicant and the Monitor may apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Monitor may act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
44. Any interested party, including the Applicant and the Monitor, may apply to this Court to vary or amend this Order on such notice required under the *Civil Procedure Rules* or as this Court may order.
45. This Order and all of its provisions are effective as of 12:01 a.m. Atlantic Daylight Saving Time on the date of this Order.

ISSUED at Halifax, Nova Scotia this 23 day of March, 2026.




PROTHONOTARY.

MYRA JANES
Deputy Prothonotary

IN THE SUPREME COURT
COUNTY OF HALIFAX, N.S.
I hereby certify that the foregoing document,
identified by the seal of the court, is a true
copy of the original document on the file herein.

MAR 23 2026


Deputy Prothonotary

MYRA JANES
Deputy Prothonotary

SCHEDULE "A"

SERVICE LIST

CREDITOR NAME	CONTACT
CFFI Ventures Inc.	Stephen Kingston stephen.kingston@mcinnescooper.com Ben Pryde ben.pryde@mcinnescooper.com Noah Yao noah.yao@mcinnescooper.com
HPS Investment Partners LLC	Gavin McDonald gmcDonald@coxandpalmer.com Marc Wasserman mwasserman@osler.com Dave Rosenblat drosenblat@osler.com
SFPC Quantum LP	Michael Scott mScott@safgroup.ca Zubair Hussain zhussain@safgroup.ca Darren O'Keefe dokeefe@okeefesullivan.com Adam Baker agbaker@okeefesullivan.com Essber Essber eesber@okeefesullivan.com Melissa De Caria mDecaria@okeefesullivan.com
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Andrew Lapham	Andrew Lapham alapham@npcapital.com
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McCarthy Tetrault LLP	Saneea Tanvir stanvir@mccarthy.ca David Lever dlever@mccarthy.ca Hina Khan hkhan@mccarthy.ca
Livingston International Inc.	Allyson Perkins a.perkins@livingston.com
Allianz (AWP Health) Worldwide Care Ltd.	Leighanne Freeman Leighanne.freeman@allianz.com
Bombardier Inc.	Nathalie Daoud nathalie.daoud@aero.bombardier.com
Cortland Capital Market Services	Georgina Bridgman georgina.bridgman@alterdomus.com
CVI Holdings (2020) Inc.	Stan Spavold sspavold@cffi.com
FP Resources USA Inc.	Stan Spavold sspavold@cffi.com
FPR Financial Corporation	John Risley jrisley@cffi.com
John Risley	John Risley jrisley@cffi.com
Sarah Risley	John Risley jrisley@cffi.com
FTI Consulting Canada Inc.	Jeffrey Rosenberg jeffrey.rosenberg@fticonsulting.com Jonathan Joffe jonathan.joffe@fticonsulting.com Maria Konyukhova mkonyukhova@stikeman.com Nick Avis navis@stikeman.com

SCHEDULE "B"

LIST OF NON-FILING AFFILIATES

1. Metric Partners Limited Partnership
2. Cormorant Utility Services Limited
3. PowerTel Utilities Contractors Limited
4. Cormorant Utilities Development Corp. Ltd.
5. PowerTraxx Vehicles Inc.
6. Pouvoir Nord Inc.
7. Eptcon Ltd.
8. Eptcon Canpower Inc.
9. Eptcon USA II Inc.
10. Eptcon Bondeo Inc.
11. Cormorant Infinity Power Solutions Limited
12. Cormorant-ECS Inc.
13. Energio Power Solutions Inc.
14. Ironbound Holdings Limited
15. CFFI USA Holdings Inc.
16. CFFI UK Ventures (Barbados) Ltd.
17. Horizon Maritime Services Ltd.
18. Horizon Maritime Offshore A/S
19. Horizon Maritime Northern Services Ltd.
20. Horizon Maritime Facility Services Ltd.
21. Horizon Maritime Offshore Ltd.
22. Horizon Atlantic Maritime Services Ltd.
23. Miawpukek Horizon Maritime Services LP
24. Miawpukek Horizon Maritime Services Ltd.

25. Horizon Pacific Maritime Services Ltd.
26. Heiltsuk Horizon Maritime Services LP
27. Heiltsuk Horizon Maritime Services Ltd.
28. Bourbon Horizon AS
29. Bourbon Horizon Inc.
30. Kotug Canada Inc.
31. Ampelmann Canada Inc.
32. BIOX USA Limited
33. BIOX Holdings, LLC
34. World Energy, LLC
35. World Energy Holdings, LLC
36. Par49 Holdings, LLC
37. World Energy Sustainable Products, LLC
38. FP Acquisition Holdings LLC
39. FP Resources Holdings LP
40. FP Resources USA Inc.
41. FPR Financial Corporation
42. MARA Renewables Corporation
43. Skinfix Inc.
44. CVI Capital Investments (Barbados) Inc.
45. Valent Low-Carbon Technologies Inc.
46. Tracking Ventures Limited
47. OpenScreen Holdings Inc.
48. OpenScreen Inc.
49. Northern Private Capital GP I Ltd.
50. Northern Private Capital Fund I Limited Partnership

51. Northern Private Capital Ltd.
52. Northern Private Capital Holdings GP Ltd.
53. Northern Private Capital Holdings LP
54. Boomerswork Employment Services Inc.
55. DeNova Inc.
56. Enlighten Innovations Inc.
57. GIT Coatings Inc.
58. Sandpiper Ventures Fund Limited Partnership

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Ontario Superior Court of Justice [Commercial List]

Hudson's Bay Company, Re

2025 CarswellOnt 4504, 2025 ONSC 1897, 19 C.B.R. (7th) 352, 2025 A.C.W.S. 1598

**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 HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC. (Applicants)

Peter J. Osborne J.

Heard: March 21, 2025

Judgment: March 26, 2025

Docket: CV-25-00738613-00CL

Counsel: Ashley Taylor, Elizabeth Pillon, Maria Konyukhova, Britnney Ketwaroo, Philip Yang, Nick Avis, for Applicants
Davis Bish, for Cadillac Fairview
Evan Cobb, for Bank of America
Linc Rogers, Caitlin McIntyre, for Restore Capital LLC
Chad Kopach, for EY in the Receivership of Woodbine Mall Holdings Inc.
Lou Brzezinski, Alexandra Teodorescu, Nadav Amar, for TK Elevator (Canada) Ltd.
Haddon Murray, for Cominar Real Estate Investment Trust & Chanel ULC
Matthew Gottlieb, Andrew Winton, Annecy Pang, for KingSett Capital Inc.
Sean Zweig, Michael Shakra, Thomas Gray, for Court-appointed Monitor
Trevor Courtis, Heather Meredith, for Bank of Montreal and Desjardins Financial Security Life Assurance Company
Gilles Benchaya, Mandy Wu, for Restore Capital LLC and Bank of America
James D. Bunting, for Ivanhoe Cambridge Inc.
Robert J. Chadwick, Joseph Pasquariello, Andrew Harmes, for RioCan Real Estate Investment Trust
Tushara Weerasooriya, Jeffrey Levine, Guneev Bhinder, for B.H. Multi Com Corporation, B.H. Multi Color Corporation & Richline Group Canada Inc.
Gregg Galardi (US Counsel), for File Agent (Restore Capital LLC) as DIP Lender
Isaac Belland, for LVMH Moet Hennessy Louis Vuitton SA
Jake Harris, for DIP Lenders
Matthew Cressatti, for Trustees of the Congregation of Knox's Church, Toronto
D.J. Miller, Andrew Nesbitt, for Oxford Properties Group, OMERS Realty Management Corporation, Yorkdale Shopping Centre Holdings Inc., Scarborough Town Centre Holdings Inc., Montez Hillcrest Inc., Hillcrest Holdings Inc., Kingsway Garden Holdings Inc. Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc., OMERS Realty Corporation, Oxford Properties Retail Limited Partnership, CPPIB Upper Canada Mall Inc., CPP Investment Board Real Estate Holdings Inc.
Calvin Horsten, for Toronto-Dominion Bank
Stuart Brotman, Jennifer L. Caruso, for Royal Bank of Canada
George Benchetrit, for Nike Retail Services Inc. and PVH Canada Inc.
Linda Galessiere, for Ivanhoe Cambridge II Inc./Jones Lang LaSalle Incorporation, Morguard Investments Limited and Salthill Property Managements Inc.

Steven Weisz, Dilina Lallani, for Ferragamo Canada Inc.
David Ullman, Brendan Jones, for Bentall Green Oak, Primaris REIT, Quadreal Property Group
David Preger, Stephen Posen, for 100 Metropolitan Portfolio, Mantella & Sons
Shayne Kukulowicz, Monique Sassi, for Proposed Liquidator
Andrew J. Hatnay, Robert Drake, Abir Shamim, for Certain HBC Employees and Retirees
Ken Rosenberg, Max Starnino, Emily Lawrence, Evan Snyder, for Financial Services Regulatory Authority of Ontario
Sam Rogers, for Investment Management Corporation of Ontario
Kelly Smith Wayland, for Department of Justice (Canada)
Blake Scott, for Unifor Local 240 & 40
Howard Manis, for Villeroy & Boch Tableware Ltd.
Mitch Koczerzinski, for Cherry Lane Shopping Centre Holdings Inc. and TBC Nominee Inc.
Lindsay Miller, for West Edmonton Mall Property
Yiwei Jin, for United Food & Commercial Workers, Int'l Union Local 1006A
David Rosenblat, for Pathlight
Pavle Masic, for Samsonite Canada
Sarah Pinsonnault, for Québec Revenue Agency

Peter J. Osborne J.:

ENDORSEMENT

- 1 Last Friday, March 21, 2025, I granted certain relief at the conclusion of the hearing in this matter with reasons to follow. These are those reasons.
- 2 On March 7, 2025, I granted an Initial Order in this Application with Reasons released on March 10, 2025. At the comeback hearing on March 17, 2025, I extended the stay of proceedings (and granted other interim relief) in effect until March 19, 2025 and adjourned the motion for the balance of the relief sought by the Applicants. The adjournment was to afford the parties, with the assistance and facilitation of the Court-appointed Monitor, an opportunity to continue discussions that were ongoing prior to and indeed during the comeback hearing, with a view to narrowing or resolving certain contested issues.
- 3 On March 19, 2025, and for the reasons set out in the Endorsement of that date, I approved the engagement of a financial advisor for the Applicants, increased the quantum of the Directors' Charge, and granted other interim relief. I adjourned the motion for the balance of the relief sought by the Applicants until March 21 at their request, with the recommendation of the Monitor, and without opposition.
- 4 Upon resumption of the comeback hearing on March 21, the parties advised that many of the issues that were contested on March 17 had been resolved as among them. As such, much of the relief sought by the Applicants is now proceeding on a consent or unopposed basis. As further described below, certain relief is opposed.
- 5 In addition, circumstances continue to evolve quite literally by the hour. The reality is that since this insolvency proceeding and the challenges facing Hudson's Bay have received significant media attention, sales of merchandise, and particularly Hudson's Bay branded merchandise, have been robust over the last number of days.
- 6 The result is that the Company has earned significant revenue and has cash on hand that has exceeded forecasts, such that it no longer has the immediate need for liquidity during the next few weeks that had been projected in the cash flow forecast appended to the First Report of the Monitor. That forecast anticipated the surge in sales that is now being realized, although anticipated that such an increase in revenue would not be so immediate.
- 7 It was for that reason that the Applicants sought, and the Monitor supported, approval of a Debtor in Possession ("DIP") Facility to provide liquidity that was urgently needed at the time. As reflected in the forecast, once sales increased in the

expectation of a liquidation, revenues were projected to be sufficient to fund wind down operations in these proceedings through the proposed stay extension period.

8 As a result of all of the above, the proposed DIP Facility is no longer required and the Company seeks, among other things, authority to repay to the DIP Lender the outstanding balance on the DIP Facility of approximately \$16 million that has been drawn down since the date of the Initial Order.

9 It further follows that a number of the highly contested issues related to the DIP Facility, about which submissions were made on March 17, have now been resolved or eliminated since they were related to terms and conditions of the proposed continued DIP Facility that is no longer necessary.

10 It is important to note that while an increase in retail sales revenues is of assistance, it should not be misinterpreted as an indication that the business is viable as a going concern. On the contrary, the only reason that there is net cash on hand is that the Company is not purchasing new inventory such as would be necessary to sustain retail operations in the usual course of business.

11 Moreover, the previously approved DIP Facility available for the initial stay period provided for access to borrowed funds up to a maximum of \$16 million. As noted, \$11 million has already been drawn down to fund operations during the initial stay period. The previously proposed DIP Facility to continue thereafter was in a maximum amount of \$23 million, inclusive of the original \$16 million, for a net increase of only \$7 million in available borrowed funds.

12 That amount fell dramatically short of any realistic estimate of the funds needed to ensure a going-concern outcome for the Company. Put simply, the Company has not yet been able to identify any lender or investor prepared to advance anywhere near the amount required to put the Company on a solid footing to provide the basis for a going-concern restructuring. While the Company advises that it is still hopeful that a source of funds can be identified, none has emerged at this time.

13 As a further result of all of the above, the Company now seeks to proceed with a proposed liquidation sale as rapidly as possible since its liquidity challenges require immediate liquidation of inventory.

14 The Service List has been served and the materials are available on the website of the Court-appointed Monitor.

15 Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding, the Application materials, and/or the Reports of the Monitor, unless otherwise stated.

16 Today, the Applicants seek four Orders:

i. a further Amended and Restated Initial Order ("ARIO"):

1. extending the stay of proceedings to and including May, 15, 2025;
2. continuing the stay of proceedings of rights of third-party tenants of commercial shopping centres or other properties where premises operated by Hudson's Bay are located;
3. authorizing the Company to repay the DIP Financing Obligations upon fulfilment of certain conditions, together with related relief;
4. approving the Restructuring Support Agreement;
5. amending the stay of the payment of rent from Hudson's Bay to the HB-RioCan Joint Venture Entities (collectively, the "JV Entities") and granting a priority charge in favour of the JV Entities to secure any rent not paid after March 7, 2025;
6. approving a Key Employee Retention Plan ("KERP") and related charge; and

7. authorizing Hudson's Bay to enter into a Financing Agreement with Imperial PFS Payments Canada, ULC to provide financing to the Company to purchase property insurance policies;

ii. a Liquidation Sale Approval Order approving the amended agreement between Hudson's Bay and the Liquidation Consultant to provide for the Liquidation Sale of the Company's inventory, fixtures and equipment; approving the Sale Guidelines; and authorizing the Company to undertake the Liquidation Sale;

iii. a Lease Monetization Order approving the Lease Monetization Process and authorizing the Applicants to undertake the monetization of their leases, including through the approval of a consulting agreement between Hudson's Bay and Oberfeld Snowcap Inc. to assist in the marketing of the Company's Leases; and

iv. a Sales and Investment Solicitation Process ("SISP") Order approving the proposed SISP and authorizing the Applicants to commence that Process immediately.

The Stay of Proceedings should be Extended

17 Sections 11.02(2) and 11.02(3) of the *CCA* provide that the Court may order a stay of proceedings for any period that the Court considers necessary, if the Court is satisfied that circumstances exist that make the order appropriate and the applicant has acted, and is acting, in good faith and with due diligence. I am so satisfied.

18 The activities of the Applicant, supported by the Monitor, are set out in the Second Bewley Affidavit, the Third Bewley Affidavit sworn March 21, 2025, the First Report of the Monitor and the Supplement to the First Report dated March 21, 2025.

19 A continued stay of proceedings is clearly necessary here to stabilize the activities and operations of the Applicants while the SISP, Lease Monetization and proposed Liquidation processes are underway. Such stabilization is necessary in order to maximize the chances of recovery for stakeholders.

20 The revised cash flow forecasts prepared by the Applicants in consultation with the Monitor reflect that the Applicants should have sufficient liquidity to fund operations and these proceedings through the proposed stay extension period.

21 The Monitor fully supports the proposed stay extension, and no party opposes the extension today.

22 Accordingly, the stay of proceedings is extended to and including May, 15, 2025.

JV Entity Rent Payments

23 As reflected in the Updated Cash Flow Forecast, the Company is expected to have sufficient liquidity to pay a monthly aggregate amount of \$7 million plus applicable taxes to the JV Entities. Accordingly, the Applicants seek, with the consent and agreement of the JV Entities and the JV counterparty, RioCan, to modify the stay of proceedings with respect to the payment of rent owing to the JV Entities to permit the partial payments. They also seek approval of a corresponding JV Rent Charge to secure post-filing rent not paid by the Company to the JV Entities.

24 As described in my Initial Order Endorsement dated March 10, 2025, I extended the stay of proceedings for the 10-day period pending the comeback hearing to the defined Non-Applicant Stay Parties, including the RioCan-Hudson's Bay JV, in part. The proportion of rent payable by the Applicants to the JV Entities that was payable to landlords under the Head Leases would continue to be paid. This relief was reviewable at the comeback hearing, at which time I would determine, with the benefit of submissions (if any) from RioCan, whether the stay of proceedings, even if continued generally, should continue to apply to the JV Entities.

25 At the commencement of the comeback hearing, the Applicants submitted that the partial stay of proceedings should continue to apply to the JV Entities, pursuant to the exercise of my discretion authorized in section 11 of the *CCA*. The Applicants relied on the decision of this Court in *Xplore, Inc. (Re)*, 2024 ONSC 4593 (Ont. S.C.J. [Commercial List]), at paras. 55-56, as

a relevant example of circumstances in which the Court required certain suppliers to the debtor (in that case satellite providers) to continue supplying services to the debtor without being paid post-filing payments to which they were contractually entitled.

26 In that case, Kimmel, J. noted that section 11.01 of the *CCAA* does not specify that suppliers must be paid at the contractual rates post-filing. While the relief granted in that case applied to suppliers of satellite services, the Applicants here submitted that the rationale applies equally to landlords such as the JV Entities. They further submitted that even if the relief sought here was novel, it was, as observed by the Court in *Xplore*, at paras. 61-63, available "in appropriate circumstances within the framework and spirit of the applicable legislation."

27 The Applicants further submitted that in *Nordstrom Canada Retail Inc. (Re)*, this Court stayed and suspended the payment of certain post-filing amounts in respect of construction, fixturing and furnishing premises, which amounts would otherwise be due and payable under the sublease between the debtor as sublessee and the non-applicant stay parties as sublessor.

28 The Monitor supported the continuation of the stay of proceedings to the JV Entities, observing that "the stay would still require rent to be paid in full to third-party landlords, while staying "rent payments" that the Monitor believes can be fairly characterized as financing arrangements" (First Report, para. 8.15).

29 Also, at the commencement of the comeback hearing, RioCan opposed the continuation of the partial stay to the JV Entities, and requested that the Court amend the Initial Order to require Hudson's Bay to pay all post-filing occupancy rent to the JV Entities for use in occupation of leased or subleased premises on the same basis as all landlords providing space to Hudson's Bay.

30 RioCan submitted that there was long-standing precedent for the proposition that post-filing rent should be paid to landlords providing leased premises to a debtor company. It further submitted that there was no reason for this Court to exercise its discretion to continue the partial stay on the basis that the counterparty to the Hudson's Bay leases, in this case, the relevant JV Entities, were partially owned (in most cases, majority-owned) by Hudson's Bay or related entities.

31 The structure of the joint venture is summarized in the Application materials, the First Report, and briefly in my Endorsement dated March 10 in respect of the Initial Order (para. 45). As described above, the stay of proceedings did not apply to that portion of the payments made by Hudson's Bay to the JV Entities which was payable by the JV Entities to the relevant landlords. It applied only to that portion of the payments made by Hudson's Bay to the JV Entities, which was retained by them and not paid over to the relevant landlords.

32 In any event, I need not determine the issue since the Applicants and RioCan have now reached an agreement, which is not opposed by any other party (including, for greater certainty, the JV Entities), and which is recommended by the Monitor.

33 Accordingly, it is not necessary for me to make a finding today as to whether the payments by Hudson's Bay to the JV Entities are wholly in the nature of "rent" payable to a landlord or whether they include a "financing" component. I do observe that while the JV Entities (sub-landlords) are not wholly owned by the Company, neither are they complete strangers in the sense of being third party landlords. The JV is majority-owned by Hudson's Bay to the extent of approximately 78%. The nature of the relationship between the parties and the precise terms of the contractual and other arrangements may be relevant to the analysis of whether and to what extent such payments are in the nature of rent for premises or not.

34 The agreement now reached by the parties contemplates that Hudson's Bay will pay the monthly aggregate amount of \$7 million plus applicable taxes in respect of the JV Rent. The Company has sufficient liquidity to do so. This amount is intended to approximate the rent payable under the head leases (already being paid even under the partial stay), together with monthly debt servicing requirements and administrative expenses incurred in the ordinary course and payable under the applicable Leases to which Hudson's Bay is a party.

35 This monthly amount will be payable on the same terms as those applicable to all other Leases provided for in the ARIO, except that to the extent that any JV Lease is disclaimed or terminated, the JV monthly amount shall automatically be reduced

by an amount equal to the *pro rata* amount attributable to such JV Lease relative to all other JV Leases, and there will be an adjustment for the period March 1, 2025 to and including March 7, 2025, the date of the Initial Order.

36 In addition, the agreement provides that any post-filing rent not paid by the Company to the JV Entities would be secured by a new JV Rent Charge in favour of the JV Entities. That JV Rent Charge would rank fourth in the waterfall that applies to Property other than the Loan Parties' Property behind the Administration Charge in first position, the KERP Charge in second position, and the Directors' Charge to the maximum amount of \$13,500,000, with the balance of the quantum of the Directors' Charge in the amount of \$35,700,000 ranking behind the JV Rent Charge. The JV Rent Charge would rank fifth in the waterfall that applies to the Loan Parties' Property, all as set out in the materials.

37 I am satisfied that this consensual resolution of the issue by the Applicants and the JV Entities, which is not opposed by the JV Lenders and is recommended by the Monitor, is appropriate in the circumstances of this case. The JV Rent Charge is limited to that which is necessary to cover unpaid amounts that would otherwise have been payable to the JV Entities in the ordinary course.

Co-Tenancy Stay

38 The Applicants also request an order that the extended stay of proceedings would continue to apply to third party "co-tenants". At the initial *ex parte* hearing of this Application on March 7, 2025, I was prepared to grant the co-tenancy stay for the initial 10-day period to maintain the status quo and stability for that short period of time. However, I specifically noted in my reasons for the Initial Order that I had concerns about the evidence in the record supporting such a stay, and that it would be addressed further at the comeback hearing. I stated in those reasons the following:

62. The proposed stay would also apply to co-tenants. Many retail leases provide that tenants have certain rights against their landlords which rights are triggered upon the insolvency of an anchor tenant or an anchor tenant ceasing operations at the location of the co-tenancy.

63. The Applicants are requesting that the stay here apply to any rights that tenants or occupants may have against the owners, operators, managers and landlords of the commercial properties where Hudson's Bay stores are located that arise as a result of the insolvency by Hudson's Bay Canada, the granting of the proposed Initial Order, or any actions taken by the Applicants pursuant thereto. This is supported by the Proposed Monitor.

64. I recognize that such relief has been granted by other Courts in retail insolvencies pursuant to the broad discretion given to the court under sections 11 and 11.02(1) of the *CCAA* to make an initial order on "any terms that it may impose". See, for example, *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.), *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 44 - 48, and *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at paras 33 - 35.

65. The rationale is that extending the stay of proceedings in such a manner prevents a so-called "run on the bank" in the sense that many other co-tenants might seek, as a result of this proceeding, to terminate their own leases with landlord locations where Hudson's Bay currently operates. As observed by the Court in *Target* at para. 44, if tenants were permitted to exercise these co-tenancy rights during the stay, the claims of the landlord against the debtor company could greatly increase, with the potentially detrimental impact on the restructuring efforts of the debtor company.

66. In the particular and unique circumstances of this case, and given the prominent nature of the business of Hudson's Bay, both generally in the retail landscape across Canada and specifically at various shopping mall locations, I am prepared to grant that relief today for the initial stay period to ensure stability of operations.

67. However, and consistent with the approach adopted by the Court in *Target*, to the extent that the affected parties wish to challenge the broad nature of this stay, such can be addressed at the comeback hearing: *Target*, at para. 48.

68. I would add that, in my view, such co-tenancy stays are representative of relief that lies towards the limit of the judicial discretion permitted by ss. 11 and 11.02 of the *CCAA* and should generally be granted only in relatively unique circumstances and where justified on the evidence before the Court.

69. Such stays suspend the enforcement of contractual rights of parties that are quite remote to the present proceeding and the insolvency of the debtor on which it is based. Such co-tenancy stays operate, in practical terms, to protect and stabilize the operations not of the debtor, but of landlords who are contractual counterparties to the debtor (i.e., through retail leases). Those landlords are not insolvent. While I appreciate that the object of such stays is to minimize the risk of that very event occurring, such stays represent a significant compromise of rights of third parties.

70. There are many examples of stays that compromise or suspend the rights of third parties. Usually, however, those third parties are counterparties in contracts or have some other relationship with the debtor. Here, such co-tenancy stays suspend the rights of parties one step even further removed from the insolvency of the debtor - other retail tenants who have their own leases with the landlords. The only factor joining those parties to the debtor is that they have a common landlord at a common retail location.

71. The exercise of termination rights by those other retail tenants sought to be suspended must depend on those termination rights existing in the first place according to the terms of the leases in place between those other tenants and the landlord. If a co-tenant bargained for the right to terminate its own lease in the event that an anchor tenant at the same location ceased operations or became insolvent, and its landlord agreed to give that co-tenant such a right (presumably for economic consideration), the landlord made the business decision to take risks in respect of other retail tenancies based on its own assessment of the risk of insolvency of the anchor tenant.

72. Finally in this regard, it does not automatically follow that even if a co-tenant terminated its lease, the landlord would have a valid claim against the debtor in the insolvency proceeding.

73. Accordingly, in my view, an analysis of whether the rights of co-tenants should be suspended pursuant to a stay of proceedings will be fact-specific in each case, and if granted at the initial order hearing of an application, will be subject to review at the comeback hearing as noted by the Chief Justice in *Target*.

74. I would add that it will also be subject to review at any time throughout the proceeding by a co-tenant pursuant to the seven day comeback clause in the Commercial List Model Order pursuant to which any affected party may request that the Court review, amend or vacate an initial order at any time.

39 As noted above, the Applicants now seek the extension of this co-tenancy stay through to and including May 15, 2025.

40 The challenge today is that there is no evidence in the record to support such a co-tenancy stay from the Applicants or from any landlords, owners or managers at locations where Hudson's Bay stores operate.

41 In particular, there is no evidence of any of the following:

- a. whether any co-tenants of Hudson's Bay in fact have contractual rights in their own leases to terminate (or abate their rent or take other action as a result of this insolvency);
- b. whether any co-tenants have sought to trigger such rights;
- c. what effect such actions, even if taken, would have on the relevant landlord, owner or manager;
- d. whether any such landlord, owner or manager would seek to assert any claim over against Hudson's Bay as part of a future claims process (since the stay of proceedings against the Company is in effect); or
- e. what effect any of this might have on the Applicants.

42 Any such claim over would likely be an unsecured contingent claim by that landlord, owner or manager in any event.

43 Accordingly, and given the absence of evidence in the record to justify a co-tenancy stay continuing, it is not granted. To be clear, this is without prejudice to the right of the Applicants to seek such a stay in the future.

Proposed Path Forward: Three Concurrent Processes

44 The Applicants seek the approval of three distinct processes to canvass the market for potential restructuring, refinancing or going-concern sale opportunities, each with a view to maximizing recovery for stakeholders in respect of available assets:

- a. a Liquidation Sale for the liquidation of the Inventory and Furniture, Fixtures and Equipment ("FF&E");
- b. a Lease Monetization Process for the sale, transfer or assignment of Leases to third parties; and;
- c. a Sale and Investment Solicitation Process ("SISP") to identify opportunities:
 - i. to sell all, substantially all, or certain portions of the property or business of the Non-Applicants State Parties or their Business; and/or
 - ii. for investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants and the Non-Applicant Stay Parties or their business.

45 The Applicants propose to commence the Liquidation Sale immediately at all retail stores while concurrently implementing the Lease Monetization Process and the SISP.

46 I will address each of these in turn.

The Liquidation Sale and Related Issues

47 The Court has jurisdiction to approve a sales process authorizing the sale of assets of a debtor pursuant to section 36 of the *CCAA*. Courts have previously exercised this jurisdiction, and done so particularly in the context of retail insolvencies.¹

48 When considering whether to approve a proposed sales process, the Court will consider the criteria set out in *Nortel*²:

- a. is a sale transaction warranted at this time?
- b. will the sale benefit the whole economic community?
- c. do any of the creditors of the debtor have a bona fide reason to object to a sale? and
- d. is there a better viable alternative?

49 Courts have also evaluated proposed retail realization processes in light of the criteria set out in section 36(3) of the *CCAA*³, namely:

- a. whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- b. whether the Monitor approved the process leading to the proposed sale or disposition;
- c. whether the Monitor filed a report stating that in its opinion the sale or disposition would be more beneficial to creditors than a bankruptcy;
- d. the extent to which creditors were consulted;

e. the effects of the proposed sale or disposition on creditors and stakeholders; and

f. whether the consideration to be received for the assets is fair and reasonable, taking into account their market value.

50 I am satisfied that all of these factors are met here. The proposed Liquidation Consulting Agreement, when taken together with the Sale Guidelines, provides the framework for the Liquidation Sale to be conducted by the Liquidation Consultant.

51 The proposed Sale Commencement Date is immediate: Monday, March 24, 2025. In addition, six stores would be removed from the Liquidation Sale: 176 Yonge Street, Toronto, Ontario; Yorkdale Shopping Centre, Toronto, Ontario; Hillcrest Mall, Richmond Hill, Ontario; downtown Montréal, Québec; Carrefour Laval, Québec; and Pointe-Claire, Québec.

52 While the Company currently proposes to conduct the Liquidation Sale at all remaining retail stores, it retains the ability to amend the list of liquidating stores on certain terms and conditions (such as, for example, if a going-concern transaction materializes). In addition, inventory at the Distribution Centres will be available for liquidation as part of the Sale, with inventory in the Scarborough Distribution Centre being utilized for e-commerce sales.

53 I am satisfied, given the limited liquidity available to the Company, that the orderly realization of its inventory and FF&E (furniture, fixtures and equipment) as soon as possible is necessary to maximize recoveries and limit operating costs. The proposed Liquidation Consulting Agreement will implement the Liquidation Sale immediately to attempt to achieve that.

54 I am also satisfied that the process to select the Liquidation Consultant was reasonable. The mandate is significant: as at January 31, 2025, the Company had approximately \$415 million of inventory reflected on its balance sheet. The Liquidation Sale will be conducted concurrently at 90 stores across seven provinces, three distribution centres in two provinces, and in respect of e-commerce sales from the fourth distribution Centre in Ontario. Approximately 9400 employees must be coordinated. All of this must occur over an extremely expedited Sale Term commencing March 24, 2025 and continuing only until June 15, 2025.

55 The Initial Order authorizes the Applicants, in consultation with the Monitor, to solicit proposals from third parties in respect of the liquidation. The proposal from the Hilco JV was provided to the Applicants and the Monitor as a joint venture among four leading liquidators. The Monitor and Reflect identified and inquired of other potential liquidators who had the resources and experience necessary to conduct a sale of this magnitude, and none was prepared to submit a proposal.

56 The Applicants believe that the Liquidation Consultant has the expertise and knowledge of their business, merchandise and store locations that is necessary to conduct the Liquidation Sale. It has the resources to commence the proposed sale process immediately.

57 The Monitor was consulted and directly involved throughout the process. It recommends the engagement of the Liquidation Consultant and also the terms of the proposed Liquidation Consulting Agreement which it submits are reasonable in the circumstances.

58 The fee structure outlined in the Liquidation Consulting Agreement is designed to attempt to align the compensation to be paid to the Liquidation Consultant with stakeholder outcomes: fees are based on a percentage of proceeds, meaning that the Liquidation Consultant is incentivized to maximize the value of inventory and FF&E.

59 The unredacted Liquidation Consulting Agreement, including the fee structure, is in the record and available to stakeholders. It is fully discussed in the First Report of the Monitor. I am satisfied that it is appropriate, and it is approved.

60 The proposed Sales Guidelines set out the mechanics pursuant to which the Liquidation Sale is to be conducted. They were designed by the Applicants and the Liquidation Consultant in consultation with the Monitor with a view to maximizing recovery for the benefit of creditors while ensuring that the Liquidation Sale takes place in an orderly manner. They are fully described in the Second Bewley Affidavit beginning at para. 107 and in the First Report of the Monitor. They are also substantially similar to guidelines for inventory realization sales approved by this Court in other retail insolvencies, including *Nordstrom* and *Bed Bath & Beyond Canada*.

61 In my view, the proposed Sales Guidelines are appropriate, and they are approved, with certain amendments as I directed at the conclusion of the hearing of these motions. Those related to various technical elements of the Guidelines.

The Lease Monetization Process and Retainer of the Broker

62 The proposed Lease Monetization Process is intended to enable the Applicants to pursue all avenues and possible offers for the sale, transfer or assignment to third parties of the Leases of the Applicants and the Non-Applicants Stay Parties. The Applicants may withdraw any Lease from the Process in consultation with the Lease Monetization Consultant, the Monitor and the Agents.

63 The Lease Monetization Process contemplates two phases:

a. Phase 1: a solicitation of interest by Interested Bidders so that they may be considered for qualification as a Qualified LOI Bidder and invited to participate in Phase 2; and

b. Phase 2: the submission of Qualified Bids by Qualified LOI Bidders, accompanied by a deposit equal to 10% of the purchase price.

64 Successful Bidders must complete all agreements no later than May 15, 2025, and a transaction approval motion is contemplated to be heard no later than June 17, 2025. Accordingly, the timeline is short.

65 The Lease Monetization Process provides for the marketing and potential sale of the lease interests of the Applicants and the Non-Applicants Stay Parties. To state the obvious, an Applicant (or any other party) cannot sell an asset it does not own. As described in the Application materials, the interest of the Applicants in some leases is less than 100%.

66 Accordingly, nothing in the Lease Monetization Process or the approval thereof permits or requires any amendments to the terms of any Lease without the consent of the applicable landlord; obligates any landlord to negotiate with any bidder regarding any such amendment; or determines that the interests in the Leases being marketed are capable of being transferred by the Applicants or the Non-Applicants Stay Parties.

67 In simple terms, the objective of the process is to identify any manner of possible transactions for the monetization of Leases whether or not they are wholly owned by the Applicants, pursuant to a process that is fair and transparent to all participants and affected parties. Bidders know at the outset that if they submit an offer, for example, for a Lease in which the Applicants own only a proportionate interest, such an offer may very well require the consent of the counterparty landlord before it is capable of acceptance. There is no representation or guarantee that such a consent may be forthcoming. No party opposes approval of either the Lease Monetization Process or the retainer of Oberfeld.⁴

68 In the circumstances, and given the conditions described above, I am satisfied that the proposed Lease Monetization Process is appropriate.

69 The Lease Monetization Process will be conducted by Oberfeld in the capacity of Lease Monetization Consultant under the supervision of the Monitor. At the time this motion was originally brought, a different broker had been identified by the Company and the Monitor to fulfil that role. However, that broker withdrew as a result of a conflict of interest with certain landlords who are counterparties to Company leases.

70 As a result, the Company, with the support of the Monitor, seeks approval today of the Lease Monetization Process and the retainer of Oberfeld according to the terms of an agreement that would be materially consistent with the originally proposed Lease Monetization Consulting Agreement fully disclosed in the Application materials and discussed in the First Report of the Monitor.

71 The key terms, including fees, of the proposed Lease Monetization Consulting Agreement are described in the materials. They include a work fee payable on a monthly basis of \$80,000 up to a maximum aggregate amount of \$240,000 fully creditable

against payment of any success fee. A one-time gross success fee per Lease would be payable conditional upon the successful closing of a sale, transfer or assignment of any Lease equal to 10% of the net proceeds payable to Hudson's Bay up to a maximum aggregate amount of \$175,000.

72 The Monitor was involved in the negotiation of the compensation and considers such compensation to be appropriate and reasonable in the circumstances.

73 In the circumstances, and given the imperative nature of commencing the Lease Monetization Process immediately to maximize potential recoveries for stakeholders, I am prepared to approve the Lease Monetization Process on this basis.

74 In my view, the *Nortel* criteria set out above and the relevant factors set out in section 36(3) of the *CCAA* support the approval of the proposed Lease Monetization Process. The terms, timelines and mechanics are reasonable and appropriate in the circumstances.

75 Any successful bids will be subject to approval of the Court, at which time the Court will have an opportunity to review the performance of the Lease Monetization Process and ensure that all relevant factors have been complied with.

76 I am also satisfied that the retainer of Oberfeld is appropriate and should be approved. That firm is experienced, is not subject to any conflicts, and its retainer is supported by the Landlords. The Monitor submits that the proposed terms of the engagement are reasonable and represent market rates. I am satisfied that the retainer will be accretive to maximizing recoveries in the circumstances of this case with respect to the marketing of Leases. It is approved.

The SISP

77 The proposed SISP is intended to solicit interest in, and opportunities for: a) one or more sales or partial sales of all, substantially all, or certain portions of the Property or the Business; and/or b) an investment in, restructuring, recapitalization, refinancing or other form of reorganization of the Applicants and the Non-Applicant Stay Parties or their business.

78 The SISP contemplates the solicitation of bids for both standalone assets such as intellectual property and/or portions of the business that can be carried on as a going concern, following a sale or restructuring. It will be conducted by Reflect, in its capacity as the Financial Advisor, under the supervision of the Monitor.

79 The proposed SISP is similar Court, customized so as to maximize chances of success in the particular circumstances of this case.

80 The proposed timelines are compact but reasonable. Qualified Bidders must submit final binding proposals by April 30, 2025. An auction may be held, if needed, by May 16 2025. The particulars of the SISP and related procedures and protocols are fully set out in the materials.

81 I am satisfied that the proposed SISP should be approved. It satisfies the *Nortel* criteria and the relevant factors set out in section 36(3) of the *CCAA*. Any successful bids will be subject to court approval at which time the Court can review the execution and implementation of the SISP and ensure that these factors have been satisfied.

Financing Agreement — Property Insurance

82 Hudson's Bay owes approximately \$5,400,000 under its property insurance policy which was recently renewed, but in respect of which the premium is due in full the week of March 24, 2025. I am satisfied that it is important for the preservation of Property and the management of liability risks related to that Property, that the insurance coverage be maintained. No party opposes the continuation of that coverage.

83 It follows that the applicable premium, which the Applicants submit and the Monitor agrees, represents market rates, must be paid. The options are to either pay it in full, now, or to finance it over time, thereby relieving immediate pressure on cash flows and liquidity.

84 For this reason, the Applicant seeks approval of the Financing Agreement to provide the additional liquidity by allowing Hudson's Bay to pay the amount of \$1,600,000 now, followed by monthly instalments of \$431,000 until the balance is paid.

85 The Monitor recommends, no party opposes, and I agree that the relief sought is reasonable and appropriate in the circumstances since the additional liquidity. It will be of significant assistance for the Applicants and the stakeholders.

The KERP and Continued Sealing Order

86 KERPs have also been recognized as to their utility and importance, and approved, in numerous debtor-in-possession proceedings and receivership proceedings pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and the *Courts of Justice Act*, R.S.O. 1990, c. C.43, in addition to the *CCAA* .

87 All of those statutes are, however, silent with respect to the approval of KERPs. Jurisdiction to approve a KERP is found in the general power of the Court under section 11 of the *CCAA* to make any order it sees fit in a *CCAA* proceeding: See, for example: *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at para. 14, quoting with approval from *Aralez Pharmaceuticals Inc.(Re)*, 2018 ONSC 6980 (Ont. S.C.J. [Commercial List]) ; *Cinram International Inc., (Re)*, 2012 ONSC 3767 and *Grant Forest Products Inc., (Re)*, [2009] O.J. No. 3344 .

88 The factors that the Court considers in approving a KERP include:

- a. the approval of the Monitor;
- b. whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP is not approved;
- c. whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company;
- d. whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and
- e. the business judgment of the board of directors of the debtor

See: *Just Energy Group Inc et al*, 2021 ONSC 7630 at para. 7; and *Aralez Pharmaceuticals Inc (Re)*, 2018 ONSC 6980 at para. 29.

89 Three criteria underlie the factors applicable to approving a KERP or similar incentive program in an insolvency proceeding: (a) arm's length safeguards; (b) necessity; and (c) reasonableness of design. Within these parameters, the scope of the KERP and the amounts allocated to beneficiaries are both highly fact dependent, based on the needs of the particular *CCAA* debtor and the role of the beneficiaries in the business and the restructuring: *Just Energy* at para. 137; *Aralez* at para. 30; *Walter Energy (Re)*, 2016 BCSC 107 at para. 57 and *Re Timminco Limited*, 2012 ONSC 2515 at para. 15.

90 I am satisfied that the proposed KERP is necessary and appropriate here. It was developed in consultation with the Monitor, and is intended to authorize retention payments to certain individuals who have been identified as key employees in the implementation of the processes described above.

91 I am satisfied that the key employees are essential to the continued operation of the Business and in particular, will be needed to assist in the SISP, the closing of any transaction thereunder assuming that occurs, the Liquidation and the Lease Monetization.

92 There are approximately 121 key employees, with an aggregate of approximately \$2.7 million in potential KERP payments. Those payments will be received by the key employees on the earlier of September 30, 2025, or the date on which the liquidation is complete and their services are no longer required. The entitlement of a key employee under the KERP is forfeited if they resign or have their employment terminated with just cause prior to payment.

93 It is important to note that a number of the identified key employees are store level or distribution centre level employees, such as is to be expected in a retail insolvency like this.

94 The Monitor supports the approval of the KERP and submits that it will provide stability to, and facilitate, an orderly wind down. The list of key employees is appropriate in the view of the Monitor. I am satisfied that the key employees are likely to consider other employment opportunities. If the KERP is not approved, and that, given the scale and complexity of the business, it will be beneficial if they remain employed to minimize the impairment of the proposed Liquidation Sale, Lease Monetization Process and SISP.

95 The corresponding KERP Charge is therefore appropriate for the same reasons, and to provide security for the obligations under the KERP. It has a maximum amount of \$3 million and is proposed to rank behind the Administration Charge. In my view, the KERP Charge is appropriate and reasonable and is approved.

96 Subsection 137(2) of the *Courts of Justice Act* provides for the Court's authority to grant a sealing order. It provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed and not part of the public record.

97 The Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25, at para. 38, recast the test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII):

The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:

- a. court openness poses a serious risk to an important public interest;
- b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- c. as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all of these prerequisites have been met can a discretionary limit on openness - for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order - properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 at paras. 7 and 22).

98 Under the first branch of the three-part test, an "important commercial interest" is one that can be expressed in terms of the public interest in confidentiality. The Supreme Court was clear that the interest in question cannot merely be specific to the party requesting the order and must be one which can be expressed in terms of a public interest in confidentiality.

99 Here, as in *Sierra Club*, the Applicants submit that the exposure of the information sought to be sealed includes the names of individual employees and the compensation for each to the extent of the applicable KERP entitlement, such that the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information as well as maintaining the sanctity of contract. I agree.

100 Further, in *Sierra Club* (at paras. 59-60), the Supreme Court recognized that the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test, provided however that certain criteria were met. The applicant must demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interest could reasonably be harmed by the disclosure of the information. The information must be of a "confidential nature" in that it has been "accumulated with a

reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the court room doors closed".

101 I am also satisfied that the second requirement is met since the order sought is necessary to prevent the risks identified above and is an important public interest. In addition, reasonably alternative measures will not prevent the risk.

102 The third requirement is also met. While these three documents would be kept confidential, the balance of the materials in the Application (which constitutes the overwhelming proportion of the information) would not be sealed, and available to the public. The gist of the issues would remain available to the public. On balance, I am satisfied that the benefits of the requested order outweigh its negative effects. The small amount of information over which confidentiality is sought (i.e., individual employee names and their compensation) to be maintained is discrete, proportional and limited.

103 I am satisfied that there is a public interest in both maximizing recoveries in this insolvency and in protecting the integrity of a Court-ordered SISP, Lease Monetization process and Liquidation Sale. There are no reasonable alternatives to sealing the material and the information contained therein is discrete, proportional and limited. It follows that the salutary effects of sealing the material outweigh the deleterious effects of doing so.

104 This Court has previously granted sealing orders with respect to KERPs: *Just Energy Corp (Re)*, 2021 ONSC 1793 at paras. 123-124; *Indiva Limited et al*, 2024 ONSC 3691 at paras. 28-29; and *Tacora Resources Inc (Re)*, 2023 ONSC 6126 at paras. 160-161.

105 For all of these reasons, the test set out by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* is met.

The Repayment of the DIP Facility

106 The Applicants seek approval to repay the DIP Obligations in the near term. As set out above, and as reflected in the cash flow variance report of the Monitor, sales of inventory since March 7, 2025 have been higher than anticipated, with the result that the Applicants no longer require further DIP financing to commence the Liquidation Sale, Lease Monetization, and the SISP. Finally in this regard, the Applicants have sufficient funding to repay the outstanding DIP obligations.

107 Given that the DIP Facility is no longer needed in connection with the CCAA proceedings, the Monitor supports the relief sought by the Applicants. I observe that the repayment of all outstanding DIP obligations is also supported by RioCan and numerous other stakeholders. It is, however, opposed by certain pre-filing lenders. Their position, in short, is that the terms of the DIP Facility approved on March 7 as part of the Initial Order provided that all pre-filing indebtedness of the Applicants was to be repaid before the DIP Facility was repaid.

108 I am satisfied that the repayment of all DIP obligations should be repaid from cash on hand which has in turn been realized from the sales of merchandise. The principal reason supporting this result, as submitted by the Monitor, is the minimization of unnecessary expenses and costs, including the continuing accrual of interest payable. The draws on the DIP Facility total approximately \$16 million. Interest continues to accrue on that amount until repaid. It is critical to the maximization of recoveries for stakeholders that expenses be minimized.

109 Given the unexpectedly robust sales and corresponding revenues earned by the Applicants in the recent days, there is sufficient liquidity to repay the principal outstanding plus accrued interest. In my view, it is to the benefit of the Applicants, the stakeholders and the restructuring process, that these amounts be repaid and further interest costs (which are significant, given the applicable interest rate of CORRA + 11.5% or approximately 14.5%), which can be avoided, should be avoided.

110 In my view, the objections of certain pre-filing lenders are without merit. They are not prejudiced and nor are they worse off by the repayment of outstanding DIP obligations, as a result of both the minimization of continued interest expenses and the maximization of chances of recoveries as a result of this restructuring.

111 Moreover, the DIP indebtedness authorized by the Initial Order could be repaid (together with interest and costs) if, on the comeback hearing, a replacement DIP facility was approved and the DIP Facility here was no longer needed. While no replacement DIP facility is required, as noted above, the same result has been achieved - the DIP Facility approved as part of the Initial Order is no longer needed and can and should be repaid together with interest and costs.

112 I approve the repayment of the DIP indebtedness pursuant to the discretion given to this Court under section 11 of the *CCAA*. I am satisfied that such is appropriate and reasonable in the circumstances. This insolvency proceeding is extremely fluid at the moment. The minimization of additional costs and expenses is critically important.

Restructuring Support Agreement

113 The Applicants seek approval of a Restructuring Support Agreement ("RSS") between and among the Loan Parties, the ABL Agent, the FILO Agent and the Term Loan Agent.

114 The Applicants submit that the RSS will allow the Company to continue to use its cash which is subject to the security of the secured lenders who are parties to the RSS, among others. Distilled to its core, the argument is that the collateral for the indebtedness owing to the secured lenders is the very inventory now being sold to generate liquidity. While that liquidity is accretive to a successful restructuring, it results from the corresponding erosion of the security for the outstanding secured debt of the Company.

115 The terms of the RSS in favour of the ABL Lenders, FILO Lenders and Term Loan Lenders are substantially similar to what was included in the DIP Term Sheet.

116 However, approval of the RSS is opposed by certain stakeholders who submit, in the main, that there are no benefits to the Applicants derived therefrom, and particularly no benefits that justify the onerous terms and obligations of the Applicants in the RSS given that DIP financing is no longer required. The stakeholders further submit that they may have additional objections to the RSS, but that they have not had time to review the document in any detail since it was just distributed to the service list shortly before the commencement of the hearing of these motions.

117 I am sympathetic to the fact that, notwithstanding that *CCAA* proceedings invariably constitute "real-time litigation" and that circumstances evolve very rapidly, as they have here, the parties on the Service List have had an extremely limited opportunity to review the terms of the RSS.

118 The Applicants and the Monitor agree that no immediate prejudice to the parties or to the process arises if approval of the RSS is adjourned for a short period of time.

119 Accordingly, and in the circumstances, I am deferring the proposed approval of the RSS to give stakeholders a realistic opportunity to consider their positions with respect thereto. That element of these motions is adjourned to be considered at the next hearing in this application, scheduled for Wednesday, March 26, 2025.

Result and Disposition

120 For all of the above reasons, I signed the four orders, amended in accordance with the directions given by me at the conclusion of the hearing of these motions, and directed that the Court-appointed Monitor distribute them to the Service List immediately.

121 The orders have immediate effect without the necessity of issuing and entering.

Application granted.

Footnotes

1 See, for example, *Danier Leather Inc (Re)*, 2016 ONSC 1044 at paras. 10, 27 [*Danier*]; *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc*, 2019 ONSC 1305 at para. 9; *Comark Holdings Inc (Re)*, (January 21, 2025), Ont SCJ [Commercial List], Court File No CV-25-00734339-00CL (Endorsement of Justice Cavanagh) at para. 7 [*Comark Endorsement*], endorsing *Comark Holdings Inc (Re)*, (January 17, 2025), Ont SCJ [Commercial List], Court File No CV-25-00734339-00CL (Realization Process Approval Order) [*Comark Order*]; *Ted Baker Canada Inc et al v Yorkdale Shopping Centre Holdings Inc*, (May 3, 2024), Ont SCJ [Commercial List], Court File No CV-24-00718993-00CL (Endorsement of Justice Black) at paras. 13-17 [*Ted Baker Endorsement*], endorsing *Ted Baker Canada Inc et al v Yorkdale Shopping Centre Holdings Inc (Re)*, (May 3, 2024), Ont SCJ [Commercial List], Court File No CV-24-00718993-00CL (Realization Process Approval Order) [*Ted Baker Order*]; *Mastermind GP Inc (Re)*, (November 30 2023), Ont SCJ [Commercial List], Court File No CV-23-00710259-00CL (Endorsement of Justice Steele) at paras. 10-18 [*Mastermind Toys Endorsement*], endorsing *Mastermind GP Inc (Re)*, (November 30 2023), Ont SCJ [Commercial List], Court File No CV-23-00710259-00CL (Realization Sale Approval Order) [*Mastermind Order*]; *Nordstrom Canada Retail Inc (Re)*, 2023 ONSC 1814 at paras. 6-13 [*Nordstrom Endorsement*], endorsing *Nordstrom Canada Retail Inc (Re)*, (March 20, 2023), Ont SCJ [Commercial List], Court File No CV-23-0069561900CL (Liquidation Sale Approval Order) [*Nordstrom Order*]; *Bed Bath & Beyond Canada Ltd (Re)*, 2023 ONSC 1230 at paras. 7-9 [*BBB Endorsement*], endorsing *Bed Bath & Beyond Canada Ltd (Re)*, (February 21, 2023), Ont SCJ [Commercial List], Court File No CV-23-00694493-00CL (Sale Approval Order) [*BBB Order*]; *Sears Canada Inc (Re)*, (July 18, 2017), Ont SCJ [Commercial List], Court File No CV-17-11846-00CL (Liquidation Sale Approval Order); *Target Canada Co (Re)*, 2015 ONSC 846 at paras. 2-5 [*Target Endorsement*], endorsing *Target Canada Co (Re)*, (February 4, 2015), Ont SCJ [Commercial List], Court File No CV-15-10832-00CL (Approval Order — Agency Agreement).

2 See *Danier*, at para. 23, citing *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ONSC) at para. 49 [*Nortel*].

3 *Comark Endorsement*, at para. 6; *Ted Baker Endorsement*, at para. 14.

4 I observed above that no party opposed the Lease Monetization Process. The Landlords, acting cooperatively and generally in unison (as is expected on the Commercial List, absent good reason not to), do not oppose the Process, but requested that this Endorsement reflect that "nothing contained any of the Orders issued today as it relates to any of the Leases involving the JVs purports to determine the issue of the Applicants' rights to do anything other than conduct the liquidation sale on the premises in accordance with the liquidation sale guidelines and corresponding Order (which is not opposed by the relevant landlords for that narrow purpose only). The marketing of the Leases pursuant to the Lease Monetization Process will be without prejudice to the complete reservation of rights to all parties on the issue of the ability of the Applicants to transact in respect of leases to which the Applicants are not parties." As I advised the parties at the conclusion of the hearing of these motions, this language is agreeable, save for the last sentence. To be clear, the reservation of rights about the ultimate sale of Leases is clear, but it is equally clear that the marketing process will commence immediately as described above.